REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

June 1, 1918 to November 18, 1918.

JOSEPH COGHLAN
REPORTER

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BY JOSEPH COGHLAN, SUPREME COURT REPORTER

FOR THE STATE OF NORTH DAKOTA.

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HON. LUTHER E. BIRDZELL, Judge.
HON. RICHARD H. GRACE, Judge.
HON. JAMES E. ROBINSON, Judge.

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[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.

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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.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

ALBERT SOLBERG & COMPANY, Respondents, v. FRANK RETTINGER, Appellant.

(168 N. W. 572.)

Sheriff — amercement of — proceedings — may be by motion — in original case — in which execution issued — new action for not necessary.

1. A proceeding for the amercement of a sheriff under the provisions of § 7770, Compiled Laws 1913, may be instituted by a motion in the original case in which the execution is issued, and a new and separate action is not necessary.

Amercement of sheriff — trial by jury — cannot be had — statute — construction.

2. A trial by jury cannot be demanded in a proceeding to amerce a sheriff under the provisions of § 7770, Compiled Laws 1913, and the statute as so construed constitutes due process of law.

Sheriff — duty of — to return execution — within statutory period — no demand necessary — to justify amercement.

3. Ordinarily it is the duty of the sheriff to return an execution within the time required by the statute, and no demand on him so to do is necessary to be proved in order to justify a proceeding in amercement.

Judgment creditor — sheriff with execution — acts directed by creditor — failure of sheriff to execute — caused in part — by directions of creditor — amercement will not be allowed.

4. Where the judgment creditors have directed the acts of the sheriff, and

their own acts have been a cause of his failing to return the execution when required by the statute, the sheriff cannot be amerced for a failure of duty in that respect.

Property levied upon — adverse claim to — sheriff — instruction to — promised from plaintiff's attorneys — instructions not given — instructions followed if given — sheriff not liable.

5. Where upon an adverse claim of property levied on being made, the sheriff asks for instructions from the plaintiffs' attorneys, which are promised him, he is not liable to amercement for not selling, until he has disobeyed or disregarded directions to that end.

Opinion filed June 1, 1918.

Proceeding to amerce a sheriff under the provisions of § 7770, Compiled Laws of 1913.

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

Judgment for plaintiffs. Defendant appeals.

Reversed.

Albert E. Coger and *Harold B. Nelson,* for appellant.

Where an execution is in all things regular, it is the duty of the sheriff to prosecute an action for the collection of choses in action, levied upon by him under the execution, and he may retain the execution, pending all necessary proceedings, and is not liable to amercement. Comp. Laws 1913, § 7723.

Where a sheriff, with execution in his hands, is following the directions and mandates of the statute, or is being directed and instructed in the performance of his work under the execution, either by plaintiff or by plaintiff's attorneys, and is following and obeying such instructions, he is not liable to amercement. Angell v. Bradley, L. R. 3 Exch. Div. 49.

Under any such circumstances, or in a case like the one here, where there are adverse claims to the property levied on, if the sheriff does his lawful duty or follows the instructions given by the creditor, he cannot be held liable in amercement. Fuller v. Wells, F. & Co. 42 Kan. 551.

Plaintiff's attorneys by virtue of their employment had power to direct and control the execution, and the officer was justified in obey-

ing their directions. Stein v. Scanlon, 42 L.R.A.(N.S.) 895; Mathews v. Perminter, 162 S. W. 1180; Simms v. Quinn, 58 Miss. 221; 35 Cyc. 1891; Campbell v. Harris, 36 N. J. L. 526.

J. E. McCarthy, for respondents.

It is admitted that the execution issued and placed in the hands of the sheriff was not returned within sixty days, as required by law, or at all. Plaintiffs demanded of the sheriff the proper return of said execution, but the sheriff failed to comply, and he is liable in amercement. Lee v. Dolan, 34 N. D. 449.

The execution was in conformity with the judgment upon which it was issued, and is regular in all things. Comp. Laws 1913, § 7563.

The sheriff had the right to take the property of the defendant in his county, no matter in whose hands he found it. Comp. Laws 1913, ¶ 3, § 7563.

No third-party claim was ever made upon the sheriff, and he had no excuse for failing to proceed with the execution, as required and requested. Comp. Laws 1913, §§ 7550, 7563, 7770; Lee v. Dolan, 34 N. D. 449.

If it were even claimed that the judgment debtor had no property it would be no defense and would not justify the sheriff in not returning the execution, as provided. 35 Cyc. 1882.

When personal property is attached or levied on, our statute requires the officer to take possession and hold same. Comp. Laws 1913, § 7547, ¶ 3.

The amercement proceedings were all regular and legal. Swenson v. Christianson, 10 S. D. 188, 72 N. W. 459; Comp. Laws 1913, § 7770; Lee v. Dolan, 34 N. D. 449.

BRUCE, Ch. J. This is a proceeding for the amercement of a sheriff. It is brought under the provisions of § 7770, Compiled Laws 1913, which provides that: "If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come to his hands, or to sell any personal or real property, or to return any writ of execution to the proper court on or before the return day, or on demand to pay over to the plaintiff, his agent or attorney of record all moneys by him collected or received for the use of said party at any time after collecting or receiving the same, except as

otherwise provided, or on demand made by the defendant, his agent or attorney of record, to pay all surplus received from any sale, such sheriff or other officer shall on motion in court and two days' notice thereof in writing be amerced in the amount of said debt, damages and costs with 10 per cent thereon to and for the use of said plaintiff or defendant as the case may be."

The negligence complained of is the failure of the sheriff to satisfy an execution out of property which had theretofore been attached, and to "return the execution within the sixty days specified." It appears from the record that a portion of the property levied upon under the warrant of attachment consisted of rye and that the remainder of the property was real estate.

It also appears that, after the levy under the above warrant, the rye in question was deposited by the sheriff in an elevator at Wolford, North Dakota, and that thereafter and before the entry of the judgment the elevator company converted the grain to its own use and issued storage tickets therefor to one W. D. McLaughlin. It also appears that when the said McLaughlin sought to recover on the said storage tickets, the elevator company refused to recognize the same, and on a suit being brought against the said company by the said McLaughlin, the sheriff, Frank Rettinger, by permission of the court and on November 24, 1916, intervened. It is also conclusively proven that the execution, which was issued on the 23d day of February, was not returned by the sheriff within sixty days, nor has the same even been returned. Judgment was rendered against the defendant sheriff for the amount of the execution for the sum of $993.93, being the amount of the execution, together with the 10 per cent thereon prescribed by the statute, and from this judgment the defendant has appealed.

The first point raised by the defendant sheriff relates to the nature of the proceeding. It is claimed that an independent action should have been brought wherein the party alleging to have been injured should have been made plaintiff, and the sheriff, defendant. This, however, we do not believe to have been necessary, and we believe that the procedure adopted in the case before us, which was that of a motion in the original action, was sufficient. Swenson v. Christoferson, 10 S. D. 188, 66 Am. St. Rep. 712, 72 N. W. 459.

The second objection made is that while the matter is presented on affidavits, it is in reality an action for the payment of money, and is properly triable to a jury. There is no merit in this objection. The proceeding is neither one for the collection of a fine, nor is it an action for damages. The liability imposed is imposed as a condition upon the holding of the office, and the penalty is not so much imposed as it is agreed by the sheriff when he takes his office to be paid in the case of a failure of duty. The recovery is fixed by the statute, and there is no option on the part of the court or anyone else to award anything else. The purpose of the statute was to award to the execution creditor a speedy and prompt remedy, and without any unnecessary formality, and above all to hold public officers to a strict performance of their duties.

The matter of due process of law was discussed on the petition for a rehearing in the case of Lee v. Dolan, 34 N. D. 449, 158 N. W. 1011.

The third objection made is that no demand for the payment of the judgment was made on the sheriff prior to the institution of the proceedings. No demand, however, seems to be necessary. The statute does not say that, if the sheriff neglects *on demand* to return the execution, he shall be amerced, but, if the sheriff shall neglect to return the execution. Of course, if the amount had already been paid, this fact could be pleaded in bar. There is no such claim, however, in the case which is before us.

It is next urged, however, that the plaintiffs' and respondents' attorney directed the acts of the sheriff in the execution of the writ, and through his acts contributed to the omission of the sheriff in executing the same.

We think there is merit in this contention, and, although we see no reason for withdrawing from the position taken by us in the case of Lee v. Dolan, supra, we think that the present case comes within the rule that, where upon an adverse claim of property levied on being made, the sheriff asks for instructions from the plaintiff's attorneys, which are promised him, he is not liable to amercement for not selling until he has disobeyed or disregarded directions to that end. Kemble v. Harris, 36 N. J. L. 526; 35 Cyc. 1891.

The case which is before us, indeed, is a peculiar one. In the fall

of the year 1915 the plaintiffs, Solberg and Studness, brought an action against Amanda Kehr for merchandise sold to her. Ancillary to the action they caused a warrant of attachment to be issued and sent to Frank Rettinger, the defendant sheriff, for service. At this time it appears that another party, by name W. F. McLaughlin, asserted some claim to the crop sought to be levied upon, which was based on a transfer or alleged transfer to him from Amanda Kehr. The deputy sheriff, Palmer, to whom the warrant of attachment was issued, went to the machine that was threshing the grain and took actual possession of the property. He then notified the agent of the Dodge Elevator Company that he as deputy sheriff would deliver the grain to the elevator. He superintended the threshing and kept track of the loads that were threshed. McLaughlin was also upon the scene, and when the grain had been delivered to the elevator at the near-by town of Wolford, he seems to have persuaded the agent that he was the real owner of the grain, and prevailed upon such agent to deliver to him the storage tickets therefor. When the sheriff applied to the elevator agent for the storage ticket he was informed that it had been delivered to McLaughlin. He also states that he was informed and verily believes that the grain was shipped out of the state together with other grain. It appears that this action was reported to the attorney of plaintiffs, and that he was aware of the fact when he entered judgment in the attachment proceedings. The execution on this judgment was issued on February 23d and sent to the sheriff with a letter containing the following:

"You will please sell the rye heretofore levied upon and oblige." The sheriff then took the matter up again with the Elevator Company. On March 6th the plaintiffs' attorney wrote the sheriff, and, presumably in reply to a letter from him, said, "I suppose it will be all right to wait a few days for a letter from Dodge Brothers, as they say they will write again." On or about March 18th he received a letter from F. B. Lambert, the attorney from the Elevator Company, saying that he knew nothing about the matter, that the Elevator Company did not wish to oppose either party, stating that McLaughlin had brought suit against the Elevator Company on the storage ticket, and suggesting that the sheriff intervene. This was sent by the defendant sheriff to the plaintiffs with a notation, "What do you think about this? and

please return with your answer." In reply to this the attorney for plaintiffs wrote: "All I can see in this matter, Frank, is that you should pay us for the rye, inasmuch as Mr. Palmer levied on the same when it was threshed, and hauled it himself, and had full charge of it. I think you had better take this matter up fully with Mr. Lambert and give him the day when it was done, what was done when it was hauled to the elevator, and who hauled it, etc. My clients feel that they should have had the money out of this before this time, and trust you will get settled up so as to make payments soon."

So far as the record shows, nothing further was heard from the attorney for plaintiffs until August 24th, when he wrote Coger and Nelson, attorneys for the defendant sheriff, as follows:

"In the matter of judgment, Albert Solberg & Company against Amanda Kehr, will say that I understand that you are acting as attorney for Frank Rettinger, sheriff, in this matter, and that as we are about to ask that the sheriff pay the said judgment and be amerced to same, and if this is paid by him prior to motion being made, we will not ask the 10 per cent additional penalty allowed by the statute, and will at this time, if paid at once, take the face of the judgment, and he can then go ahead and collect for himself."

When this letter was written the time for making the return had expired,—that time being on May 23d. As far as the letter of March 6th is concerned, there was clearly a permission to negotiate with Dodge Brothers, and in the letter of May 20th there was clearly a permission to negotiate with the attorney for the Elevator Company contained in the words, "I think you had better take this matter up fully and give him day when it was done and what was done with it when hauled to the elevator and who hauled it," etc.

In the same letter, too, there is no requirement for the return of the execution nor any requirement for a levy, but rather an assertion of a claim against the sheriff personally for not having obtained the storage ticket, this being contained in the statement, "All I can see in this matter, Frank, is that you should pay us for this rye inasmuch as Mr. Palmer levied on the same when it was threshed, and hauled it himself, and had full charge of it." In the letter of August 24th, also, even where amercement is spoken of, there is a suggestion that the sheriff could go ahead and collect for himself.

We are by no means satisfied from the record that the rye in question was within the state. There was nothing, therefore, on which the sheriff could levy except on the chose in action; and since the Elevator Company had paid the money obtained from the grain into court, the reasonable and proper thing was to intervene in the action, which was brought by McLaughlin against the Elevator Company. If the property had belonged, as a matter of fact, to McLaughlin, he could not have levied upon it without liability, and could have insisted upon an indemnity bond from his client. They offered to give no such bond, but merely suggested that he take the matter up with the attorney for the Elevator Company, and that he himself was liable not because of a failure to sell under an execution, but because in the first place he had failed to obtain the storage ticket.

The amercement, in short, is sought for the failure to return the execution within the sixty days when the retention of that execution by the sheriff seems not only to have been acquiesced in by plaintiffs' attorney, but was necessary in order to sustain the petition in intervention. Under the provisions of § 7723 of the Compiled Laws of 1913, the sheriff was required to "execute the writ by levying on the property of the judgment debtor, collecting the things in action by suit in his own name, if necessary, or by selling the same; . . ." and it would seem that pending this intervention or suit for collection of the chose in action, the execution creditor had no right to the immediate return of the writ. See Angell v. Baddeley, L. R. 3 Exch. Div. 49, 47 L. J. Exch. N. S. 86, 37 L. T. N. S. 653, 26 Week. Rep. 137. It is true that plaintiffs could have demanded a return of the writ within sixty days, and waived the suit or the attempt to collect on the chose in action, or their claim for personal liability against the sheriff for the failure to obtain the storage ticket. They do not appear, however, to have done so.

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

ROBINSON, J. (concurring specially). The title of this case as given on the brief of counsel is Albert Solberg et al., Plaintiffs and Respondents, v. Frank Rettinger, Sheriff of Pierce County, Defendant and Appellant, but there is no such action pending in this court and as far

as the records show there never was such an action. The matter now pending against the sheriff is a motion, and not an action, and in the original proceeding against the sheriff the title was as follows: "In the Matter of the Application of Solberg & Studness for an Order of Amercement of Frank Rettinger, Sheriff of Pierce County."

In August, 1915, a writ of attachment against the property of Amanda Kehr was issued to the sheriff of Pierce county. The sheriff levied on "all defendant's interest" in a quarter section of land and "her interest" in the crops of rye grown and harvested on the same land. In February, 1916, judgment was given for $848.54. Then a special execution was issued to the sheriff, commanding him to satisfy the judgment out of the property which he had attached. But a serious question arose as to whether the execution debtor had any interest in the property attached. One McLaughlin had claimed the rye, had obtained the storage tickets for the same, and had brought suit to recover the rye or its price. In that suit the sheriff intervened and claimed the rye under his execution. There was nothing else for him to do. Then he very properly held the execution pending the suit, as he could not well return it without releasing his levy. Counsel for plaintiff did not instruct the sheriff to return the execution within sixty days. He kept quiet until the time had elapsed and then kindly asked the sheriff to pay the execution. Then on motion of counsel for plaintiff—on a summary motion and not in any action—judgment was given against the sheriff for the amount of the execution, with interest and 10 per cent penalty, amounting to $903.

The statute is that, if any sheriff refuse or neglect to return any writ of execution to the proper court on or before the return day, he shall on motion and two days' notice be amerced in the amount of the debt, damage and costs and 10 per cent penalty for the use of the plaintiff. Comp. Laws, § 7770.

Some two years ago this court gave that statute a construction which seems narrow and unjust. Lee v. Dolan, 34 N. D. 449, 158 N. W. 1007. In two more recent decisions this court denied a motion to amerce the sheriff under the statute, and held in effect that such a motion should not be granted except in cases of clear and wilful wrong and on a showing of damages to the moving party. In this case there is no showing of any loss or damage, or that the execution debtor had any

property subject to execution. There is no showing that McLaughlin did not own the rye and the land. In the suit of McLaughlin to recover the rye or its price the sheriff has been good enough to intervene and to assert a claim to the rye under his execution. That suit is still pending and it is really the suit of the plaintiffs. It is their business to stand behind the sheriff, and to save him from all expense and loss, instead of trying to rob him of $900. The sheriff has a right to tender to the plaintiffs the conduct of the McLaughlin suit, and to demand that they indemnify him against all cost and damages. He has done his full duty in trying to protect the rights of the plaintiffs, and now it is their duty to protect him.

There are other objections to this statute and to the fine imposed on the sheriff in the form of a judgment against him.

1. A person may not be deprived of life, liberty, or property without due process of law.

2. The right of trial by jury is assured to all, and is inviolate.

3. Excessive fines shall not be imposed.

A fine is a penalty for the omission or commission of some act which the law commands or forbids. The purpose of the penalty is to redress some wrong or to compensate for some damages. When, as in this case, there is no wrong or damage, then any penalty is excessive. A judgment is the final determination of the rights of the parties in an action. Comp. Laws, § 7599.

It is the culmination of a deliberate judicial proceeding which must be in accordance with the law of the land or the established course of judicial procedure. A judge may not go up to a man, slap him on the back, and pronounce a judgment against him, even though it were in accordance with the letter of the statute. Such a summary procedure as a judgment against a person for $900 on a notice of two days is just the same as a judgment on a notice of two hours or a notice by a slap on the back. It gives a man no time to think and deliberate, to take counsel, and to prepare for a trial. It is not a final determination of an action. Before a judgment for $800 can be obtained against any person there must be an action against him. There must be a complaint stating facts sufficient to constitute a cause of action. There must be a reasonable time for him to answer and prepare for trial. If the action is based on a failure to perform a

legal obligation, there must be proof of compensatory damages. But in this case there is no action, no summons or complaint, and nothing to sustain a judgment. The pretended judgment is given on a mere notice, and on affidavits made November 15th and 16th, 1916, showing the recovery of a judgment against Amanda Kehr, and that on February 25, 1916, an execution on said judgment was issued to the sheriff; that several times he has been requested to satisfy the judgment and to return the execution, and he has failed to do so. There is no showing that defendant in the execution was the owner of any property, or that it was in any way possible for the sheriff to satisfy the judgment without paying it himself. There is no showing that the failure of the sheriff to return the execution had caused the plaintiffs the least damages. Hence the affidavits do not state a cause of action against the sheriff, while the proof submitted by the sheriff does show that no fault can be imputed to him.

This case makes no appeal to either law, equity or conscience. Judgment reversed and motion dismissed.

GRACE, J. I concur in the reasoning and result of the within concurring opinion of Judge J. E. ROBINSON.

MARY A. KRAUSE, Respondent, v. CITY OF WILTON, Appellant.

(168 N. W. 172.)

City — defective sidewalks — inadequate lighting of streets — negligence — damages for injuries — action for.

1. The court will not hold as a matter of law that negligence is not shown where a city allows three boards to be missing from a sidewalk and an opening to exist some 20 inches in breadth and from 2 to 5 inches in depth, and where the lighting of the street is more or less inadequate.

NOTE.—For authorities passing on the question of liability of municipality for injuries resulting from loose or decayed boards in sidewalk, see note in 20 L.R.A. (N.S.) 642; on contributory negligence as affecting liability of municipality for defects in streets and sidewalks, see notes in 21 L.R.A.(N.S.) 614, and 48 L.R.A.(N.S.) 628.

Traveler — defective sidewalks — knowledge of — not required to avoid traveling on — because of such knowledge.

2. A traveler is not required to avoid traveling upon a sidewalk merely because he has knowledge that it is defective.

Negligence — contributory negligence — questions of — primarily for jury.

3. The question of negligence and of contributory negligence are primarily and generally questions of fact for the jury.

Contributory negligence — burden of proving — upon defendant.

4. The burden of proving contributory negligence rests upon the defendant.

Knowledge of defective sidewalk — defects at some particular place in — does not impute knowledge of.

5. Knowledge that a sidewalk is defective does not necessarily impute knowledge of a defect at any particular point.

Knowledge of defect — failure to remember — at all times when walking on such sidewalk — not negligence as a matter of law.

6. Although one may not go blindly forward without looking ahead and take the chances of getting along safely, it is not negligence as a matter of law for a person who has knowledge of a defect not to remember it at all times and under all circumstances, nor to be momentarily forgetful of it.

Opinion filed June 1, 1918.

Action for personal injuries.

Appeal from the District Court of McLean County, Honorable *W. S. Nuessle,* Judge.

Judgment for plaintiff. Defendant appeals.

Affirmed.

Wade A. Beardsley, James T. McCullouch, and *E. T. Burke,* for appellant.

An injury alone is not sufficient to support a verdict in a personal injury action. There must be evidence of negligence on the part of defendant amounting to proximate cause.

There is an entire want of proof of negligence on the part of appellant. The proof shows that the sidewalk in question was receiving proper care by the appellant city, and that respondent's injury was the result of her own negligence. Note in 43 L.R.A.(N.S.) 1158; Hartnet v. New York, 127 N. Y. Supp. 295; Powers v. East St. Louis, 161 Ill. App. 163; Huntinton v. Bartrom, 48 Ind. App. 117; Gastel v. New

York, 194 N. Y. 15, 128 Am. St. Rep. 540, 16 Ann. Cas. 635; Snyder v. Superior, 164 Wis. 671; Kawiecka v. Superior, 20 L.R.A.(N.S.) 633; Davidson v. New York, 133 App. Div. 352, 117 N. Y. Supp. 185; Anderson v. Toronto, 15 Ont. L. Rep. 443; Breckman v. Comington, 143 Ky. 444; Ewing v. Toronto, 29 Ont. Rep. 197.

Where plaintiff's own negligence contributed so materially to her injury, as is shown in this case, she cannot recover. She knew for some time before the injury of this claimed defect in the sidewalk, and if it was in the condition claimed, she should not have traveled upon it, when there were other routes easily accessible to her. Without cause or reason she negligently traveled over this walk. Moeller v. Rugby, 30 N. D. 438; 13 L.R.A.(N.S.) 1262; 17 L.R.A.(N.S.) 195; 21 L.R.A.(N.S.) 614.

It is the duty of a person, knowing the facts and conditions, to care for himself. 28 Cyc. 1419, 1428.

James A. Hyland and *T. J. Krause,* for respondent.

The hole or depression in the sidewalk into which plaintiff stepped while walking on said sidewalk in the nighttime, and which she claims was the cause of her injury, is a sufficient defect in the walks upon which to base a verdict. Foster v. Kansas City, 133 S. W. 562; O'Brien v. Syracuse, 31 App. Div. 328, 52 N. Y. Supp. 322; Lawrence v. Davis, 8 Kan. App. 225, 55 Pac. 492.

In any event all such questions are for the jury, and the court has no right to say, as a matter of law, that a given and described condition in a sidewalk in a city is not a dangerous defect. So, also, is the question of negligence one for the jury, in such cases. Marvin v. Bedford, 158 Mass. 464, 33 N. E. 605; Bieder v. St. Paul (Minn.) 91 N. W. 20; Crites v. New Richmond (Wis.) 73 N. W. 322; Aslen v. Charlotte, 54 N. Y. Supp. 754; Graham v. Oxford (Ia.) 75 N. W. 473; Hall v. Austin (Minn.) 75 N. W. 1121; Finnigan v. Sioux City (Ia.) 83 N. W. 907; Thoorsell v. Virginia, 163 N. W. 976; Demier v. Hyatt, 28 Colo. 129, 64 Pac. 403; Beltz v. Yonker, 74 Hun, 73, 26 N. Y. Supp. 106.

Where plaintiff was obliged to undergo an operation soon after the accident, it was left to the jury to determine whether or not the fall of plaintiff was the primary cause of the operation. Jones v. Caldwell (Idaho) 130 Pac. 995.

Also as to whether or not the street was properly lighted. Ashland v. Boggs, 161 Ky. 728, Ann. Cas. 1916B, 1008; West v. Eau Claire (Wis.) 61 N. W. 313; Crites v. New Richmond (Wis.) 73 N. W. 322.

Proximate cause, contributory negligence, and existence of notice are all questions for the jury, under proper instructions from the court. Thoorsell v. Virginia (Minn.) 163 N. W. 976; Pyke v. Jamestown, 107 N. W. 359.

BRUCE, Ch. J. This is an action to recover damages for an injury alleged to have been received by reason of three boards having been removed from a sidewalk in the city of Wilton. The defendant appeals and argues error in the court's failure to direct a verdict for the defendant. It claims:

"1. That there was no defective sidewalk.

"2. That even if there was such a defect, the plaintiff is merely guessing that her injury was caused thereby.

"3. That she was guilty of contributory negligence."

We cannot hold as a matter of law that there was no proof of negligence on the part of the defendant. The proof shows that three boards were missing, and that the opening was some 20 inches in breadth and from 2 to 5 inches in depth. It also shows that the lighting was more or less inadequate. This was a defect in the structure of the sidewalk itself, and a defect for which the city was certainly responsible, if, indeed, it was responsible for sidewalks at all, and this responsibility is now generally recognized. See Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359.

Nor can we say as a matter of law that the plaintiff was guilty of contributory negligence because she had reason to believe that the sidewalk was out of repair and had therefore no right to walk thereon. It was the sidewalk which led to her home, and it does not seem that one must avoid such walks altogether. Ibid.; Jackson v. Grand Forks, 24 N. D. 601, 45 L.R.A.(N.S.) 75, 140 N. W. 718; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; 13 R. C. L. 475.

It is true that in the case of Moeller v. Rugby, 30 N. D. 438, 153 N. W. 290, we held that contributory negligence was shown as a mat-

ter of law. We did not, however, so hold on the ground that the plaintiff had no right to travel upon the sidewalk, but that, knowing of the defect and remembering it both on her way to and from the house from which she sought to remove the goods, and after traveling over the defect to her own home, she encumbered herself with so many articles that it was almost impossible for her to travel in safety.

Nor can we say as a matter of law that the plaintiff was guilty of contributory negligence because at the time of the accident she was talking to her husband and did not notice the pitfall which was before her. The questions of negligence and of contributory negligence are primarily questions for the jury, and the burden of proving contributory negligence rests upon the defendant. Pyke v. Jamestown, supra.

Though there is proof that the plaintiff knew that the sidewalk was defective, there is no proof that she knew of the absence of the boards at this particular place; nor does she testify as to having noticed any such defect on her way to the opera house, on the return journey from which she was injured.

All that she testifies to is that prior to the accident she had noticed that the boards were loose; that sometimes someone would kick them out and then again you come along and they are all in. Sometimes one way and sometimes the other way. I never knew which ones were loose and which ones were not. A good many were loose. I noticed it. Sometimes they were in and sometimes not. I mean by that that I have seen from my window where someone was hauling a cart of water or a wheelbarrow, and a plank would be out, and they would lay them in, and then again someone would kick and stumble on the way and would throw them out. At times I saw holes there. The reason was those planks were out. I passed over the sidewalk after the 14th, on the evening of the accident, which was on the 18th. I had been to the picture show. The accident was about 10 o'clock. I fell in a hole in the sidewalk, that is the only sidewalk there was. I think we were carrying on a continuous conversation. We weren't talking about the sidewalk. At the time I was walking along I didn't notice any of the holes I am speaking of at the place of the accident. That is all I know about it. There was a hole there. I know it was a big hole as I was

right down in it. Three planks were gone. I knew then it was big enough when I was in it.

Q. And you are quite certain there were not any holes before that that you came to?

A. I didn't have any trouble about that and I don't think so. Before then I knew that there were holes in the walk from time to time. On the night of the accident I was walking along and the first thing I knew I had fallen. It was pretty dark and the light was pretty poor. The light at the corner was out. The light was back of me about a block and one half away or that block away and across the street behind.

Q. What was the condition of the street ahead of you? Could you see the sidewalk clearly?

A. No. I couldn't. I could not have seen the sidewalk. Perhaps if I was going along examining it, maybe I could. I could see the general line where the sidewalk was. Sometimes the boards would be a little higher than the others, and sometimes one lapped over onto another.

Q. Did you notice at that time whether there were any boards loose on the sidewalk?

A. I did not. There were about two or three blocks to the picture show. I knew it was a poor walk. The hole was about 5 inches.

Q. Now you had noticed it often, hadn't you? Did you testify that you had seen people haul water carts along there and kick those planks out and then again they would be placed back?

A. Of course watching those people. They would be some distance from my window.

Q. And you knew those locations of those places in the sidewalk?

A. Yes, sir.

Q. Now when you came along there that night you had in mind the condition of this sidewalk?

A. I don't remember whether I had it just in mind.

Q. Did you say that you looked out for the bad places in the sidewalk, that you could look out for bad places in the sidewalk better alone than walking with someone?

A. Well, of course, in other parts of the walk, not just speaking of these, there would be places where one would pick her way along, but I don't remember just at this time.

Q. You said you were scared when you stepped into it?

A. I was scared after I stepped into it.

Q. Hadn't your husband been taking you previous to this?

A. Yes, but he didn't have to help me along. Along these poor places each of us walked independently.

It is true that at the time of the accident she was talking to her husband and did not notice the pitfall that was before her. It is true that there is no rule of law that goes so far as to excuse the traveler from making such a use of his faculties as to preserve him from danger and to protect himself therefrom. "He cannot rely so far on the presumption that the municipal authorities have done their duty and have kept the highway in repair, as to go blindly forward without looking ahead and taking the chances of getting along safely." See Jackson v. Jamestown, 33 N. D. 596, 157 N. W. 475; 5 Thomp. Neg. § 6424.

It would seem, however, that a person injured by a defect or obstruction in a street does all that the law requires of him, when he observes ordinary or reasonable care, and it can hardly be expected of a person that he should keep his eyes glued to the sidewalk all of the time that he is walking thereon. See 13 R.C.L. 474. The fact that one knows that in the past some boards have been absent or loose in the sidewalk does not imply knowledge as to the exact location of all of them, or that they are absent at any particular place or time.

Nor does the fact that the plaintiff was at the time of the accident talking to her husband prove contributory negligence as a matter of law. The question is one of ordinary and reasonable care, and we can hardly say that the proof of such care was positively negatived in this case before us. All that is necessary is that one should walk with his eyes open, observing his usual course and in the usual manner. Earl v. Cedar Rapids, 126 Iowa, 361, 106 Am. St. Rep. 361, 102 N. W. 140.

This is not a case such as was presented to us in the case of Jackson v. Jamestown, supra, for in that case the evidence disclosed that the plaintiff knew or should have known of the defect, that he paused in front of it after he saw or should have seen it, and then stepped backwards into it.

Nor is there any merit in the contention of appellant that there is

no evidence that the miscarriage was occasioned by the accident in question, and that the verdict is based upon the guesses of the plaintiff alone. It is true that in answer to the question, "Then in medical science it is only a conjecture as to what the cause is?" Dr. Thompson answered: "Unless the patient knows absolutely, but as a rule it is. Nine times out of ten it is. The person does not know what the cause is. They think they know and the chances are they do, but it is guesswork at that." This testimony, however, is by no means conclusive, and in itself admits that the patient's information may be true and that the patient may know.

Opposed to it is the direct testimony of the plaintiff that she was hurt and jarred and felt sick and nervous immediately after the accident, and that soon after she reached home the amniotic fluid commenced to flow, that she never recovered from the shock, and that on the Fourth of July her child was prematurely born.

Dr. O'Hare also testifies positively that accidents such as that encountered very frequently occasion miscarriages. It is also to be remembered that on the other medical features of the case the testimony of Dr. Thompson was disputed by Dr. O'Hare.

The judgment of the District Court is affirmed.

GRACE, J. I concur in the result.

ADVANCE-RUMELY THRESHER COMPANY, INCORPORATED, a Corporation, Appellant, v. PETER GEYER et al., Respondents.

(168 N. W. 731.)

Promissory note — transfer of — for value — consideration — due course — — separate corporations — same general purpose — organized for — agency — evidence.

1. Evidence examined and considered and *held* to show that the plaintiff did not take a certain $810 negotiable promissory note in due course of business for value without notice, it having taken and received the note from M. Rumely Company, who did not take said note in due course of business for value with-

out notice; it appearing from the testimony that Rumely Products Company and M. Rumely Company though separate corporations are organized for the same general purpose, to wit, the placing in the hands of the purchasers, the actual users thereof, certain farm machinery manufactured by M. Rumely Company, of which the Rumely Products Company, under all the testimony, appears to be a selling agency of the M. Rumely Company, and for all general purposes so far as the public is concerned are one and the same concern.

Corporations — legal entity — general rule — two corporations — organized for same general purpose — community of interest — form of corporation — court will look through — substance of — individuals — right of action — redress — impaired or abridged — remedies and relief — granting — corporate character will not prevent.

2. Corporations as a general rule will be considered a legal entity; but where two or more corporations having to some extent a similarity of name and which appear to be organized for the accomplishment of the same general purpose, and there is some appearance of a community of interest, such as where one of the corporations is the manufacturing corporation and the other corporation is organized to sell the manufactured products, turning in the proceeds of the sale to the manufacturing corporation, the court will look through the form of the corporation to its substance; and if it appear to be organized so that public convenience could be defeated, or the right of action or redress of individuals or others against the corporation could be prevented, its corporate character in and of itself will not prevent the exercise of proper remedies and granting proper relief where it appears clearly that the party applying for remedy and relief is clearly entitled thereto.

Opinion filed June 3, 1918. Petition for rehearing denied June 19, 1918.

Appeal from the District Court of Towner County, North Dakota, Honorable *C. W. Buttz,* Judge.

Judgment of the trial court modified, with costs.

H. R. Turner and *Barnett & Richardson,* for appellant.

Every holder of a negotiable instrument is deemed prima facie to be a holder in due course, unless the title of the holder is shown to be defective, as defined by the Code.

There is no claim here that the title of plaintiff is defective. Civ. Code, §§ 6940, 6944.

In the purchase of machinery where there is a written warranty and also provisions as to giving notice by the purchaser, upon which the warranty is based, his failure to give the notice as required by the contract is conclusive against his right to rely on the warranty. Fahey

v. Machinery Co. 3 N. D. 220; Case Co v. Ebbinghausen, 11 N. D. 466; Gould Co. v. Herold, 26 N. D. 287, 292; Nichols v. Knowles (Minn.) 18 N. W. 413; Murray v. Russell, 67 Pac. 421.

Notice to the agent from whom the machine was received is not notice to the company, as provided in the contract, and does not constitute a compliance with its provisions in such respect. Fahey v. Machinery Co. 3 N. D. 220, 224; Case Co. v. Ebbinghausen, 11 N. D. 466; Gould Co. v. Herold, 26 N. D. 287.

Where the agent sends out experts of his own selection, and without authority from the managing office so to do, such acts do not constitute a waiver of the stipulation as to giving notice. Mfg. Co. v. Lincoln, 4 N. D. 410.

Flynn & Traynor, for respondents.

A failure to give notice of defect in machinery bought or that it fails to work as required by the contract or order for the machinery does not constitute a waiver of the warranty contained in the contract. 50 L.R.A.(N.S.) 754.

"One who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose." Comp. Laws 1913, § 5980.

Under the sale of such property with a warranty, the purchaser has a reasonable time after such purchase to ascertain whether or not the property complies with the warranty, and whether there are defects or breaches of the warranty, and what is a reasonable time is always a question for the jury, under the circumstances of each case. Comp. Laws 1913, §§ 5991–5993.

"It is a well-settled rule that an agent having power and authority to sell a machine under a contract which contains conditions for the benefit of the seller has authority to bind his principal by a waiver of such conditions." First Nat. Bank v. Dutcher (Iowa) 104 N. W. 197; McCormick v. Brower, 88 Iowa, 614, 55 N. W. 537; Osborne v. Bavker, 81 Iowa, 375, 47 N. W. 70; Peterson v. Machine Co. 97 Iowa, 148, 59 Am. St. Rep. 399, 66 N. W. 96; Harrison v. Russell & Co. (Idaho) 87 Pac. 784.

Appellant was not a holder of the note, for value, in due course and without notice. All defenses are still available.

GRACE, J. Appeal from the district court of Towner county, North Dakota, Honorable C. W. Buttz, Judge.

This is an action to recover the balance claimed to be due upon a promissory note by the plaintiff, which claims to be the holder in due course of such note, and also to foreclose a chattel mortgage given to secure such note. The complaint is in the ordinary form and alleges cause of action on the note, and contains proper allegations asking for the foreclosure of the chattel mortgage given to secure such note. Answer admits the execution of the note and mortgage referred to in the complaint, and further, by way of defense, alleges that the note was given for the purchase price of certain plows and equipment, and sets out a warranty by the seller upon which defendants allege they relied. Answer further sets forth that the plows were unfit for plowing, and that said warranty had never been fulfilled. The breach of warranty is fully pleaded in the ordinary way. Answer further sets out that the plaintiff and the seller and all the assignors and indorsees mentioned in the complaint are one and the same person or party, and that said Rumely organization under its various names is one and the same concern, and its reorganization under its various names is and has been accomplished in part at least for the purpose and with a view to defeat the legitimate defenses and claims of the defendants and others in like circumstances who have had dealings with the said organizations; and defendants specifically allege that said note was not in the usual course of business and for value duly sold and indorsed to M. Rumely Company before maturity, and that said M. Rumely Company had not become the owner and holder of said note before maturity thereof in the usual course of business for value, and without notice, and that the same is true with reference to the plaintiff's ownership, and that all of the obligations of the seller were, at all times, assumed by the plaintiff and their assignors; and defendant pleads a total failure of consideration of said note, and makes a tender of the property described in the complaint to the plaintiff, and also alleges that the plows and machinery so purchased were wholly worthless. Defendant further alleges with reference to the two payments made upon such note of $100 each, that they were made under a promise and agreement that the plaintiff would make good the warranty, and that this plaintiff has failed and refused to do, and defendant

demands payments for $200, with interest. Facts in the case are as follows:

Hansboro Hardware & Implement Company, located in Hansboro, North Dakota, are engaged in the hardware and implement business, and sold to the defendants the plows and plowing outfit, under consideration for which, on the 22d day of May, 1912, the defendants executed and delivered to the Rumely Products Company the note in question for $810, with interest at 8 per cent, and at the same time the defendants, Peter Geyer and Victor Geyer, executed to the Rumely Products Company the chattel mortgage upon the following property: One 10-bottom, 14-inch Oliver engine gang plow with stubble bottoms; five 14-inch breaker bottoms, ten 14-inch stubble shares, and five 14-inch breaker shares.

M. Rumley Company was an Indiana corporation organized in 1887 and was a manufacturing corporation. The Rumely Products Company was organized under the laws of New York in 1912 for the purpose of selling the manufactured products of the M. Rumely Company and others. The Advance Rumely Thresher Company was incorporated in September, 1915, and was a New York corporation, and took over or purchased $6,000,000 worth of the assets of the M. Rumely Company, which had become insolvent and went into the hands of a receiver, and the assets of the insolvent company were largely taken over or purchased by the Rumely Products Company from M. Rumely Company and its receiver, and with the property taken over or purchased was the note upon which suit is brought.

One payment of $100 was made on December 5, 1912, and another payment of $100 was made November 25, 1914. Each payment was made to a collector of the M. Rumely Company. Defendants claim that payments were made with the understanding had and promise made at the time the payments were made that the plows would be made good. Defendant testifies that he would not have made the $100 payments except for the promise to make the plows good, and the same condition is claimed as to the execution of the last chattel mortgage in March, 1915.

Among other findings of fact which the court made, there is the following:

"That during all of said negotiations the said Rumely Products

Company, M. Rumely Company, Advance-Rumely Thresher Company, and Finley P. Mount, as receiver of M. Rumely Company, was designated in all conversations by such terms as "the Rumely concern," and the said defendants were not, during said times, apprised of any change in the corporation or corporation name, but dealt, at all times, with the Rumely people or Rumely Company or Rumely concern with the understanding and belief that they were dealing with the same people at all times, and the said Rumely Products Company, M. Rumely Company, Finley P. Mount as receiver of the M. Rumely Company, and the Advance-Rumely Thresher Company, were each and all of them responsible for the impression given to the defendants that they were, at all times, the same concern and, at all times, each and all of said corporations and said receiver through their duly authorized agents assumed the position that it or he was the first original seller and entitled to all rights of the original seller and assuming all liabilities thereof; that the said last-mentioned chattel mortgage, dated March 30, 1915, was under date of August 14, 1916, assigned by Finley P. Mount, receiver of M. Rumely Company, to Advance Rumely Thresher Company, incorporated."

The foregoing finding of fact means that the Rumely Products Company, M. Rumely Company, and Advance-Rumely Thresher Company, so far as the rights of defendant are concerned, are to be considered the same concern. We are of the opinion that the finding of fact is correct, at least as to the Rumely Products Company and M. Rumely Company being, in effect, one and the same corporation; for if the Rumely Products Company was organized for the *purpose of purchasing and marketing the products of the M. Rumely Company,* even though it purchased and marketed the products of other concerns, the Rumely Products Company and the M. Rumely Company were, in effect, one concern. The M. Rumely Company manufactured certain articles of machinery or certain machinery. It is evident that the mere manufacture of the machinery did not terminate the object for which such corporation was organized. The machinery which it manufactured had to be marketed, and if the Rumely Products Company, a corporation, was organized for the specific purpose of marketing such machinery of the Rumely Company as it manufactured, the marketing process was equally as important a part of the business as the manu-

facture of the machinery, and the specific purpose of the Rumely Products Company being that of selling the articles manufactured by the M. Rumely Company, the conclusion is irresistible that they were really, in effect, one company though operated under separate names and possibly with entirely distinct stockholders. The appellant, in his brief, uses the following language: It concedes that the Rumely Products Company was organized *for the purpose of purchasing and marketing the products of the M. Rumely Company and other products.* "The undisputed facts in the case show that the Hansboro Hardware & Implement Company, Hansboro, North Dakota, were the local agents of the Rumely Products Company, a New York corporation organized January 25, 1912. *This corporation was organized for the purpose of purchasing and marketing the products of various corporations, among which was the M. Rumely Company,* an entirely distinct corporation, organized in Indiana in 1887. The uncontradicted testimony was that there was no connection whatever between the Rumely Products Company and the M. Rumely Company, and that all the officers and directors of the two corporations were separate and distinct."

The above language concedes that the Rumely Products Company was organized *for the purpose of purchasing and marketing the products of M. Rumely Company.* It is also further shown and must be conceded that there was an arrangement between the M. Rumely Company and the Rumely Products Company whereby the Rumely Products Company might turn into the M. Rumely Company the note or evidence of indebtedness which the Rumely Products Company received for the machinery of the M. Rumely Company which it was engaged in selling.

This is more clearly shown by the testimony of George C. Aldrich, witness on behalf of the plaintiffs. He testified by deposition.

The following question was asked him:

Q. Please state if you know the relations between the M. Rumely Company and Rumely Products Company.

A. M. Rumely Company was a manufacturing corporation organized under the laws of the state of Indiana, and in the fall of 1911 increased its capital stock, bought out some other companies engaged in the same business, and thereafter confined itself strictly to manu-

facture. Rumely Products Company was a corporation organized by some gentlemen wholly independent of M. Rumely Company for the purpose of purchasing and marketing the products made by M. Rumely Company, and products made by other manufacturing concerns, *and, in the selling arrangement between M. Rumely Company and Rumely Products Company, it was agreed that Rumely Products Company might pay to M. Rumely Company a part of its obligations arising to M. Rumely Company by reason of the purchase of its goods in good and collectable farmers' notes which Rumely Products Company might receive in the usual course of its business, and the note in suit was sold and delivered by Rumely Products Company pursuant to that arrangement.*

It would seem from the foregoing that the organization and business of the M. Rumely Company and Rumely Products Company served to accomplish the same purpose, to wit, the manufacture and sale of certain articles, conceded to be mostly farm machinery; this was the general purpose of the business as a whole. The organization of the Rumely Products Company was only an element to assist in carrying out the purposes of the M. Rumely Company and to facilitate and assist in the marketing of the articles manufactured by the M. Rumely Company, and was, in effect, a part of the same business. If the M. Rumely Company and Rumely Products Company were doing their respective parts for the purpose of accomplishing the purposes of the general business, they were, so far as the public is concerned, one and the same party. If it is a fact that the stockholders and directors of the M. Rumely Company and the Rumely Products Company are entirely separate and distinct, this fact alone, so far as the public is concerned, does not make them absolutely independent concerns if the results and whole compass of their work and the effect of the organizations is to accomplish one purpose.

It is not difficult to see, under such an arrangement as claimed by the plaintiff, that the public and the people who deal with concerns organized in the manner claimed for the M. Rumely Company and Rumely Products Company could have no recourse against them or either of them for breach of warranty of machinery purchased from such concern, or for any other cause of action, for the reason that M.

Rumely Company would claim that it sold machinery outright to the Rumely Products Company, therefore was under obligations to no one excepting the Rumely Products Company, while the Rumely Products Company, immediately upon taking good negotiable paper for the machinery, would immediately indorse it to the M. Rumely Company before maturity, and thus the M. Rumely Company would take shelter under the familiar rule of negotiable paper, that it took it in the ordinary course of business before maturity for value. Under such an arrangement, the public who deal with such concerns would be left helpless and would have no recourse for any cause of action against such concerns.

The time has passed, or at least is swiftly passing, when courts are confined, in their analysis, to the mere form and entity of the corporation. Courts will look upon the corporation as a legal entity until sufficient reason arises to look beyond the mere form and entity of the corporation. If the corporation is so organized that it can be used to defeat the rights of innocent parties, defeat public convenience, or cut off the right of redress, or of action against it or against other corporations of which it is, in effect, an agent, a court of equity will look through the form of the corporation and examine the substance of it, and if several corporations are organized for a common purpose, it will look through the forms of all such corporations to the substance thereof; and the fact that several corporations are organized to carry out a common purpose will not prevent redress to an injured party, though the corporation which causes the injury or loss claims to have no connection with the general purpose for which the principal corporation is organized. Its legal entity will not alone protect it.

Authorities which, to some extent, express a similar principle, are as follows: J. J. McCaskill Co. v. United States, 216 U. S. 504, 54 L. ed. 590, 30 Sup. Ct. Rep. 386; Re Rieger, 157 Fed. 609; United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 247; First Nat. Bank v. F. C. Trebin Co. 59 Ohio St. 316, 52 N. E. 834; Coupon Corporation, § 664.

As we view this matter, the M. Rumely Company and Rumely Products Company, while conceding they may be organized separately, having separate stockholders and officers, they are, so far as the public is concerned and those dealing with them, in effect, one concern. That

the Rumely Products Company was no more than a selling agency of the M. Rumely Company, that the purpose of the two corporations was a common one, that is, to place in the hands of the actual purchasers for use certain machinery with the understanding and agreement that the Rumely Products Company could turn over the paper it took from the purchaser of the machinery to M. Rumely Company,—all of which simply facilitated the placing on the market of the machinery manufactured by the M. Rumely Company, which was the purpose of its organization.

Under such circumstances we must hold that the paper, the negotiable instrument in question, turned over by the Rumely Products Company to the M. Rumely Company, was not taken in due course, but that the turning over in such manner was, in effect, the same as if taken directly by the M. Rumely Company, and it is subject to all defenses as it would have been in the hands of the Rumely Products Company. It must be held, under these circumstances, the M. Rumely Company was not a purchaser in due course without notice and for value, of the paper in question, and having turned it over to the Advance-Rumely Thresher Company after maturity, the Advance-Rumely Thresher Company took it subject to all the defenses which might have been made against the paper in the hands of the M. Rumely Company. It is not necessary to go into an analysis of the corporation which is denominated the Advance-Rumely Thresher Company, as it is not material in this action. Whether the plow in question was manufactured by the M. Rumely Company is not material. The note given for the plows was turned in to the M. Rumely Company. It must be presumed that the Rumely Products Company received the machinery in question from the M. Rumely Company, otherwise it would not have turned in the note as payment therefor. At any rate, under the arrangement between M. Rumely Company and Rumely Products Company which we have before outlined, the M. Rumely Company could not become a purchaser in due course for value without notice, so as to be relieved from any cause of action arising or defenses to be made by reason of the sale of any machinery by the Rumely Products Company.

Referring to the warranty, the plaintiff claims that there is no breach of the warranty. It is claimed there was no showing made

that the plows were not made of good material, and no substantial proof adduced that the plows did not do as good work under the same conditions as any other plows of the same size and rated capacity, made for the same purpose. The plaintiff, in his brief, uses the following language: "There is not a word of testimony in the record, that other machinery of the same size and rated capacity, made for the same purpose under the same conditions, would or did work any better than the plows in question. Indeed, there was no attempt to offer any proof with respect to any other machinery of a similar kind whatsoever."

We do not believe such is the proper construction to be placed upon that portion of the warranty. That language really means, and we believe would be understood by the purchaser to mean, that the plows will actually do the work for which they were intended and constructed; and the statement in the warranty, that the plows would do as good work under the same condition as any other plows of the same size for the same purpose, is a warranty of the working quality of the plows in question, and holds out the meaning that the plows are properly constructed mechanically and thus will do the work. Otherwise, the warranty would be practically meaningless and of little effect, and it would be absurd to hold, under such a warranty, that a person who bought the plows in question would have to go about testing other and different kinds and makes of plows to determine their capacity to do good work and then make note of all those tests and conditions, then make a test of the plows in question, then compare the work of the plows in question with the work performed by the other and different plows which were tested. If a plow is made of good material, if it is properly constructed and built, if it is mechanically correct, it should do the work for which it was built and intended; and if it does not do the work for which it was constructed and intended, then, as a plow, it is of little value, and to the purchaser would be practically worthless. Presumably the reason the purchaser bought the plow and gave his note therefor was to get a plow that would do the work, and the testimony is quite conclusive that this plow would not do the work for which it was constructed. The plow in question was warranted to be made of good material and, with good care and proper use and management, to do as good work as other plows of like size and capacity made for the same purpose.

The defendants could not make the plows work, nor did the experts seem to remedy the trouble or do anything which would cause the plows to do the work for which they were constructed. If the testimony is to be believed, the plow was really worthless, and it was not necessary to make a comparison between the working qualities of this plow and other plows of different makes of the same size and rated capacity, to determine the failure of the plows in question to do good work in accordance with its capacity and size, and, as we before stated, the reasonable construction to be placed upon the language as a whole is that the plow, if made of good material and properly constructed, should do the work for which it is constructed; and we think the real meaning of the warranty is that the plow is warranted to do good work within its capacity and size.

There is no merit in the point that notice of the defects and breach of warranty was not served in proper time or upon the proper party. It is properly served, if such notice of defects or breach of warranty is served within a reasonable time upon the person who negotiated the sale of the property, concerning which the breach of warranty is alleged, or who made delivery of such property. Sections 5991 and 5992, Compiled Laws 1913, fully cover these questions. Section 5993 provides that any provisions in any written order or contract of sale or other contract, which is contrary to any of the provisions of this act, shall be void. Said act includes the sections we have quoted. Said act remains in full force and effect.

It is not shown that the Advance-Rumely Thresher Company received any part of the two $100 payments that were made upon the note in question. The payments having been made to the M. Rumely Company before the note in question was turned over to the Advance-Rumely Thresher Company, it must be assumed, in the absence of testimony to the contrary, that the M. Rumely Company retained the $200 so paid. If the defendants have any remedy by which to recover the said $200, it would not be against the Advance-Rumely Thresher Company but against the M. Rumely Company. We do not pass upon the question whether they have any such remedy against the M. Rumely Company.

We have examined all the assignments of error from 1 to 15 inclusive, and find no error therein.

The judgment of the trial court is modified, with costs, in that the judgment is to be reduced in the sum of $200, the amount of the payment on the note, and interest on the $200, if any, which was incorporated in the judgment of the trial court.

BIRDZELL, J. (concurring specially). I concur in the result reached in the foregoing opinion of my associate, Judge Grace, and in most of the reasons assigned therefor. I am of the opinion, however, that it was not shown that the Rumely Products Company and the M. Rumely Company were, to all intents and purposes as regards the transaction in question, the same corporation. I am further of the opinion that, under all the facts and circumstances disclosed in the record, there is ample foundation to support a finding that the M. Rumely Company had notice of the defense which was established by the defendants, and that it was consequently not entitled to the protection which is accorded to holders in due course. The M. Rumely Company could transfer, through the receiver, no better title or right than it had. 8 C. J. 472.

CHRISTIANSON, J. (dissenting). I am unable to agree with the conclusions reached by my associates in this case, for the following reasons: The M. Rumely Company was a manufacturing corporation. The Rumely Products Company was a corporation organized for the purpose of purchasing and selling agricultural implements. And while the latter company handled some of the goods manufactured by the M. Rumely Company, it also handled goods manufactured by other companies. The undisputed evidence is to the effect that the two corporations were entirely distinct and separate. That they were organized by different men. That the officers, directors, and stockholders were different. That not any of the stock in the Rumely Products Company was ever owned by the M. Rumely Company, and that not a single officer or director of the M. Rumely Company was either a stockholder in, or officer of, the Rumely Products Company. The evidence also shows that the M. Rumely Company was dissolved and its assets sold by receivers appointed by the district court of the United States for the district of Indiana, and that the plaintiff, Advance-Rumely Thresher Company, purchased a portion of the assets at such

receiver's sale. The sale was conducted in the receivership proceeding in the usual manner; under the supervision and with the approval of the Federal court. The undisputed evidence is to the effect that the Advance-Rumely Thresher Company was organized under the laws of New York, and that the organizers, directors, and stockholders were men who never had been either stockholders or officers in either the M. Rumely Company or the Rumely Products Company. In the face of this evidence, I am at a loss to understand how it can be held that these different companies were in fact one concern. The name "Rumely" was well known among men interested in agricultural, especially threshing, machinery; and it is easy to understand why it was deemed desirable to include this word as a part of the corporate name of the different corporations. And the mere use of the word "Rumely" in the names of these different companies, in my opinion, does not justify the conclusion that the companies were in fact one, especially when the uncontradicted evidence in the case is all to the contrary.

Nor is there anything in the record to warrant the conclusion, that the M. Rumely Company was not a holder in due course of the promissory note involved in this action. Under the Negotiable Instruments Act, "a holder in due course is a holder who has taken the instrument under the following conditions:

"1. That it is complete and regular upon its face.

"2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

"3. That he took it in good faith and for value.

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Comp. Laws 1913, § 6937.

And, "to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, *the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.*" Comp. Laws 1913, § 6941.

This statute is plain and specific, and leaves little room for construction. It provides that, in order to charge a purchaser of com-

mercial paper with notice of defenses thereto, it must appear that he had actual knowledge of the specific infirmity or defect set up as a defense, or knowledge of such facts that the purchase of the negotiable instrument amounts to bad faith. See American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99; McPherrin v. Tittle, 36 Okla. 510, 44 L.R.A.(N.S.) 395, 129 Pac. 721; 3 R. C. L. § 277, pp. 1071, 1072.

As already stated, the undisputed evidence in the instant case is to the effect that the M. Rumely Company and the Rumely Products Company were entirely distinct and separate corporations, owned and officered by different men. There is not a scintilla of evidence to the effect that the M. Rumely Company had any actual notice or knowledge of any defect or infirmity in, or of any existing defense to, the promissory note involved in this case. There is no contention that all of the machinery manufactured by the M. Rumely Company was defective or undesirable. On the contrary, it is a matter of common knowledge that a great deal of the farm machinery manufactured by this company was desirable and had been, and was then being, purchased and used generally throughout the state of North Dakota. And in this case, the evidence is to the effect that the note in controversy was executed and delivered in payment of certain Oliver plows, and there is not one word of testimony to indicate that there was any connection whatever between the M. Rumely Company and the Oliver Plow Company. But even though the M. Rumely Company had occasion to believe or was informed that the note purchased by it from the Rumely Products Company was received by the latter company in payment of Oliver plows sold by the Rumely Products Company, this would not of itself constitute notice to the M. Rumely Company of any defect or infirmity in the note, and that the makers thereof had any defense thereto. For it is well settled that mere knowledge of the consideration for which a negotiable instrument is given does not of itself impose upon the purchaser the duty to make inquiry with respect to the sufficiency, or charge him with notice of failure of the consideration. See Houston v. Keith, 100 Miss. 83, 56 So. 36; Bank of Sampson v. Hatcher, 151 N. C. 359, 134 Am. St. Rep. 989, 66 S. E. 308; Dollar Sav. & T. Co. v. Crawford, 69 W. Va. 109, 33 L.R.A.(N.S.) 587, 70 S. E. 1089; Hakes v. Thayer, 165 Mich. 476, 131 N. W. 174;

Park v. Zellars, 139 Ga. 585, 77 S. E. 922; Citizens Bank v. Greene, 12 Ga. App. 49, 76 S. E. 795; Stubbs v. Fourth Nat. Bank, 12 Ga. App. 539, 77 S. E. 893.

I am also of the opinion that §§ 5991–5993, Comp. Laws 1913, relating to the time and manner of giving notice of breach of warranty in personal property, have no application in this case, as the note involved was executed and transferred over a year before those sections became the law of this state.

In my opinion, the judgment should be reversed and judgment ordered for the plaintiff, or a new trial had.

BRUCE, Ch. J. I concur in the opinion of Mr. Justice CHRISTIANSON.

PER CURIAM. In the petition for rehearing filed herein, principal reliance seems to be placed upon the contention that the plaintiff is entitled to occupy the position of a holder in due course; and it is insisted that there is no evidence in the record to support a finding either that the M. Rumely Company and the Rumely Products Company are, in effect, the same corporation, or that the M. Rumely Company took the negotiable instrument burdened with defenses that might have existed as to the Rumely Products Company. While the opinions filed by the majority members of the court disclose that these questions have been fully considered, it is deemed proper to briefly state the record evidenced in support of the finding that the M. Rumely Company is not entitled to the favorable position contended for.

The agent who represented the M. Rumely Company, in attempting to collect the note in suit and who, in fact, collected a portion thereof, was shown to have made a definite promise on behalf of the M. Rumely Company that the plows would be made good. It was further shown that experts were sent to work on the plows in an effort to put them in working order, and also that on the 30th day of March, 1915, the defendants, in reliance upon the promise of the agent of the M. Rumely Company to put the plows in working order, executed a new chattel mortgage, running to Finley P. Mount, receiver for the M. Rumely Company, which covered their crop as well as the machinery which had been embraced in the original mortgage (the one in suit). If the

M. Rumely Company was at that time claiming to be the holder in due course of the paper, with the right to enforce the security that it had without regard to the warranty, it should have asserted its right then so that the defendants could have chosen as to whether or not they would stand upon the rights which they contend were theirs. The attitude of the M. Rumely Company in taking additional security under the circumstances is in the nature of an admission of their obligation to make the warranty good. If it was a holder in due course, it was a holder in due course before the efforts made to collect and before it undertook to make good on the warranty. A holder in due course of negotiable paper is not ordinarily concerned about collateral arrangements between the payee and the maker, and the fact that the M. Rumley Company concerned itself to the extent that it did in this case is, to our minds, strong evidence that it considered itself under obligation to the defendants. When this admission is considered in connection with the selling arrangement between the M. Rumely Company and the Rumely Products Company, according to which the M. Rumely Company was to receive payment in notes taken by the Rumely Products Company, and also in connection with the fact that the Rumely Products Company was a selling agent for the "Rumely Line," the "Advance Line," and the "Gaar-Scott Line," as shown on the note in suit, it is only reasonable to infer that the M. Rumely Company was apprised of the character of the selling contract that the Rumely Products Company customarily used.

The foregoing answers also the contention that the plaintiffs failed to comply with conditions precedent to the enforcement of the warranty, such as the giving of notice, etc. These conditions were for the benefit of the warrantor or its assignees, and could, of course, be waived. There was ample evidence that they were waived in this case.

The petition for rehearing is denied.

BRUCE, Ch. J., and CHRISTIANSON, J., adhere to their dissent.

STATE OF NORTH DAKOTA, Respondent, v. JOHN MUELLER, Appellant.

(168 N. W. 66.)

Examination of witness — trial — leading questions — allowing — largely in trial court's discretion — same testimony given by witness for complaining party — no prejudice.

1. The allowance of leading questions is largely in the control of the trial court, and no prejudice can be assumed where the testimony elicited is afterwards testified to by a witness of the party complaining.

Homicide — guilt — evidence of strong — insanity — defense of — technical or immaterial errors — disregarded.

2. Where evidence of guilt of the act of a homicide is overwhelming and practically admitted, and the real defense is that of insanity, mere technical or immaterial errors in relation to the homicide will be disregarded.

Testimony — errors in excluding — matters later covered by testimony without objection — errors cured.

3. Errors in the exclusion of testimony will not be considered where the matters in dispute are afterwards testified to without objection.

Questions — form of — repetition — exclusion of testimony.

4. It is not error to exclude testimony which has been repeatedly given, even though the question is not exactly in the same form as that which has been before answered.

Person shooting several others in succession — within short time — murder of first — trial for — res gestæ — all shootings part of.

5. Where a person shoots several others in succession and within the space of less than an hour and is tried for the murder of the first one shot, all of the shootings are part of the *res gestæ*.

Questions — previous statements or testimony — impeachment — foundation for.

6. No error is committed in asking the question, "Didn't you testify in answer to the question I am reading now, and make the following statement when you were at the preliminary examination? etc.;" nor is there any merit in the contention that the evidence on the preliminary examination had been given through an interpreter, and was not understood by the stenographer who transcribed it, when the question is merely asked for the purpose of laying the foundation for impeachment.

Witness — medical expert — questions as to family history — crime — criminal tendencies.

7. No reversible error was committed where a medical expert was asked whether a family history of crime would not generally result in a descendant being in the penitentiary, and where the expert answered that "criminal tendencies are not inherited," and even though there was no proof of any such family history.

Cross-examination — ill feeling — prejudice of witness — may be shown on.

8. The ill feeling and prejudice of a witness can always be shown on cross-examination.

Hypothetical question — refusal to allow — freedom of examination — allowed later.

9. The mere refusal to allow a hypothetical question will not constitute reversible error, where later on in the trial the utmost freedom of examination is allowed.

Witness called in rebuttal — name not indorsed on information — may testify.

10. It is not necessary that the name of a witness who is called in rebuttal should have been written upon the information.

Preliminary hearing — testimony given on — stenographer taking — may testify to what he heard.

11. When a stenographer testified as to what he heard upon a preliminary trial, and not as to the contents of his notes, and there is no evidence that he did not understand the German language, no error is committed in allowing him to testify even though the evidence shows that the testimony on the preliminary examination was given through an interpreter, and even though the stenographer had not testified that he had correctly transcribed his notes.

Jury — instructions — murder — first degree — what constitutes — premeditation — malice — wilful intention — reflection — determination.

12. It is not error to instruct a jury that "in order to constitute murder in the first degree as charged in the information the killing must have been wilful, with malice aforethought, and with premeditation and deliberation. There must have been a specific, deliberate, premeditated intention to take life, unaccompanied by any circumstance of mitigation. The generally accepted meaning of the word 'premeditation' is a prior determination to do the act in question and then determination to do it, but it is not essential that this intention should exist for any considerable period of time before it was carried out. If the determination is formed deliberately and upon due reflection, it makes no difference how soon the fatal resolve was carried into execution. An act is done wilfully when done intentionally and on purpose.

"Murder in the second degree differs from murder in the first degree only in the fact that as to the second degree there is no premeditation or deliberation.

Thus, where a person forms a design to kill in the midst of a conflict and immediately executes such design, the killing is not premeditated, and is therefore no higher offense than murder in the second degree."

Opinion filed May 9, 1918. Rehearing denied June 10, 1918.

Prosecution for the crime of murder.

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

Judgment for plaintiff. Defendant appeals.

Affirmed.

Knauf & Knauf and *John Carmody,* for appellant.

Where an expert hears the testimony of the witness, and the testimony is undisputed, as it was in this case, it is proper for him to base his opinion on that testimony. Walters v. Rock, 18 N. D. 45, 115 N. W. 511.

A witness should not be cross-examined upon matters upon which he was not interrogated upon his direct examination. State v. Cross, 26 N. W. 62.

"One who did not understand the words spoken by a witness, but who heard the interpretation thereof, cannot prove what the interpreter said, where no reason is shown why the interpreter is not produced." Schearer v. Harber, 36 Ind. 536.

"The testimony given through an interpreter cannot be proved on a subsequent trial by reading the shorthand notes of the evidence as it was given by the interpreter." People v. Ah Yute, 56 Cal. 119; People v. Les Fat, 54 Cal. 527.

"Proper foundation must be laid before introducing the minutes of the court as evidence of testimony in former proceeding." Watkins v. Clowe, 119 App. Div. 527, 103 N. Y. Supp. 270.

On a trial for murder in the first degree it is the duty of the court to fully and properly instruct the jury as to what constitutes murder in the second degree. Failure to do so is reversible error. State v. Marsh, 171 Mo. 523, 71 S. W. 1003; State v. Curtis, 70 Mo. 594; State v. Hunter, 92 N. W. 872; People v. Balkwell, 143 Cal. 259, 76 Pac. 1017; Maugher v. State, 23 So. 26; Sullivan v. State, 15 So.

264; Comp. Laws 1913, § 10,822; Moline Plow Co. v. Gilbert, 3 Dak. 392, 1 N. W.

The functions of the court and those of the jury are limited and are separate and distinct. The court must only instruct as to the law of the case, and the jury are the sole judges of all questions of fact. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; State v. Barry, 11 N. D. 428, 92 N. W. 809; State v. Peltier, 21 N. D. 188, 129 N. W. 451.

Opprobrious words of conduct used with reference to the wife of a person usually tend to excite in him the fiercest passions, and are a sufficient provocation to mitigate a killing, from murder to manslaughter.

The means by which the passions of a person are excited are regarded as immaterial, so long as they are of a nature naturally calculated to have such effect. Note C. 4 L.R.A.(N.S.) 158 and cases cited; State v. Grugin, 147 Mo. 39, 42 L.R.A. 774, 71 Am. St. Rep. 553; Scott v. Com. 17 Ky. L. Rep. 308, 29 S. W. 141; Massie v. Com. 16 Ky. L. Rep. 790, 29 S. W. 871; Reg. v. Rothwell, 12 Cox, C. C. 145; Seals v. State, 3 Baxt. 466.

The court should have instructed that if the killing was wilful and unlawful, but done without deliberation or premeditation, the offense would be murder in the second degree. State v. Noah, 20 N. D. 281; 21 Cyc. 1063, and cases cited.

John W. Carr, State's Attorney, *Lewis Tellner,* Assistant State's Attorney, and *William Langer,* Attorney General, for respondent.

The authorities cited by counsel for appellant do not support their assignments of error. Evidence offered which assumes the existence of a fact essential to a conviction, where there is no evidence that such fact existed, is of course inadmissible. Such is the only vital point presented by counsel, but no such condition existed in this case. Clock v. State, 19 N. W. 543.

The trial court was correct in charging that murder in the second degree differs from murder in the first degree only in the fact that as to the second degree there is no premeditation or deliberation. State v. Noah, 20 N. D. 281.

BRUCE, Ch. J. The defendant in this case was convicted of the crime of murder in the second degree. Practically the only defense is that of insanity. The abstract contains nearly six hundred printed pages. Appellant's brief contains seventy-three assignments of error, and the rules of this court are entirely ignored which require "the assignments upon which he relies to be set forth," and that "the brief shall contain such portions of the record as will enable the court to clearly understand the nature of the case, and, where rulings on the testimony constitute the errors complained of, sufficient explanatory facts or evidence shall be recited." See rule 34.

These omissions are no doubt due to the fact that the principal counsel has been called to the service of his country, and are ignored by this court for that reason, and for the reason that it does not desire that anyone shall be imprisoned for thirty years without a full opportunity for a hearing. Defendant's omissions, however, have rendered an examination of the case extremely laborious and extremely difficult.

The defendant, John Mueller, is charged in the information with the murder of Valentine, otherwise Fulda Hins, on December 25, 1915. Valentine was seventeen years of age and the defendant was twenty years old. The defendant lived with his parents, 6 miles north of Medina, in Stutsman county, and Valentine Hins lived with his parents 4 miles north of Medina. The Hins family had lived there about five years, at the time the crime was committed. The Hins and Mueller families appear to have been friendly and visited back and forth until January, 1915, when they became unfriendly because of undue intimacy between Gustave Hins, a brother of the murdered boy, Valentine, and Anna Mueller, a sister of the defendant, John Mueller. Some time about January 9, 1915, Gustave Hins, having been charged by the Mueller family with this offense against Anna Mueller ran away and left the country. From that time until the time of the murder, on December 25, 1915, the two families did not visit back and forth and were not very friendly. The defendant, John Mueller, had not been to the Hins home for a year prior to the evening of December 24, 1915, the night before the murder was committed.

The defendant went to the Hins home on the afternoon of December 25, 1915, and together with Valentine Hins and Frederick Hins, the father of Valentine, went to the barn on the Hins farm to do their

chores. Valentine Hins and the defendant, John Mueller, went into the barn. Frederick Hins, the father of Valentine Hins, was working outside trying to drive some colts into the barn. When he got close to the barn he noticed that someone had shut the door which he had opened a short time before. When he opened the door the defendant, John Mueller, began shooting with a revolver. Frederick Hins describes what happened, as follows: "Somebody had closed the door, but I don't know who it was. It was not me. I then got behind the colt to drive it into the barn. Mueller was standing behind the horse which Fulda had watered last. I did not see Fulda. . . . I wanted to drive the colt back to its place. I got about 8 feet from where Mueller was. It was John Mueller, the defendant. I did not see any gun from where he shot me. He shot me, then I saw it. When he shot me he was standing there until I came up and until he shot me. Was so scared I don't know where he shot me first or where the shot hit me first. After he shot me, he shot me immediately again. The second time he hit me up here. I noticed he struck me up here. I did not say anything. I turned around and ran out, and he shot me again. He shot me through the foot, I mean he hit me through the leg instead of the foot. In the barn he shot me three times. After I was hit the third time, I fell down. I did not quite fall down altogether, but almost fell down or collapsed. I got out of the barn. My wife came running. She was feeding the pigs in the old barn. I did not see anything else besides my wife when I got out. I did not see Mueller after I got out. I did not see Mueller until my wife was shot dead. I mean she fell down before me and was completely dead. She did not die. She got up again after a while. When I saw my wife shot down like she was dead, I saw Mueller. He was standing beside me. He was standing quiet and looking. He did not point the gun at me right away. My wife got back upon her feet. She was holding my arm when she was shot. He came up behind and shot her and she fell down before me. She was shot in the neck. After she got up she said, 'John, are you shooting on purpose, or what is the matter?' John said, 'Yes.' He said, 'We had this made up three months ago already that this was to happen to you.' He did not say anything else. . . . My wife said you were with us last evening and we thought you were good. He said, 'Well, we are Muellers.'

My little daughter came out and got hold of me and said, 'Oh, God! Father is shot.' Mueller put the revolver up to her breast and said, 'Get away or I will shoot you.' Then he put the revolver up to the breast of my wife and said, 'Go away or he would shoot her.' And then he pointed the revolver at me and said I should go away or he would shoot. I said, 'John, have pity on me and do not kill me altogether.' Then my wife said I should come along. Then I went in. Up to this time I had not seen Fulda."

The witness then details going to the house and their son Valentine, or Fulda as they sometimes called him, coming to the house in a wounded condition, and details an attempt made by the defendant, John Mueller, to get into the house, and how they refused to let him come in until he had put down his revolver. Prior to the shooting of Frederick Hins and his wife, the defendant and Fulda Hins were in the barn with the door shut, and Fulda, or Valentine, was shot while in the barn. After the defendant had laid down his gun the Hins let him into the house. Mr. Hins, the father, said to the defendant: "John are you drunk or what is the matter with you?" And the defendant replied, "I am as sober as you." And it appears from the testimony that the reason given by the defendant for shooting was that he wanted to marry Johanna Hins, daughter of Frederick Hins, and that he "could not get her." These same statements are testified to by Mrs. Hins a little later on in the abstract. The witness Frederika Hins, mother of Valentine Hins, details what happened in almost the same language. She says that she heard Frederick Hins ask the defendant, John Mueller, "Are you drunk, or what is the matter with you that you shoot all of us?" And the defendant replied, "I am as sober as you." The witness says she said to John Mueller, the defendant, "You were with us last night and I thought you were favorably inclined towards us." He said, "Well, we are Muellers." She asked him if he was shooting on purpose, and he said, "Yes, we decided three months ago that we were going to do this to you."

This same witness describes what happened after the shooting, as follows: "I next saw John after he and Valentine came up to the house. I was inside the house then. The first thing that called my attention to their coming up was Fulda saying quietly, 'Mother, open

the door.' Frederick said, 'Is John Mueller there too?' Fulda said, 'Yes.' I said, 'Then we will not open because he will shoot us again.' John said we should open up or he would shoot through the door." Then the witness details how the defendant finally put down his revolver and came up to the door and was let in. She also describes how Valentine Hins, or Fulda as he was called, looked when he came into the house. She says: "When he came in I noticed that Fulda's head looked as though someone had poured a pailful of blood over him. The blood was running down and was all run down from the top of the head." The witness continues as follows: "After John laid the gun on the cellar door and I let him in the house, he came in and went up to Frederick and said, 'Forgive me, uncle! forgive me, uncle!' Frederick said, 'John, do you think I could forgive you! Look at me! You put three bullets into me and shot my wife and Fulda!' John said, 'If I hadn't done it yet, I would give a million dollars.' Then I went out and took the revolver and stuck it into the ashes. . . . After I buried it in the ashes the people came and I brought it in and laid it on the table." The witness then stated that the defendant gave his reason for the shooting, as follows: "I said, 'I don't know why,' he said, 'I tried to get Johanna and I saw I can't get her and that is why I shot.'"

The defendant then took one of the Hins horses and rode to his home. After he reached there he told what had happened at the Hins home. He claims that he has no recollection of the shooting at the Hins home. He, however, admits remembering everything that happened that evening except the actual shooting.

He remembers hearing Ida Hins say to her father, "Are you shot? Are you shot?" He remembers that he had the gun in his hands. He admits remembering that he threw it away. He admits remembering that he rode home on Hins's horse. He says he discovered that while on the way to his home, although he pretends not to be able to remember what he told his brother, or father or mother, when he got home.

That the defendant knew what he had done and had told his father and mother about the shooting when he reached home is also very clear. The Muellers immediately went to the Hins's home, and upon reaching there informed the Hins of what the defendant had told them, and the evidence clearly shows that Mr. and Mrs. Mueller

learned of the shooting before they got to the Hins home. Upon reaching the Hins home, Mrs. Mueller, mother of the defendant, told Mr. Hins and Mrs. Hins that the defendant had said that he "had accidentally shot Fulda."

Mrs. Mueller, the mother of the defendant, says that she was in the room when John came home that night, and "I went out when I heard there was something happened. We always asked him (defendant), 'How did you shoot and where did you shoot them?' We were talking about that on our farm before they were hitching up the horses. My husband had told me that John had said to him that Hins had said to him he had shot." Again, in answer to the question:

"But your husband, Christ, had told you that John had told him that he had shot over at Hins?" She answered, "Yes."

It also appears from the testimony of the defendant's father that the defendant had told him all about the shooting after he had reached the Mueller home.

The testimony also shows very clearly that during the period of the shooting the defendant, John Mueller, had reloaded, or partly reloaded, his revolver. The revolver with which he did the shooting was a gun with five chambers, or a five-shot revolver. When the revolver was found after the shooting, four of the chambers were empty and one contained a loaded cartridge, but the testimony shows that there were at least five shots fired. Mr. Hins had been shot three times, Mrs. Hins had been shot once, and Valentine Hins at least once.

The testimony of Frederick Hins shows that the barn door had been closed by the defendant just prior to the shooting. Fulda or Valentine Hins was in the barn and was shot while the door was closed. When Frederick Hins went up to the barn and opened the door, John Mueller, the defendant, immediately shot him three times. The testimony would indicate that the murder committed by the defendant was contemplated and planned before the act was performed.

The defendant's only real defense, therefore, is that he was insane, when he committed the act, or, in other words, that he had an epileptic fit. The defendant's father and mother and some other members of the family attempt to show that he had suffered injuries to his head and was subject to fits when anything angered him for about four years prior to the time of the shooting. There is, however, nothing

in the testimony showing that any of the friends or neighbors of the Muellers had ever heard of the fits. The defendant was confined in the Stutsman county jail from December 25, 1915, until the time of this trial in July, 1916, under such circumstances as to be constantly reminded of all of the circumstances connected with this entire matter, but the evidence does not show that he had any fits during that time. The defendant's father and mother attempt to show that, whenever anything was said regarding the trouble between Gustave Hins and Anna Mueller, the defendant, John Mueller, would immediately become angry and have a fit. The trial of this case in district court occupied several days time, and, although this same matter was constantly referred to, and the defendant was continuously in court, there is no evidence of his having had any fit on this occasion. The mother of the defendant also says that the first person she ever told that her son, John Mueller, had fits, was his counsel in the case.

There is, in short, no dispute about the fact of the shooting of Mr. Hins, Mrs. Hins, or Valentine Hins, by the defendant. Neither can there be much dispute that the defendant's acts constitute a clear case of murder.

The defendant's sole claim is that he had a fit, caused by some language used in the barn by Valentine Hins, and that he did not know what he was doing when he shot. He remembers practically every detail of the occurrences happening upon this day up to the moment that he claims this remark to have been made. He does not claim that he was not fully responsible for his actions up to that time. His explanation of how he happened to have his revolver with him on that day is very unsatisfactory. He claims to have carried it in his overcoat pocket, and he says that he did not take his overcoat to the barn, but he offers no explanation of how the revolver got from his overcoat pocket into the pocket of his inside coat. He makes no explanation of the closing of the barn door prior to the shooting of Valentine Hins.

The first error complained of is the overruling of defendant's objection to the question, "Did he say anything about being at Muellers?" This was objected to as being leading, and it is claimed that it was asked for the purpose of proving that the Hins and the Muellers were enemies, and that there was a tribal feud between them. This

fact, however, was later testified to by Mrs. Hins without objection on the part of the defendant, and we can see no prejudice even if the question was otherwise objectionable, of which we have some doubt. Even if the question was leading its allowance was within the discretion of the trial court, and all that the testimony would tend to show would be a family feud and a state of mind that would tend to prove a criminal intent, and of this intent there can be no dispute, if only the defendant were sane and capable of entertaining it.

Counsel next complains of the question, "And was that the same son that was hurt in the head on the 25th of December on your farm at or near your barn?" There is no doubt of the rule relied upon by counsel for defendant, that a question which assumes the existence of a fact essential to a conviction where there was no evidence that fact existed is entirely inadmissible. The record, however, elsewhere shows that the son referred to had been hurt, and the rule is not here applicable.

Objection is next made to the allowance of testimony as to blood being upon one of the colts, and that the same was entirely well before John went into the barn. It is claimed that the questions assumed facts not in evidence, and have no bearing upon the issue in the case. We cannot see, however, that any reversible error was committed. The matter had no bearing upon the sanity or insanity of the defendant, and that we consider to be the only question in issue.

The evidence indeed is so overwhelming as to the guilt of the defendant, John Mueller, that he intentionally killed the deceased, and that the same was done with a criminal intent, and that the act would constitute murder, unless perchance the defendant was insane, that it is really immaterial that any technical errors were committed. For this reason we also deem the alleged errors assigned on the ground of refusing to strike out testimony as not being responsive, to have been harmless even if errors were committed. Next follows several alleged errors in the admission of testimony. This testimony, however, was elsewhere given without objection and had little, if any, bearing upon the question of insanity. Error is next assigned on the refusal to allow the witness Fred Hins to answer the question, "If you said that to Mrs. Mueller you don't remember it now, Is that right?"

The witness had, however, already denied making the statement, and no material error was committed. The first three errors complained of under assignment No. 8 are not worthy of notice. As to the fourth, which is that the court erred in not allowing the witness Fred Hins to answer the question: "Did you tell Louie that at the time he was talking to you at the hospital that when John had the revolver at the time he shot you and Reca out at the barn that he looked terrible, and that he acted just like a mad dog and frothed at the mouth, or words to that effect," the objection was that this fact had been denied several times, and the testimony would be a repetition and an improper subject on cross-examination. The complaint of the appellant is merely that the question had not been before asked in the same form. There is, of course no merit to the objection.

The next assignment of error is entirely without merit. All that the testimony would have shown would have been the point at which the bullet came out of the witness's back. This had nothing to do with the question of sanity or insanity. As we have said before, the question of the killing and the intentional killing is so well established that the technical errors on this point are immaterial. The same is true of the claimed error in regard to the admission of testimony as to the shooting of Mrs. Hins and as well as of the deceased. All of the shootings, too, seem to have been part of the *res gestæ*.

For the reasons before assigned and for the reason that insanity was practically the only defense, assignment No. 11 is entirely without merit.

The leading question complained of in assignment No. 12 could have had no prejudice.

The question complained of in assignment No. 13 was not even answered, and counsel asks a good deal of us when he asks us to infer that "the probability is, however, that the witness nodded her head." There is no such presumption that we know of in the law.

There is absolutely no merit in assignments Nos. 14 and 15, and they are not worth discussing, as the points were fully covered later in the testimony.

Assignment No. 16 relates to the testimony as to the condition of the wounds on the witnesses Mr. and Mrs. Hins. Whether this testimony was competent and relevant or not is immaterial here. If any-

thing, the debauchery of bloodshed would indicate an unbalanced mind; and, as that was practically the only defense, the testimony, even if irrelevant, was without prejudice.

Assignment of error No. 17 is too indefinite and incoherent to admit of consideration.

Assignments of error Nos. 18, 19, 20, 21, and 22 relate to the testimony in regard to the wounds on Mr. and Mrs. Hins, and for reasons given before do not furnish any grounds for a reversal.

Assignment of error No. 23 is absolutely without merit, and so much so that it needs no discussion.

The exception which is the basis of assignment of error No. 24 relates to questions which were clearly leading and to testimony which could easily have been produced in proper form as far as the exclusion was concerned, or to testimony in relation to matters which could have had no effect upon the verdict.

There was certainly no prejudice in the errors complained of in assignments Nos. 31, 32, 33, as the questions objected to were afterwards answered. There is certainly no merit to the objection that the witness Christ Mueller was allowed to answer whether he had a bad temper, and that this was immaterial.

In assignment of error 34 complaint is made of the overruling of defendant's objection to questions asked witness Christ Mueller, and to the proceedings on cross-examination. The witness Christ Mueller had been a witness at the preliminary examination. His testimony was given through an interpreter and taken down in shorthand by H. E. Rutgers and was transcribed by him. The attorney for the state was examining the witness on the transcript for the purpose of impeachment, and asked questions in the following form:

"Didn't you testify in answer to the questions I'm reading you now, and make the following statements when you were at the preliminary examination? First, I asked you, 'What did John do when he came home?' and did you answer, 'He didn't do anything?'" The objection was as follows:

"Objected to on the ground that it is not the best evidence. The deposition or testimony itself being the best evidence and on further ground being the conclusion of the witness."

Counsel for defendant claims that these questions were not proper

for impeachment purposes. He states that the evidence on the preliminary examination had been given through an interpreter and was not understood by the stenographer who transcribed it. He claims that there was no evidence before the court that the evidence of the witness Mueller was correctly interpreted and correctly taken down and transcribed.

There is certainly no merit in these objections. Counsel was merely seeking to lay the foundation for impeachment. He was not introducing the transcript in evidence, nor was anyone testifying therefrom.

Assignment of error No. 25 is based upon the court's action in allowing a witness, after he had testified that the defendant's face was first white and then turned reddish or purple, to answer the question, "A man does that when he gets mad, don't he?" The mere statement of the assignment shows its lack of merit.

In assignment of error No. 36, exception is taken as to the exclusion of testimony given by the specialist, which was not in fact excluded and was later fully covered.

The same is true of assignment No. 37 and assignment No. 38.

In assignment No. 39, objection is made to the following questions asked a medical expert on cross-examination.

Q. Supposing the Muellers's testimony as untrue, and that it is all wiped out of this case, then there wasn't anything this young man did but what might have been normal?

A. If you are going to wipe out the fits and epilepsy.

Q. Going to wipe out the fits. Wipe out the fits and epilepsy, my defense falls.

Q. I am talking about the defendant's defense the wiping out the fits at the binder, and at the elevator in Medina, and anywhere; suppose that evidence didn't exist, then he didn't do anything besides that, that might not have been normal?

A. Might have been normal.

Q. So you have got to have the fits in order to make this defense of epilepsy good?

A. The fits and corroborative facts. Not without the corroborative physical condition of this man, which is as important as his epilepsy.

Q. Now, I want to know something else. What is the mental classification of these fellows that are in the fit, that have a predisposition or tendency to crime?

That is too big a question. It is a very large question. That depends on their family history and conditions and their bringing up.

Q. If they had a family history of crimes and criminal tendencies?

A. You are getting into deep water now.

Q. I expect you to be fair with me, because I am not skilled in this line. If they had a family history of crimes, and the grandfather had been a drunkard and epilepsy ran in the blood; and they had criminal tendencies, bank robbers, shooters, or what nots; and these descendants of such a race, when you come on down with them, you would find those fellows in the pen, wouldn't you?

Mr. Knauf: Objected to as improper cross-examination assuming a state of facts not in the evidence, and not before the court; calling for extraneous matters not referred to in the examination.

The Court: Overruled. Exception.

A. Criminal tendencies are not inherited. The social conditions, surroundings, environment, education, and bringing up and such matters, are the things that made criminals, not inheritance. If this man didn't have good bringing up, if he had fights with his father and brothers, and his environment not the best, it perhaps might be a tendency to make him have a criminal mind. I wouldn't say that he was a criminal defective. You might find a defective. Defectives might commit crimes, mental defectives. A defective physically and you might say morally, I don't know whether that is the proper term, is a man who doesn't have the normal sense or moral responsibility. He is defective in that he doesn't have the normal sense of moral influence or actions, upon himself. That is what makes a natural criminal.

Objection is also made to the question, "Did you ever see a criminal who had an expressionless face?"

All of these questions were asked on cross-examination. The doctor had testified fully as to the appearance of the defendant, the condition of his skull, and had been examined in regard to his history and that of his antecedents. Certainly no harm was done by asking him if he had ever seen a criminal who had an expressionless face, as he answered, "Yes." It is true that counsel should not have asked him the

question, "If they had a family history of crimes and the grandfather had been a drunkard and epilepsy ran in the blood; and they had criminal tendencies, bank robbers, shooters, or what nots; and these descendants of such a race, when you come on down with them, you would find those fellows in the pen, wouldn't you?" We hardly believe, however, that in the mass of evidence that is before us this mere question would have stood out and prejudiced the jury against the defendant, especially as the doctor answered that criminal tendencies were not inherited.

Assignment of error objects to the question, "You all get mad out there on the farm sometimes, don't you?" It was claimed that the question had no bearing on the case at bar. It probably had not, but it could hardly have been any more prejudicial than if the witness had been asked if he, like all other men, was not a miserable sinner.

Assignment of error 43 refers to the testimony of Katie Kassman. The witness testified that the defendant was hanging with his toes on the rafters; that she pushed him from behind, and he fell down on his head and laid on his face. She did not know how long, as she had no watch. She was then asked the question, "Do you know whether he got unconscious at that time?" An objection to the question was sustained. It is claimed that this was a preliminary question and could have been answered by yes or no, and that the objection came too soon; that neither the court nor the state could tell at that time whether the testimony defendant was attempting to elicit from this witness was proper or improper, hence the question should have been answered.

We can hardly, however, see any prejudice in this matter. After the objection the witness testified that John Mueller lay on the floor about ten minutes as far as she knew, that she didn't know what he was doing while he was lying there, that she didn't know whether he bled in his face or ears or eyes at that time. She also later testified that, after she pushed John down, she went out because she felt sorry, and stayed out about seven minutes.

We have no reason to believe that she would have known whether he became unconscious or not, or whether his unconsciousness would have had any effect on his sanity or on his later physical condition.

Assignments 44, 45, and 46 relate to questions which tend to show

ill feeling between the witness Froelich and Mr. and Mrs. Hins. Objection is made that these matters were not referred to on the direct examination. The objection, of course, is not well taken, as ill feeling and prejudice can always be shown.

As far as the assignment of error number 47 is concerned it is clear to us that no prejudice is shown. The evidence may have been more or less hearsay, but was entirely harmless.

Though, too, it is claimed that the witness Louie Froelich was allowed to testify as to conversations held with the mother about the conduct of Anna, these conversations had been gone into on direct examination and the matter was unimportant.

Assignments of error No. 48 and 57 relate to the examination of the medical expert, Dr. Culbert. Dr. Culbert was an expert on insanity as well as on epilepsy. He was in the court room and heard all of the testimony of the Muellers in regard to the alleged epileptic spells of their son John. He was then asked:

Now, Doctor, assuming that their statements in that regard were true, and that thereafter and during the time that the boy had become unconscious and that thereafter he didn't remember what he had done, what in your opinion was the boy suffering from at that time?

Ans. Mental or psychic form of epilepsy. I have also heard their statements as to the time in January, 1915, when the talk had been about his sister Anna and Gustave Hins and the baby. I heard the description of his actions, and how he stiffened out and became rigid, and how he started to fall and they had taken him up and put him to bed. In my opinion he was suffering from epilepsy.

Mr. Thorp. (Preliminary for an objection.)

Q. Are you basing your answer upon the hypothesis as stated by Mr. Knauf, or by what you heard testified to by the defendant's witnesses?

Ans. The hypothesis stated by Mr. Knauf.

Mr. Thorp. Then we offer the objection on the ground and for the reason that there are two opinions called for by this witness,—the conclusion as to what the effect of the testimony of defendant's witness

was, and what their statements were as to how they put him to bed and as to how he fell down?

The witness must draw his conclusion as to what they stated and what their statements meant. Secondly, that the question calls for an answer and an opinion based upon the opinion and conclusion, and there being no proper hypothetical question and it inveighs the province of the jury and puts it up to this witness to decide for himself what the witness meant by this statement.

The court sustained the objection and defendant excepted.

Counsel admits that the court did not strike out the testimony and it may have been considered by the jury, but he claims, however, that the objection prevented the defendant from properly and thoroughly cross-examining the witness. Whether technical error, however, was committed or not we are not called upon to decide. It is sufficient to say that not only was the answer not stricken out, but defendant's counsel was afterwards allowed the utmost freedom in examining the witness, and we are satisfied that everything that was material was elicited from him.

Objections are next made to the rulings of the court on several questions. No reason, however, for the objections, is pointed out, no prejudice is shown, and we are unable to find any. Assignment of error No. 55 relates to objections made by the defendant's attorney to questions which were asked Dr. Culbert on cross-examination, one of them being, "Did you ever know of a cold blooded murder to be committed by a man that was sane?" Counsel states that he cannot understand the bearing of these questions. Nor can we. It would seem, however, that if they tended to do anything it was to aid and not to injure the defendant. They were asked by the state's attorney, and the answers, even if they were suggested, would tend to sustain the defendant's contentions. Many of the objections, indeed, are trifling, and there are so many of them that their number occasions us to lose faith in them all. An objection for instance is made to the question, "What do you mean by epilepsy?" What harm could come from this question, we are unable to see.

Assignments of error Nos. 58, 59, 60, and 61 relate to the cross-examination of a medical expert, and the complaint is that facts not

in evidence were assumed. The questions, however, came, we believe, under the general rule that where a medical expert bases his opinion upon his knowledge and what he has read, you can go at great length into his training and experience and the extent of his readings. See State v. Brunette, 28 N. D. 539, 150 N. W. 271, Ann. Cas. 1916E, 340.

Not only was the testimony complained of in assignments of error Nos. 62 and 63 stricken out by the court, but the objection here made, that it was negative in its form, was not made in the court below. The principal objection, indeed, was that the name of the witness was not written upon the information, and this, of course, was without merit, as the witness was called in rebuttal.

Assignment of error No. 64 is based upon the fact that a court reporter, Henry Rittgers, was allowed to testify to certain testimony given at a preliminary hearing and for the purpose of impeaching the witness Christ Mueller. The objection is that the testimony of the witness in the justice court was given through an interpreter, and counsel argues that the interpreter was not called to testify, and the reporter did not understand the German language. This fact, however, is not apparent from the record, and whether the stenographer understood German or not, we are unable to determine. All that the record discloses is that he testified from "his memory of the memorandum which he made at that time and from his memory of the testimony which he heard."

Nor is there any merit in the contention that the witness did not testify that he had correctly transcribed his notes. The witness testified as to what he had heard, and not to the contents of the notes.

It is next urged that the court failed to instruct the jury as to what constitutes murder in the first degree, and also as to what constituted murder in the second degree; also that in his instructions the court assumed that the defendant fired the shot that penetrated the head of the deceased. The court, however, did instruct the jury as follows:

"In order to constitute murder in the first degree as charged in the information, the killing must have been wilful, with malice aforethought, and with premeditation and deliberation. There must have been a specific, deliberate, premeditated intention to take life, unaccompanied by any circumstance of mitigation. The generally accept-

ed meaning of the word 'premeditation' is a prior determination to do the act in question and then determination to do it, but it is not essential that this intention should exist for any considerable period of time before it was carried out. If the determination is formed deliberately and upon due reflection it makes no difference how soon the fatal resolve was carried into execution. An act is done wilfully when done intentionally and on purpose."

"Murder in the second degree differs from murder in the first degree only in the fact that as to the second degree there is no premeditation or deliberation. Thus, where a person forms a design to kill in the midst of a conflict and immediately executes such design, the killing is not premeditated, and is therefore no higher offense than murder in the second degree."

These instructions we believe to have been sufficient under the holding in State v. Noah, 20 N. D. 281, 124 N. W. 1121, since the record also discloses the fact that the court by repeated instructions submitted to the jury the question as to whether the defendant fired the shot claimed to have killed Valentine Hins. In fact, the contrary seems hardly to have been contended for by defendant.

Counsel also claims that the court should have instructed the jury to the effect that, in order to convict the defendant of murder in the second degree, a jury must find from the evidence beyond a reasonable doubt that the defendant did unlawfully, premeditatedly, and with deliberation kill the said Valentine Hins. No premeditation or malice aforethought, however, seems to be necessary to constitute this crime. Murder in the second degree is defined by §§ 9462 and 9469 of the Compiled Laws 1913. The statutes upon the subject are as follows:

"Homicide is murder in the following cases:

"1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed or of any other human being.

"2. When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

"3. When perpetrated without any design to effect death by a person engaged in the commission of any felony."

"Every murder perpetrated by means of poison, or by lying in wait, or by torture, or by other wilful, deliberate or premeditated killing, or in committing or attempting to commit any sodomy, rape, mayhem, arson, robbery or burglary, shall be deemed murder in the first degree; all other kinds of murder shall be deemed murder in the second degree."

We are satisfied that no material errors were committed on the trial, and that the jury was fully and fairly instructed not merely on the law relating to murder in the first and second degrees, but on the defense of insanity, and that this latter defense was in reality the only one which was interposed. We are fully satisfied with the verdict of the jury.

The judgment of the District Court is therefore affirmed.

ROBINSON, J. (concurring). In this case defendant was convicted of murder in the second degree and sentenced to imprisonment for thirty years. He appeals on the ground that at the time of committing the deed he was insane. There is no doubt defendant was guilty of a cruel and unprovoked shooting and killing. He was twenty years old and for years he and his parents had lived on a farm in Stutsman county, a few miles from the Hinses, a German family. The two families visited together and became rather intimate, and Gustave Hins, a young man, became too intimate with a sister of defendant, and instead of marrying her he went to Canada. The result was an ill feeling between the two families. To wipe out the disgrace to his sister defendant concluded to make a general killing of the Hins family.

Accordingly on the afternoon of December 25, 1915, he took his five shooter and went to the Hins place, shot the old man three times, the mother once, and then fatally shot the young man Valentine Hins. Then he reloaded his five shooter and tried to get into the house, but they parleyed with him and held him out till he put down his revolver. The father said to him: "John, are you drunk or what is the matter with you?" The answer was: "I am as sober as you." To other questions he answered: "Well, we are Muellers. Yes, we decided three months ago that we were going to do this to you."

When let into the house he relented and asked forgiveness for the shooting and said he would give a million dollars if he had not done it. Defendant took one of the Hins's horses, rode to his home, told what he had done, and then the Muellers at once hitched up and drove to the Hins place.

There was a showing that defendant had suffered injuries to his head, and that he was subject to fits and to extremes of uncontrollable passion. Still the friends and neighbors do not remember of his having fits, and he had no fits during a period of eight months that he was in jail before the trial.

It may well be conceded that defendant was not in a proper and normal condition at and prior to the time of the shooting, and that it is his misfortune as well as his fault if he is subject to uncontrollable passion which throws him into fits and impels him to commit crime. However, he may well be thankful that he does not have to hang by the neck for so grave a crime, and that our state's prison is in reality a reformatory where by good conduct he may learn to think and control his passions and reduce the term of his sentence to twenty years.

Certain it is defendant has shown himself to be a very unsafe member of society. He has had a fair trial. The question of his insanity has been fairly submitted to the jury and they have found against him. There is no occasion for this court to repeat or to argue the convincing testimony; but even if there were any doubts, which there is not, a court should hesitate long before releasing one who has shown himself to be a very dangerous person and wholly unworthy of civil liberty. Judgment affirmed.

STATE OF NORTH DAKOTA EX REL. PETER W. SKEFFINGTON, Relator, Appellant, v. DAN SEIGFRIED, Alexander Hay, L. B. McLain, Robert Kee, and C. J. Schmitt, as the Board of Trustees of the Soldiers' Home, and J. W. Carroll, as the Commandant of Said Home, and Ex-Officio Secretary of the Board of Trustees of the Soldiers' Home, Respondents.

(168 N. W. 62.)

Grant — object of — comprehensive — object not fully attainable — grant may be used to accomplish real purpose — such right and power — not denied.

1. The fact that the object of a grant may be comprehensive does not deny the right and the power, when that object cannot be fully accomplished, to so use the fund that its real and fundamental purpose may be attained.

Statutes — spirit and reason of statute — general terms of — may be restricted — policy intended — must be construed in light of.

2. The meaning of general terms and of the word "all" as used in § 1776 of the Compiled Laws of 1913 may be restrained by the spirit or reason of the statute, and every statute must be construed with reference to the policy intended to be accomplished.

Soldiers' Home — object of its establishment — board of trustees — persons applying for admittance — rules and regulations — applicant financially able to support self — application refused — powers of trustees.

3. Even though § 1776 of the Compiled Laws of 1913 provides that "the object of the Soldiers' Home shall be to provide a home and sustenance for all honorably discharged soldiers, sailors, and marines," etc., the board of trustees of the Soldiers' Home is fully justified in refusing admittance to one who owns 240 acres of land of the value of $12,000, a house and lot of the value of $2,000, and draws a pension of $30 a month, and where the proof shows that the home is overcrowded and the admission of the applicant would be to the detriment of poor and needy soldiers, their wives and widows.

Board of trustees — rules and regulations — management and government — powers of board — may limit use of home — what cases — when.

4. Under the express power granted by § 1781 of the Compiled Laws of 1913 to make rules and regulations "for the management and government" of the State Soldiers' Home, "including such rules as it shall deem necessary for the preservation of order, enforcing discipline, and preserving the health of the inmates," the board of trustees of such institution has the power to make rules in regard to the admission of the inmates which shall prevent an over-

crowding, and where there is not provision for or funds appropriated which are sufficient for the accommodation of all, to limit the use of the home to those who are most in need of its aid and support.

Opinion filed June 12, 1918.

Mandamus to compel admission to the Soldiers' Home.

Appeal from the District Court of Ransom County, Honorable *Frank P. Allen,* Judge.

Judgment for respondents. Relator appeals.

Affirmed.

Charles S. Ego, for relator, appellant.

The relator here was denied admittance to the Soldiers' Home because he was possessed of more property and had a greater personal income than the rules and regulations prescribed by the board of trustees permitted. The appellant contends that the statutes fix and determine the qualifications of applicants for admission to the Soldiers' Home, and that the board of trustees has no power to make rules changing the qualifications as defined by statute. Comp. Laws 1913, §§ 1776, 1777.

The board of trustees is invested with the power of supervision and government of the home. Comp. Laws 1913, § 1779.

The law confers upon such board the power to make rules for the management of the home, subject to the constitutions of the state and nation, for preserving order, health of the inmates, and enforcing discipline. Comp. Laws 1913, § 1781.

"A more comprehensive word than 'all' cannot be found in the English language." Moore v. Virginia Ins. Co. 26 Am. Rep. 373.

The context of the section of our statute here involved is plain. The word "all" is used as an adjective signifying number, and includes all old soldiers of this class, *viz.,* all who have served in the Army of the United States, and who have been honorably discharged therefrom, and who are disabled by old age, disease, or wounds, and who have resided in this state one year. Consequently, as used in the context, the word "all" denotes "each," "every," "any." Burton v. Tuite (Mich.) 44 N. W. 282; Sherburne v. Sischo (Mass.) 9 N. E. 797; Swindell v. State (Ind.) 42 N. E. 528; Field v. Thistle (N. J. Eq.) 43 Atl. 1072; Campbell v. Cincinnati (Ohio) 31 N. E. 606.

"All" has a distributive as well as a collective meaning. Young v. DuBois, 113 N. Y. Supp. 456; Bellamy v. Bellamy, 6 Fla. 62; State v. Townley, 18 N. J. L. 311; Hare v. McIntire (Me.) 8 L.R.A. 451; Ford v. State, 42 Neb. 418, 60 N. W. 960; Ex parte Voll, 41 Cal. 29.

The language of the statutes is the embodiment of simplicity, and therefore the rule of contemporaneous construction does not apply. Such statutes must be interpreted judicially without reference to extrinsic facts. Wiles v. McIntosh County, 10 N. D. 594; Eddy v. Morgan (Ill.) 75 N. E. 916; Hord v. State (Ind.) 79 N. E. 916; Mantle v. Casey (Mont.) 78 Pac. 591; People v. Subway Co. (N. Y.) 79 N. E. 892; Studebaker v. Perry, 184 U. S. 258.

Laws cannot be amended or repealed by the courts under the plea that custom must be upheld. Travelers Ins. Co. v. Fricke (Wis.) 68 N. W. 120; Merritt v. Cameron, 137 U. S. 542; McCrary v. McFarland, 93 Ind. 466; Smyth v. Walton (Tex.) 24 S. W. 1084; Ewing v. Ainger (Mich.) 58 N. W. 767; Re Manhattan Sav. Inst. 82 N. Y. 142.

All legislative power is vested in the legislative assembly. Const. § 25; State ex rel. v. Budge, 14 N. D. 532; Vallely v. Park Comrs. 16 N. D. 25.

The attempt of respondent to make rules outside of statutory authority is legislative. The trustees do not possess such power, nor could it be delegated to them. The construction placed on the statutes by the trial court would render them unconstitutional. Re Watson (S. D.) 97 N. W. 463; Brookings v. Murphy (S. D.) 121 N. W. 793; Am. Dig. Cent. ed. title "Statutes" ¶ 303; Howell v. Sheldon (Neb.) 117 N. W. 109; Loser v. Board (Mich.) 52 N. W. 956.

Kvello & Adams, for respondents.

In construing a statute, consideration must be given to the object sought to be accomplished by the statute. The occasion and the necessity for the legislation must be kept in mind.

General words used in a statute must be understood as used in reference to the subject-matter in the mind of the legislature, and strictly limited to it. Comp. Laws 1913, § 1776; 36 Cyc. 1108–10–18.

Above all other considerations the object of this legislation was to provide a "home and subsistence for certain old soldiers. Can it be

said that the legislature had in mind or intended to make such provision for old soldiers who already had "home and subsistence?" State v. M'Kenny (Nev.) 2 Pac. 171, 173.

The word "all" as used by the statute simply refers to those old soldiers who do not have a "home and subsistence." It refers to every old soldier in such class or so situated. Glenn v. Wray (N.C.) 36 S. E. 167; Austin v. Berlin, 22 Pac. 433; Holden v. O'Brien, 90 N. W. 531; Dano v. Miss. R. Co. 27 Ark. 564; 2 C. J. 1134.

The board of trustees has the power to make rules and regulations not only for the management of the home in its general business details, and for the health, care, and comfort of the inmates, but also to fix and determine who of the old soldiers are eligible to admittance to the home for care and subsistence. Laws 1890, § 4, chap. 165; Ball v. Evans (Ia.) 68 N. W. 437; Howell v. Sheldon (Neb.) 117 N. W. 109; Brooks v. Hastings (Pa.) 43 Atl. 1075; 44 Am. Dig. "Statutes" § 296; 18 Decennial Statutes, Key No. 219; 36 Cyc. 1140.

BRUCE, Ch. J. This is an appeal from a judgment denying a peremptory writ of mandamus, which was entered after a demurrer to the answer had been overruled. This opinion is written after rehearing. The question involved is whether the board of trustees of the Soldiers' Home at Lisbon, North Dakota, must admit to the privileges of the home one who has adequate means of support and to the detriment of others who have not such means; or whether, on the other hand they may make reasonable rules and regulations, which shall prevent the home from being overcrowded, and where, on account of lack of room and facilities, admittance must be denied to some, they may favor those who are most in need. Incidentally there is involved the validity of a rule of the board which limits the use of the home "to veterans not having an annual income of over $400 from all sources, including pensions, rent of houses, farm interest, etc."

We are satisfied that the trial judge was justified in denying the writ of mandamus, and that the facts which are disclosed by the answer and the truth of which are admitted by the demurrer fully justify the trustees in denying the use of the home to the relator. We do not desire, however, to be understood as unquestionably approving the rule which has been adopted by them and which limits the use of the

home in all cases to those "not having an annual income of over $400 from all sources, etc."

Whether this rule would be justified or not would depend upon the circumstances and the demand for the accommodations furnished by the institution. We are satisfied, indeed, that the object of the legislature was to furnish a home for *"all* honorably discharged soldiers, sailors, and marines," their wives and widows, who might apply for its aid, and on account of old age or sickness desire its support and companionship or comfort, and this regardless of their financial situation.

We are equally satisfied that, although § 1776, Compiled Laws 1913, states that the object of the Soldiers' Home shall be to provide a home and sustenance for *all* honorably discharged soldiers, § 1781, Compiled Laws 1913, which places the general management and control of the institution in the hands of the board of trustees, with the power to make rules and regulations in relation thereto, gave to that board the power to make rules of admission as well as of government, and, when facilities were not at hand to accommodate all, to so manage the institution that those really in need should first be benefited. It is clear, indeed, that the alleviation of distress was the prime purpose of the gift, and it would be absurd to contend that, where two are equally entitled to a benefaction, he who has the right to determine which shall possess it cannot give it to the one most in need.

The Soldiers' Home at Lisbon was established by the legislature under the provisions of § 216 of article 19 of the Constitution of North Dakota, which provides among other things that:

Section 216. "The following named public institutions are hereby permanently located as hereinafter provided, each to have so much of the remaining grant of one hundred and seventy thousand (170,000) acres of land made by the United States for 'other educational and charitable institutions' as is allotted by law, *viz.:*

"First: A soldiers' home when located, or such other charitable institution as the legislative assembly may determine, at Lisbon, in the county of Ransom, with a grant of forty thousand (40,000) acres of land."

The 40,000 acres of land in question were part of the Federal grant,

which was made by § 17 of the Enabling Act, and which among other grants gave to the state of North Dakota:

"For the school of mines 40,000 acres; for the reform school 40,000 acres; for the deaf and dumb asylum 40,000 acres; . . . for the state normal schools 80,000 acres; for public buildings at the capital of said state 50,000 acres; and for such other educational and charitable purposes as the legislature of said state may determine 170,000 acres; in all 500,000 acres."

Under the sanction of the constitutional provision in question the Soldiers' Home was located at Lisbon, North Dakota, and by § 1776 of the Compiled Laws 1913, which originally appeared as chapter 165 of the Laws of 1890, it was provided that "the object of the Soldiers' Home shall be to provide a home and subsistence for all honorably discharged soldiers, sailors, and marines who have served in the Army or Navy of the United States, and who are disabled by disease, wounds, old age, or otherwise, and their wives and widows."

Section 1777 also provides that "no applicant shall be admitted to such home who has not been a resident of this state at least one year next preceding his application for admission therein, unless he served in a Dakota regiment or was accredited to the territory of Dakota."

By the same act the management of the Home was placed in the hands of a board of commissioners, and later, and by §§ 1778, 1779, and 1781 of the Compiled Laws of 1913, was placed in the hands of a board of trustees. These latter acts prescribe the power of the board of trustees and, among other powers, give to them the power to "make rules and regulations not inconsistent with the Constitution of the United States or of this state for the management and government of such homes, including such rules as it shall deem necessary for the preservation of order, enforcing discipline and preserving the health of its inmates."

It was under the provisions of the above act that the board refused admission to the plaintiff. Its reason for so doing is stated in the answer to the petition, and the facts therein pleaded are admitted by the demurrer.

This answer stated that the relator, although suffering with paralysis and confined to his bed and unable to care for himself, and having a wife who was advanced in years, physically frail and somewhat in-

firm, so that she could not properly care for him without impairing her health, was the owner of at least 480 acres of land in Ransom county, North Dakota, free of encumbrance, and of sixteen lots in Lisbon, on which he occupied a substantial and comfortable home, fitted with electric lights and other modern conveniences; that said lands were worth not less than $50 an acre; that said city lots, with the buildings thereon, were worth not less than $2,000; that the rents and profits of the relator's real estate were at least $500 a year; and that in addition thereto the relator drew a pension of $30 a month from the United States. Its answer further stated that the Soldiers' Home has only accommodations for about forty-five old soldiers, and hospital facilities for not to exceed nine, and that where old soldiers and their wives are admitted to the home the trustees are compelled to keep them in the hospital building, there being no other facilities; that the relator would have been a hospital case, and that to admit him would mean that indigent and destitute old soldiers, their wives, and widows, would be deprived of the home and sustenance provided for them by law, and of the care and attention which they so much need and which relator is abundantly able to and does provide for himself, in his own comfortable home surrounded by his wife and several sons and daughters,—all comfortably well to do. The answer further alleges and the demurrer admitted that there are not less than 1,000 old soldiers, their wives, and widows in the state of North Dakota qualified for admission to the Soldiers' Home, if relator is qualified, and that to admit relator and those similarly situated would result in the exclusion of indigent and destitute old soldiers, their wives, and widows, and that to avoid such a result, the rules and regulations herein before referred to were made and promulgated and for more than twenty-four years have been enforced and adhered to without question or dispute.

The contention of the relator centers around the word "all," which is to be found in § 1776 of the Compiled Laws of 1913, and which provides that "the object of the Soldiers' Home shall be to provide a home and subsistence for all honorably discharged soldiers, sailors, and marines, who have served in the Army or Navy of the United States, and who are disabled by disease, wounds, old age, or otherwise, and their wives and widows."

He maintains that the word "all" must be given its widest signifi-

cance. He also maintains that § 1781 merely provides that the board shall "make rules and regulations not inconsistent with the Constitution of the United States or of this state for the management and government of such homes, including such rules as it shall deem necessary for the preservation of order . . . and preserving the health of its inmates."

He maintains that this statute merely relates to the government of the home, and does not include or confer the power to make any rules or regulations on the question of admission or the right of admission, and that there is no other statute which confers this power.

We have, however, as we have before stated, no hesitancy in sustaining the judgment of the district court in the case which is before us, and this, in spite of the fact that the statute under consideration makes use of the word "all" and contains the statement that "the object of the Soldiers' Home shall be to provide a home and sustenance for *all* honorably discharged soldiers." The fact that the object of a grant may be comprehensive does not deny the right and the power, when that object cannot be fully attained, to so use the fund that its real and fundamental purpose can be best subserved. It is well established that "the meaning of general terms may be restrained by the spirit or reason of the statute, and that general language may be construed to admit implied exceptions," and that "every statute must be construed with reference to the policy intended to be accomplished by it." 36 Cyc. 1109, 1110; Hare v. McIntire, 82 Me. 240, 8 L.R.A. 451, 17 Am. St. Rep. 476, 19 Atl. 453; Ex parte Voll, 41 Cal. 29; Ford v. State, 42 Neb. 418, 60 N. W. 960; McCoy v. Fahrney, 182 Ill. 60, 55 N. E. 61; 2 Am. & Eng. Law, 143; Phillips v. State, 15 Ga. 518; Hallowell v. Gardiner, 1 Me. 93.

We are of the opinion that the words, "charitable purposes," which are used in the clause in § 17 of the Enabling Act, which granted to the state the land by which the institution is endowed for "such other educational and charitable purposes as the legislature may determine," must and should be construed in its broad, and not limited, meaning, and to include acts of public benefaction which are done for public purposes, as well as mere almsgiving or benefaction to the poor, and that as so construed the section authorizes the maintenance of an institution which shall care for all classes of aged and infirm

soldiers, irrespective of their monetary worth. See 5 R. C. L. 291; First M. E. Church v. Donnell, 110 Iowa, 5, 46 L.R.A. 858, 81 N. W. 171; 11 C. J. 299; New Castle Common v. Megginson, 1 Boyce (Del.) 361, 77 Atl. 565, Ann. Cas. 1914A, 1207; State ex rel. Linde v. Packard, 35 N. D. 298; L.R.A.1917B, 710, 160 N. W. 150.

We are also of the opinion that the legislature of North Dakota, when it enacted § 1776 of the Compiled Laws of 1913, intended that the Home should be open to "all old soldiers, sailors, and marines, who have served in the Army or Navy of the United States, and who are disabled by disease, wounds, old age, or otherwise, and their wives and widows."

This, however, must necessarily only have been to the extent of the capacity of the building, to the accommodations afforded, and within the limits of the funds provided.

We, in short, entertain no question as to the power of the board to adopt rules of admission as well as of government, and we believe that the power conferred by the statute (§ 1781) to "make rules and regulations not inconsistent with the Constitution of the United States, or of this state for the *management* and government of such homes, including such rules as it shall deem necessary for the preservation of order, enforcing discipline and preserving the health of its inmates," is sufficiently comprehensive for the purpose. Surely rules which shall prevent overcrowding relate to the government of the institution to the preservation of order, and the preservation of the health of its inmates, and surely a rule which prevents overcrowding by rejecting those who have other abundant means of support is not an arbitrary exercise of the power. It is to be remembered that for twenty years or more the control of the Home has been in the hands of a board of trustees made up entirely of old soldiers. And it would be unreasonable to suppose that such a board would not have at heart the best interests of all of their old comrades, or to suppose that they would not have a rational conception of the real purposes for which the Home was instituted.

It is also to be noticed that, although in the past and in many instances the statutes expressly gave to the several boards of trustees the power to make rules for the admission to the various state educational and charitable institutions, no such express power was given to the

trustees of the Normal Schools, the Agricultural College, the School of Forestry, the School for the Blind, and the State Industrial School. See §§ 1582, 1589, 1605, 1675, 1699, 1727. Nor is such a power expressly given under the new Board of Regents Act of 1913. It can hardly be believed, however, that it was the intention of the legislature that children of any age, or any degree of preliminary education, should be admitted to these institutions.

Of course, if the legislature definitely prescribes the standards of admission, no board of trustees may depart from its determination, but otherwise the board of trustees must be held to possess the usual powers, which would include the giving of aid where most needed.

Although counsel for appellant contends to the contrary, we are satisfied that the answer sufficiently pleads the fact that the accommodation of the plaintiff would result in denying the use of the Home to others more in need of its comfort and support.

The judgment of the District Court is affirmed.

ROBINSON, J. (specially concurring). The relator sues for a mandamus to compel the defendants to admit him as a member of the Soldiers' Home at Lisbon. He appeals from an order and judgment denying the suit. By answer, which is admitted, the defendants show that, according to the rules of the Home, no person can be admitted who has an income in excess of $400 a year; that in his application for admission to the Home the relator swore that his income did not exceed $400 a year, and the same is false and untrue; that he owns 400 acres of land in Ransom county, North Dakota, free of encumbrances and sixteen lots in Lisbon, on which he has a comfortable home, fitted with electric lights and modern conveniences, and in which he and his family reside; that the land is worth $50 an acre and the lots are worth $2,000. The rents of the land are at least $500 a year and the relator has a pension of $30 a month.

The Home is of limited capacity and the admission of the well to do would crowd out the needy veterans. However, it is the contention of counsel for relator that all disabled persons who have served in the Army and have been honorably discharged are entitled to the benefits of the Home, regardless of their wealth or the capacity of the Home. The statute reads thus:—

Section 1776. "The object of the Soldiers' Home shall be to provide a home and subsistence for all honorably discharged soldiers, sailors and marines who have served in the Army or Navy of the United States, and who are disabled by disease, wounds, old age or otherwise, and their wives and widows."

The object of the statute was as far as practicable to provide a home for *all* of a certain class who need a home, but not for *all* such as may apply regardless of their needs and the capacity of the home. Regardless of the word "all" or any other word in the statute, it must be given a construction in accord with reason and common sense.

The board of trustees in charge of the Home must of necessity have a right to control it, and to exercise some judgment and discretion in regard to the admission and discharge of inmates. In such cases an appeal to the court for a mandamus does not lie except to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Comp. Laws, § 8457.

Manifestly the law does not specifically enjoin the trustees of the Soldiers' Home to admit *all* applicants to the Home or to admit any person who is well able to help himself and who has no need of the Home.

GRACE, J. (dissenting). I cannot agree that the word "all" as used in § 1776 of the Compiled Laws of 1913 has the restrained meaning attached to it by my associates in the majority opinion. The word "all" in said section must be accorded its ordinary and usual signification. The word "all" is defined by Webster's International Dictionary as follows: "The whole number, quantity, or amount; the entire thing; everything included or concerned; the aggregate; the whole; totality; every thing or person." In State v. Maine C. R. Co. 66 Me. 510, the court said, defining the word "all:" "'All' means everything, or the whole number of particulars,—the whole number."

Section 1776 declares the object of the Soldiers' Home shall be to provide a home and subsistence for *all* honorably discharged soldiers, sailors, and marines who have served in the Army or Navy of the United States, and who are disabled by disease, wounds, old age, or otherwise, and their wives and widows.

It is my opinion that any old soldier, sailor, or marine who has

served in the United States Army or Navy, and who has been honorably discharged, if he is disabled in the manner set forth in such statute, as a matter of strict legal right is entitled to be admitted to the Soldiers' Home if he wishes to be. The word "all" includes every such soldier within our state, and all that is needed to gain him admission to the Soldiers' Home is that he bring himself within the provisions of § 1776. His admission thereto does not depend upon whether he has or has not money or property, neither do I concede that the ministration of the state to the care and comfort of the soldiers is to be understood in the nature of a charity, nor is the maintaining of a home for the care, comfort, and protection of such old soldiers to be classed as a charitable institution. Rather is it the effort on behalf of the state to show its gratitude to the brave men who, when the life of the nation was imperiled, gallantly came to its defense, and offered to give up their life in the defense of their country, and in the defense of liberty. The state in such case is not conferring charity, but rather is it engaged in the payment of a debt of gratitude. 40,000 acres of land were granted to the state to maintain the Soldiers' Home, to which all soldiers qualified under § 1776 might retire if they desired, to spend their declining years when old age or sickness was upon them. I cannot bring myself to believe that the Soldiers' Home may be classed as a charitable institution, and I am confident that it is open to all and every one of the old soldiers in this state who come within the qualifications of § 1776. I am also further of the opinion that the board of trustees have nothing to do with the admission or exclusion of the old soldiers, and have no power to make any rules or regulations in regard to their admission or exclusion, but such qualifications for admission are those, and only those, which are contained in § 1776. The board of trustees have the power to make rules regulating to some extent the conduct of the old soldiers after their admission to the institution.

MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, Appellant, v. WASHBURN LIGNITE COAL COMPANY, Respondent.

(— A.L.R. —, 168 N. W. 684.)

Lignite coal — maximum rates for transporting — legislature — act of — fixing such rates — violation of act — by carriers — action to enjoin — by state — injunction dissolved — difference between statutory rate and alleged reasonable rate — action against shipper to recover — contract — implied — either in fact or in law.

In an act of the legislature passed in 1907 maximum rates were prescribed for the carriage of lignite coal. The carriers declined to comply with the act, and the state brought an action to enjoin continued violation. In March, 1910, the United States Supreme Court affirmed the decree of the state supreme court in favor of the plaintiff, but provided in the decree that the affirmance should be without prejudice "to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rate for coal." After a period of experimentation the case was reopened and the injunction was continued by the state supreme court, but later, in June, 1915, dissolved by the United States Supreme Court. In an action against the shipper to recover the difference between the statutory rate and an alleged reasonable rate for shipments made during the period between the dates of the first and second decrees of the United States Supreme Court, it is *held:*

1. The action must be considered as brought upon a contract implied either in fact or law.

Complaint — circumstances from which contract may be implied in fact — absence of such allegations — promise — absence of allegation of — no cause of action on implied contract in fact.

2. In the absence of allegations in the complaint of circumstances from which a contract may be implied in fact, and in the absence of allegations of a

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NOTE.—On elements entering into determination of reasonableness of railroad rates prescribed by the state for local traffic, see notes in 33 L.R.A. 183, 15 L.R.A. (N.S.) 108, and 25 L.R.A.(N.S.) 1001, in which there is indicated in a general way, the principles and rules that have been applied in the cases cited to the determination of the question as to the reasonableness or unreasonableness of the rates complained of as confiscatory. On effect that return as a whole is reasonable on right to require railroad to transport commodity for less than reasonable compensation, see note in L.R.A.1917F, 1158.

promise, the complaint does not state a cause of action upon a contract implied in fact.

Statute prescribing rates — invalid under Federal Constitution — confiscatory character — because of — reparation by shipper — not obliged to make — as a matter of law.

3. When a statute prescribing rates is held invalid under the Federal Constitution because of its confiscatory character, it does not follow that a shipper is obliged, as a matter of law, to make reparation to the carrier.

Statutes — depriving person of life, liberty, or property — due process of law — without — state cannot make or enforce — Constitution — provisions of — prohibition applicable to state — individual rights transgressed — reparation for — is not secured by Constitution.

4. Article 14 of the Amendments to the Federal Constitution, which provides that no state shall make or enforce any law which "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws," is a prohibition applicable to the acts of the state, and does not, of itself, secure to individuals whose rights may be transgressed by the state a remedy by way of reparation.

Highest tribunal — decree of — enjoining violation of state statute — defendant coerced into compliance — no conditions imposed — prerequisite to obtaining benefit — decree is damnum absque injuria.

5. Where a decree of the highest judicial tribunal enjoins the violation of a statute, and the defendant is thus coerced into complying with its provisions, and where no conditions are imposed upon those in whose favor the decree operates as a prerequisite to obtaining the benefits of such decree, any damage done the defendant by the operation of the decree is *damnum absque injuria*.

Opinion filed June 12, 1918.

Appeal from District Court, Burleigh County, *W. L. Nuessle*, J.

Affirmed.

John L. Erdall (*A. H. Bright, John E. Greene,* and *Dullam & Young,* of counsel), for appellant.

The legislature of North Dakota by enactment fixed maximum interstate rates for the transportation of coal. Laws 1907, chap. 51.

This act was sustained by the decree of the supreme court of North Dakota. 19 N. D. 45; 26 N. D. 438.

The decree of the supreme court of North Dakota was reversed by the decree of the Supreme Court of the United States. 236 U. S. 585.

The case was brought and prosecuted by the attorney general of the

state of North Dakota in his official capacity for and on behalf of all the people of the state. Under such circumstances all the people of the state are bound by the decision and judgment. State v. Villis, 19 N. D. 209, 124 N. W. 706; Ashton v. Rochester, 123 N. Y. 187; McConkie v. Remley, 119 Iowa, 512, 93 N. W. 505; Fullton v. Pomeroy, 111 Wis. 663, 87 N. W. 831; People v. Harrison, 253 Ill. 625, 97 N. E. 1092; McIntieer v. Williamson, 65 Pac. 244; State v. Hartford St. R. Co. 56 Atl. 506; Bank of Kentucky v. Stone, 88 Fed. 383; Bear v. Brunswick County, 29 S. E. 719; Stone v. Winn, 176 S. W. 933; State v. Center Creek Min. Co. 171 S. W. 356; Kansas City Exposition Driving Park v. Kansas City, 74 S. W. 979; Orcutt v. McGilney, 147 N. W. 586; Worrell v. Landis, 141 Pac. 962; Hovek v. Shepherd, 147 S. W. 224; Central Bank & Trust Co. v. State, 76 S. E. 587; State ex rel. Forgues v. Superior Ct. 127 Pac. 313; Greenburg v. Chicago, 99 N. E. 1039; State v. C. B. & Q. R. Co. 93 N. E. 422; People v. Detroit G. H. & M. R. Co. 121 N. W. 533; Pierce v. Pierce, 122 S. W. 1147; Leet v. Gratz, 117 S. W. 642; Davis v. Davis, 124 N. W. 715; Spokane Valley Land & Water Co. v. Jones & Co. 101 Pac. 515; Freeman, Judgm. 4th ed. § 178; Black, Judgm. § 584; 23 Cyc. 1269.

This present action is instituted to recover the difference between the maximum rate fixed by the legislature (being the rate or carrying compensation received by appellant during the course of the litigation), and the reasonable rate for such transportation of coal. The United States Supreme Court's final decree entered in this litigation renders the rate invalid and unconstitutional not only during the period covered by the testimony, but up to and including the time of the decree. Missouri v. Chicago, B. & Q. R. Co. 241 U. S. 533.

The appellant is clearly entitled to recover such difference in rates. N. P. R. Co. v. North Dakota, 236 U. S. 585, 595; Reagan v. Farmers Loan & T. Co. 154 U. S. 362.

The law is well settled that when a judgment or decree is reversed, the law raises an implied obligation or agreement on the part of the person securing the judgment or decree, or the person benefiting thereby, to restore all that was obtained, directly or indirectly, by reason thereof. United States Bank v. Bank of Washington, 6 Pet. 817; 2 Salk. 587, 588; Tidd, Pr. 936, 1137, 1138; N. W. Fuel Co. v. Brock,

139 U. S. 216; Brown v. Detroit Trust Co. 193 Fed. 622; Zimmerman v. Bank, 56 Iowa, 133; Thompson v. Reasoner, 122 Ind. 454; Flemmings v. Riddich, 5 Gratt. 272; Hier v. Brewing Co. 60 Neb. 320; Bellamy v. St. L. I. M. & S. R. Co. 220 Fed. 876.

The appellant here is not seeking to recover damages flowing from or connected with the injunction, but to recover undercharges to which we are entitled by law, independent of the injunction, and which we were temporarily restrained from recovering, by the injunction. Haebler v. Myers, 132 N. Y. 363; Pulteney v. Warren, 6 Ves. Jr. 73; Southern Ry. Co. v. Railroad Commission, 196 Fed. 558; Tift v. Ry. Co. 123 Fed. 789, s. c. 138 Fed. 753; Love v. N. A. Co. 229 Fed. 103, 106.

"The rates fixed by the legislative assembly or Board of Railroad Commissioners shall remain in force pending the decision of the courts." N. D. Const. § 142.

This provision was doubtless intended simply to prevent a common carrier from applying a different rate from that fixed, pending the litigation. It was probably not intended to prevent an adjustment between the carrier and the shipper, after the litigation was ended, in accordance with the final judgment in such litigation.

A construction such as suggested would make the provision accord with the law as it is generally understood and administered, and would obviate any conflict with the Federal Constitution. Any other construction permits of taking property without due process of law. 236 U. S. 585; Fed. Const. § 1, 14th Amend.; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362.

The construction and the results for which defendant contends would be in conflict with other provisions of the Constitution.

"This Constitution and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any other state to the contrary, notwithstanding." U. S. Const. art. 6; Smyth v. Ames, 169 U. S. 466; Scott v. McNeal, 154 U. S. 34; Virginia v. Rives, 100 U. S. 313, 318, 319; Ex parte Virginia, 100 U. S. 339; Neal v. Delaware, 103 U. S. 370; United States v. Cruikshank, 92 U. S. 542; Bank of Columbia v. Okely, 4 Wheat. 235, 244; Huntington v. Attrill, 146 U. S. 657;

Mobile & O. R. Co. v. Tennessee, 153 U. S. 486; Loughlin v. McCauley, 186 Pa. 517, 48 L.R.A. 1; Hauenstein v. Lynham, 100 U. S. 483.

Miller, Zuger, & Tillotson, for respondent.

There can be no coercion where, by a decree of the court, one is compelled to comply with a valid law. By the first decision of the Supreme Court of the United States, the law in question and the rates fixed thereunder were upheld. One cannot say that he involuntarily and against his will complied with a valid law.

The rates existing during the time of the litigation, down to the date of the institution of the second action, were the legal and lawful rates, and the rates or charges accepted and published by plaintiff as its schedule of rates for such transportation and plaintiff voluntarily accepted such rates as its full compensation for such services.

It is therefore clear that plaintiff's reason for performing the services alleged for the compensation received was not because it was coerced into doing so, by the first decree of the United States Supreme Court, nor was it because of lack of adequate remedy to protect itself; and if not coerced and not lacking of a remedy to protect itself, it must of necessity have been its voluntary act. But even if plaintiff was coerced, and suffered damage as alleged, still a recovery at law is not warranted, because, if any damages followed by reason of such course, they would be damages arising from the act of the court, and damages of such a nature are *damnum absque injuria,* for which there is no redress. Russell v. Farley (U. S.) 26 L. ed. 1060.

There were no conditions imposed at the time the injunction was obtained, nor did the Supreme Court make any provision as to future recovery. Missouri v. C. B. & Q. R. Co. 241 U. S. 533, 60 L. ed. 1148.

Plaintiff cannot recover under this form of action.

It might have recovered in an action on the bond had one been properly brought. Russell v. Farley, supra; 2 Sutherland, Damages, 2d ed. §§ 520, 521; Hayden v. Keith (Minn.) 20 N. W. 195.

BIRDZELL, J. This is an action to recover the difference between the statutory rate upon certain coal shipments and an alleged reasonable rate. It arose upon the following facts:

In the year 1907, the legislature of North Dakota passed a statute

prescribing a schedule of maximum rates to be charged for hauling lignite coal. When the law went into effect the carriers declined to comply with it, whereupon an action was brought to enjoin the continued violation. In this action, the carriers were unsuccessful. State ex rel. McCue v. Northern P. R. Co. 19 N. D. 45, 25 L.R.A. (N.S.) 1001, 120 N. W. 869, and Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423. A supersedeas having been obtained, the statutory rate was not put into operation until after the decree of the United States Supreme Court, in March, 1910. The case was later reopened in accordance with the terms of the decree and additional evidence taken. It was then determined by this court that the statutory rates were reasonable, but it was ultimately held by the United States Supreme Court that the rates were confiscatory. State ex. rel. McCue v. Northern P. R. Co. 26 N. D. 438, 145 N. W. 135; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1. The portion of the complaint which states the alleged cause of action is as follows: "That the plaintiff at the time said shipments moved, and until the 11th day of June, 1915, by reason of the mandate of the Supreme Court of the United States and the decree entered in the supreme court of the state in the year 1910, aforesaid, without its consent and against its will, was coerced and forced to accept and transport for the defendant all of said shipments upon payment to the plaintiff of the rates and charges prescribed in said chapter 51. That from and after the 11th day of June, 1915, when final judgment was entered in the supreme court of the state in said state case as aforesaid, plaintiff became entitled to recover from the defendant the difference between said lawful and reasonable rates and the rates prescribed by said chapter 51 heretofore paid by the defendant, amounting in all to the sum of $26,819.99."

It will be noted that the complaint alleges that, by reason of the decree of the United States Supreme Court, the plaintiff was coerced and forced to accept and transport shipments for the defendant at rates prescribed by chapter 51 of the Session Laws of North Dakota for the year 1907. The remainder of the paragraph merely states a legal conclusion to the effect that, by reason of said shipments, the plaintiff became entitled to recover from the defendant the difference between

a reasonable rate and the rate prescribed by the statute, which right is alleged to have arisen on June 11, 1915. It will be observed that it is not alleged that the defendant performed the services under protest or under any sort of legal compulsion, except such as was imposed by the mandate of the Supreme Court of the United States. The decree referred to affirmed that of this court, granting an injunction to prevent the violation of the statute, and the opinion of the court concludes as follows (Northern P. R. Co. v. North Dakota, 216 U. S. 579–581, 54 L. ed. 624, 625, 30 Sup. Ct. Rep. 423): "We do not say that experiment may not establish a case in the future that would require a decision upon the question of constitutional law, but we can express no opinion upon it now. The great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and often has been remarked. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal." Following the entry of the above decree, the statutory rate was put into effect in conformity with the judgment.

The pertinent inquiry is: what is the basis for the legal conclusion that, by reason of the shipments, the plaintiff became entitled to recover from the defendant? It is elementary that a pleading which states legal conclusions merely does not state a cause of action; it must state facts from which the legal conclusion of liability follows. It is equally elementary that the facts stated must bring the plaintiff within the operation of some rule of substantive law, according to which a liability may be found to exist. Obviously, the relations between a carrier and a shipper are governed by the same basic principles that would control were they between individuals and related to matters not commonly subject to the regulatory power of the state. A departure from these principles in the case of carriers is only to be countenanced when their application threatens to embarrass, or does actually

interfere with, the exercise of the regulatory power of the government in the interest of justice and equality. Thus, the liberty to contract for the services of a carrier is generally interfered with to the extent necessary to prevent discrimination as between patrons. But we are aware of no rule or policy that requires a determination of this case upon any principle peculiar to the relations of public carriers. It being clear that the liability contended for is not a tort liability, before a recovery can be had it must be found that the defendant is indebted to the plaintiff under an obligation in the nature of contract. This brings us to a consideration of the circumstances alleged in the complaint, and those reasonably inferable from the facts there alleged, for the purpose of determining, first, whether there was any contract, express or implied in fact, for the payment of the difference sought to be recovered; and second, whether, in case no contract in fact is alleged, the complaint states facts from which it must be held that there was a legal obligation in the nature of a contract obligation which could be enforced in this action.

If it be assumed that the shipper acted at all times with full knowledge of the litigation and of its ultimate result, could it then be further assumed that he agreed in fact to pay for the services at a higher rate than that fixed by statute if, perchance, the decree should be modified or reversed at some subsequent time? We think not. A business man acting with full knowledge of the facts that the law in question had been attacked, and that those interested in stopping its action had been defeated after prolonged litigation carried to the highest court in the land, would, we believe, be more apt to assume that he was justified in dealing with the carrier on the hypothesis of the validity of the law, and in the absence of express protest, that the services of the carrier were rendered voluntarily. By "voluntarily" in this connection is meant in voluntary obedience to a supposed law. Sections 4339–4342 of the Revised Codes of 1905 (Comp. Laws 1913, §§ 4724–4727) require, among other things, that the carriers shall print and keep for public inspection schedules showing the rates which are in force at the given time, and they are required to file such schedules with the Railroad Commission. Manifestly, if shippers cannot rely upon the rates as so published and filed, the requirement of publication becomes a mere trap for the unwary. In our judgment, it is wholly improper,

in the absence of clear allegations of the rendition of services under a distinct protest, for a court to find that a shipper had, in effect, undertaken conditionally to pay according to a rate different from that published in compliance with the statute. The foregoing considerations lead inevitably to the conclusion that there was no contract in fact, either express or implied, to pay any rate other than the statutory rate, and that which, from the entry of the decree forward, must be presumed to have been filed and published in accordance with the provisions of § 4727, Comp. Laws 1913, Revised Codes of 1905, § 4342. This should dispose of the complaint, in so far as it may be thought to state a cause of action upon a contract either express or implied in fact.

But it is urged that the obligation to pay a reasonable rate arose as a matter of law, regardless of any express contract or any contract which might have been implied in fact. But this contention is without merit, for the reason that the elements essential to the implication of a contract in law are likewise lacking. Where there is no contract in fact, either implied or express, the law will not imply one except to support a recovery in favor of a plaintiff on the principle that the defendant has been unjustly enriched at his expense. While authorities in point are singularly lacking, the controlling principle is clearly the same as in case of mistake, and it is elementary that where the defendant is free from responsibility for plaintiff's mistake, or is responsible in no greater degree than the plaintiff, and where his position is such that the enforcement of restitution would subject him to loss, the defendant is entitled to retain whatever benefit he has derived from the mistake. Woodward, Quasi Contr. § 20. In such cases it may be unfortunate that the law does not attempt to distribute the loss; but, until some other basis for recovery than that of *unjust* enrichment is established, the party who has sustained the loss must bear it. To allow the plaintiff to recover in this action is to visit the consequences of the wrong imposed, without the fault of either, upon one who would be incapable of obtaining reparation from those who are probably the real beneficiaries of the wrong (the consumer of the commodity).

It frequently happens that the risk of certain contingencies affecting a transaction must, as a matter of law, be held to be borne by one party rather than the other. The law always leaves a loss where it

finds it, unless there is something to indicate that there was an intention to the contrary, or unless it distinctly fixes the burden otherwise. The situation of the plaintiff in the case at bar is very much the same as that described by Justice Learned in the case of Windbiel v. Carroll, 16 Hun, 101, wherein he stated (page 103): "Ignorance of the fact is one thing; ignorance of the means of proving the fact is another. When money voluntarily paid is recovered back [and this would be no less true as to services rendered], it is because there was a mistake as to some fact. But here the plaintiff was not mistaken as to the fact. Only at the time he did not know how to prove it. The subsequent discovery of evidence to prove the fact, known to the party when he makes the payment, cannot authorize a recovery back of the money. Such a principle would be most dangerous."

In the case at bar, the plaintiff, from the beginning of the proceedings involving the rate, professed knowledge of the facts upon which its invalidity was ultimately determined. But apparently it was not able to choose the appropriate means of proving these facts. It cannot be said to have supplied its services under a mistake as to the facts, and we can see no just reason for allowing it to shift the burden of the experiment to the shipper.

As a further test of the plaintiff's position, it is proper to inquire what the situation would be had the suit to determine the constitutionality of the rate statute been begun by the carrier as one to enjoin the execution of the law. Had relief been denied in such a proceeding, and later, after a reasonable period of experimentation, had the injunction been issued by the United States Supreme Court, preventing the state officers from enforcing the law, manifestly the "coercion," compelling the carrier to apply the statutory rate during the period of experimentation, would not have been of a judicial, but rather of a legislative, character. Its position would have been precisely that of any individual who yields obedience to an unconstitutional law and sustains a loss in so doing. It could not shift this loss to another who was justified in contracting with it, upon the supposition that its yielding was voluntary.

If obligation rests upon the defendant as a matter of law it is wholly because of the fact that the state of North Dakota, through its legislature, has denied to the plaintiff rights secured to it by the 14th

Amendment to the Federal Constitution. It must be borne in mind that the amendment is intended as a security against any action by the state which may result in the confiscation of property. It does not secure to the individual or the corporation any particular remedy for the enforcement of the right, but it presupposes that ordinary legal remedies will be adequate. If, however, supplementary action is deemed necessary in order to give greater security, Congress is given authority to make appropriate provision to that end. The Civil Rights cases have amply defined the powers of Congress in this connection. Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18. In legal theory, the remedies provided to prevent the violation of the rights secured are adequate. They are the usual remedies available in state and Federal courts, and they have never been extended so as to embrace cases of civil liability flowing incidentally from prohibited state action. The right to so extend them is even denied to Congress. Ibid. Nothing is clearer than that the amendments (13th, 14th and 15th) do not compromise a code of remedial law, according to which reparation may or must be made for every temporary denial of a right so secured, and that the amendments spend their force in permitting state action to be set aside when it involves a violation of the amendments, and when the right is sought to be vindicated in the ordinary channels. The remedial law, as between individual suitors, is left entirely untouched and remains subject to such imperfections as are inherent in a judicial system that is compelled to respect practical considerations in measuring individual rights. Theoretically, there would be no occasion for fastening a liability upon an individual defendant because a state had confiscated the plaintiff's property. The 14th Amendment contemplates that such action can and should be entirely prevented by a resort to appropriate legal remedies.

In so far as the complaint may be based upon a supposed right to collect a reasonable rate during the period of experimentation, it entirely ignores the effect of the decree of the United States Supreme Court. While the decree was based upon evidence covering a certain period of time, and in this sense looks backward, it nevertheless operated in the future as well. In reality, the plaintiff's whole case seems properly hinged upon the real meaning and effect of the first decree of the United States Supreme Court.

The matter that was settled in that suit was the right of the state to an injunction, and it was found that the state was entitled to the relief sought. Neither the state court nor the United States Supreme Court saw fit to impose any terms or conditions. Thus, so far as the party adverse to this defendant is concerned, the decreeing of the mandatory injunction was absolute, and its effect was to compel the plaintiff herein, among others, to apply the statutory rate until such time as it might obtain relief from the terms of the decree, at the peril of contempt of court. The decree was not interlocutory in any sense, but final; nor do we find that there is anything in the subsequent decree of the same court dissolving the injunction and nullifying the statutory rates which amounts to a qualification of the original decree, except as to the future. Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

While the Supreme Court of the United States, in the case of Missouri v. Chicago, B. & Q. R. Co. 241 U. S. 533, 60 L. ed. 1148, 36 Sup. Ct. Rep. 715, explained quite thoroughly the meaning of a decree such as the one involved here, it expressly refrained from deciding whether or not excess rates paid pending a decision as to the constitutionality of a rate-fixing statute were recoverable in the absence of a condition to that effect, imposed when the injunction was issued. So that, in dealing with this question, we must dispose of it without an authoritative interpretation of the original decree by the court which entered it. But in the light of well-considered precedent, we think the correct interpretation is that the decree was absolute and bound the plaintiff herein for the time being, and also that the damages flowing therefrom were within the rule of *damnum absque injuria*. In the case of Russel v. Farley, 105 U. S. 433, 26 L. ed. 1060, Mr. Justice Bradley stated the principle of nonliability in such a case as follows: "Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit as it may deem equitable and just . . . and if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of

the court itself is *damnum absque injuria,* for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon and arises from the discretion which the court has in such cases, to grant or not to grant the injunction applied for. It is a power inherent in the court as a court of equity, and has been exercised from time immemorial."

Where the enforcement of a statutory rate is enjoined, pending an ultimate determination of its validity, the proceedings from the beginning are predicated upon the right of the shippers to command the services at the rate prescribed, and the injunction is only issued to prevent irreparable loss in case the prescribed rate is ultimately held illegal. It follows from this that, when such a suit is determined adversely to the carrier, the shipper may recover whatever difference there may be between the statutory rate and the rate collected during the progress of the suit. But it is nevertheless appropriate for the court, in enjoining the operation of a statute, to require a bond as an added protection. The right of action upon the bond, however, is not exclusive. Bellamy v. St. Louis, I. M. & S. R. Co. 136 C. C. A. 442, 220 Fed. 876. Where, on the other hand, at the end of an unsuccessful suit, the carrier is restrained from violating the terms of a rate statute, it is manifest that any damages it may sustain through compliance with the injunction are not recoverable. Were the rule otherwise, the injunction, which is merely a continuing expression of the judgment of the court that the statutory rate must be applied, is a judgment deprived of its force as an adjudication of the rights of the parties. The error in the plaintiff's contention inheres in the failure to recognize the injunction as being the continuing expression of the court until such time as it may be modified or dissolved by a new judgment or decree. During such time, it is impossible that there could have been any other measure of the rights and obligations of the parties than that provided in the decree itself.

In so far as the practice of the United States Supreme Court in qualifying decrees in rate cases as being "without prejudice" sheds light

upon the question in hand, it seems to indicate that the transactions following the entry of such a decree shall be controlled by the prescribed rate where a decree enjoining it has been reversed, or by a rate otherwise lawfully fixed where a decree enjoining the prescribed rate has been affirmed. In the first cases in which such decrees were entered (Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 39 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034) decrees of the lower courts enjoining the prescribed rate were reversed, and the causes remanded with directions to dismiss the bills without prejudice. The entry of such decrees was thought appropriate for the reason that practical experience with the rates in actual operation might result in enabling the companies affected to show, as they had not previously been capable of demonstrating, the confiscatory character of the rates. In Louisville v. Cumberland Teleph. & Teleg. Co. 225 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. Rep. 741, it was simply stated that the whole question was so much in the air that the court did not feel authorized to let the injunction stand; consequently the decree was reversed "without prejudice." In the case of Des Moines Gas Co v. Des Moines, 238 U. S. 153, 59 L. ed. 1244, P.U.R.1915D, 577, 35 Sup. Ct. Rep. 811, while the court affirmed the decree of the lower court dismissing the bill of the utility company, it modified the order to the extent of providing that the dismissal should be "without prejudice." This modification was made in "view of the fact that ordinarily time alone can satisfactorily demonstrate . . . whether or not the rates established will prove so unremunerative as to be confiscatory in the sense in which that term has been defined in rate-making cases." In all of the foregoing cases, it will be noted that the qualification "without prejudice" was attached to a final order of dismissal. In the Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975, and in the North Dakota Rate Case, Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423, the final decrees seem to presuppose the continued pendency of the litigation. In three of the Missouri rate cases, where the injunction against the statutory rate was allowed to stand, the court provided that "the Railroad and Warehouse Commissioners, and the attorney

general of the state, may apply at any time to the court by bill or otherwise, as they may be advised, for a further order or decree whenever it shall appear that, by reason of a change in circumstances, the rates fixed by the state's acts are sufficient to yield to these companies reasonable compensation for the services rendered." A similar decree was entered in the North Dakota case, where the court allowed the statutory rates to continue in effect. Whether the order be one dismissing a bill "without prejudice" or whether it be in the nature of a modification of a final decree permitting subsequent proceedings in the same case, it seems to be interpreted as affecting the rights of parties in the same way. In Missouri v. Chicago, B. & Q. R. Co. 241 U. S. 533, 60 L. ed. 1148, 36 Sup. Ct. Rep. 715, in answering the contention that the reservation "without prejudice" left the whole subject open for renewed attack, the court, speaking through Chief Justice White, stated that the proposition contended for disregarded "the foundation upon which such a reservation came to be applied," and further criticized the contention on the ground that it treated "the reservation without prejudice as looking backward and overthrowing that which was concluded by the decree, instead of considering it in its true light; that is, as looking forward to the future and providing for conditions that might then arise."

The foregoing reference to the qualified decrees and to the reason which seems to have moved the court to enter them seem to indicate clearly that, while the decree was absolutely binding as an adjudication of the rights of the parties down to the time of its entry, it also had the effect of letting the future take care of itself. As to the future, therefore, adopting the construction of the decree most favorable to the plaintiff in this suit, it has simply rendered the service at a rate which both the legislature and the judiciary have determined to be applicable, and it has rendered the service without any other contract on the part of the shipper than would arise from the mere delivery of his goods for transportation according to the prescribed rates. The prescribed rates are either applicable or they are not applicable at the time the goods are delivered for shipment. The legislature and the Supreme Court of the United States have considered that they are applicable; and during the period embraced in this controversy it is inconceivable that either the shipper or the carrier should have been

allowed to question it, except in the manner allowed by the Supreme Court. When that court finally dissolved the injunction, it did not reverse its prior judgment, nor, it seems to us, did it profess to give to the carriers any rights with respect to past shipments that did not exist at the time they were made. These rights were governed by the former decree.

This case is readily distinguishable from that of C. L. Merrick Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 35 N. D. 331, 160 N. W. 140. In that case, the shipper was allowed to recover the difference between the rate prescribed and collected by the carrier and the statutory rate upon shipments made after the statute went into effect and before the carrier was restrained from violating the statute; whereas, here, the carrier seeks to recover for having done exactly that which it was compelled to do by the decree of the court as a condition to being permitted to secure a dissolution of the injunction. In a case in which a shipper has been permitted to recover the difference between a rate charged and some lower rate, the result has been merely to give to the shipper the benefit of a violated regulatory measure, with which the carrier was not, for the time being, complying. For all purposes of such a situation, the regulatory provision fixes the absolute criterion of reasonableness, and, it having been prescribed by competent authority, a departure therefrom is a distinct breach of the obligation of the carrier. In the case at bar, the effect of the first judgment of the United States Supreme Court was to fix a criterion of reasonableness based upon the statute which should control until the decree might subsequently be modified.

In addition to the reasons assigned, there are strong practical considerations which weigh against the maintenance of an action such as the one at bar. In the case of Van Patten v. Chicago, M. & St. P. R. Co. 81 Fed. 545, which was a suit to recover damages on the ground that the charges exacted by the carrier were unreasonable, it was held that it was competent and proper for the carrier to show in defense that, in obedience to the Interstate Commerce Act, it adopted, printed, and posted a schedule of rates, and that the charges complained of were in accordance with those contained in the schedule. Commissioner Prouty of the Interstate Commerce Commission later criticized this result (Cattle Raisers' Asso. v. Ft. Worth & D. C. R. Co. 7 Inters.

Com. Rep. 553) on the ground that, under the Interstate Commerce Act as it existed at that time, the effect of the decision was to entirely cut off the right to recover any portion of an excessive or extortionate charge. Conceding that the opinion referred to would, under the then existing state of the law, have had the effect pointed out by Commissioner Prouty, it may be open to the criticism of being extreme. But the practical considerations referred to by Judge Shiras afford persuasive reasons for holding the first decree of the United States Supreme Court to have been binding upon the parties until changed, and the damages incident to a compliance therewith to come within the rule of *damnum absque injuria.*

Judge Shiras, in the case referred to (page 551), said: "In the present case, however, the proposition of the plaintiff is that, after the carrier, in obedience to the requirements of the act, has adopted, printed, and posted schedule of rates [which was done in this case under § 4727, Comp. Laws 1913], and for the past five years has received and transported grain, charging the schedule rates therefor, and the shipper, without protest or demur, has delivered his grain for shipment, knowing the schedule rate, and has paid the charges in conformity with the established rate, he may now, and at any time within the period of the Statute of Limitations, bring an action at law for damages, not on the ground that more than the schedule rate was exacted, or that the schedule itself provided for unequal, and therefore unjust, rates, but solely upon the ground that the schedule rates, though uniform and properly proportioned, were greater than they should have been; and thus the question is presented whether the Interstate Commerce Act, considered as a whole, authorizes and provides for an action of this kind. If it can be maintained, it results in the holding that it was the intent of Congress to place upon the courts and juries of the country the duty and burden of establishing the rates of transportation for interstate commerce, and upon the common carrier the burden of transportation, with the right to ultimately retain as pay therefor the rate fixed by the verdict of a jury rendered perhaps five years after the rendition of the services. How is it possible for a jury to pass understandingly upon the question which inheres in the establishment of a properly proportioned and equalized schedule of transportation rates? . . . Now the theory of the plaintiff is that

the jury must inquire into and determine what the reasonable rate was for each shipment when made, and, by comparing the reasonable rate thus fixed by the jury with that actually charged, to determine whether the plaintiff is entitled to damages, and, if so, to ascertain the amount on each shipment made. It is self-apparent that, no matter how intelligent the jury might be, nor how conscientiously and carefully they might endeavor to deal with the problem thus submitted to them, it would be wholly impossible for them to reach a proper verdict under such circumstances.

"But, suppose the case involved but a single shipment, would the difficulty be remedied, if the theory of the plaintiff is to prevail? How could the jury fairly and understandingly deal even with the case of a single shipment, provided the duty is placed upon the jury of determining what a fair and reasonable charge for the particular service would be, unless some standard, already recognized and established, is given them for their guidance? It is impossible for the jury to deal with the questions of the total cost of building, equipping, and operating the line of a railway as a whole, the proportionate cost of the particular transportation in question, the total amount of business done over the entire system, the total burden properly to be laid upon the total business for transportation charges, and the proper proportionate share which the particular shipment should bear."

It is true that these practical considerations should not have weight as against a clear legal right; but since they inhere in, and are so thoroughly characteristic of, the particular matter in controversy, it is only reasonable to suppose that they were present in the mind of the court when the decree in question was entered, and that the court purposely granted the relief unconditioned as to the consequences of a possible future modification. Surely the United States Supreme Court did not intend that, during the entire period its first decree should be in operation, the parties whose business would be affected favorably or unfavorably by the experiment should be left to the uncertainties incident to numerous subsequent jury trials in order to determine the rate applicable to shipments of coal.

The order appealed from is affirmed.

CHRISTIANSON, J. (concurring specially). It was stated upon the argument by counsel for both parties that no objection was made because of any mere technical or amendable defect in the complaint. The defendant asserted and stood squarely upon the proposition that the complaint on its face showed clearly that no cause of action existed or could exist against it under the facts pleaded. And that this, and this alone, was the theory on which the demurrer was interposed and on which it had been argued in the court below, and on which it was asserted in this court.

The questions presented in this case are by no means easy to determine. That the constitutional rights of the plaintiff have been infringed upon and its property taken without due process of law cannot be denied. The rate statute became effective July 1, 1907. State ex rel. McCue v. Northern P. R. Co. 19 N. D. 46, 25 L.R.A.(N.S.) 1001, 120 N. W. 869. It was sustained by the decision of this court, filed April 16th, 1909. Ibid. This judgment was affirmed by the United States Supreme Court in a decision filed March 14, 1910. Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423. The case was subsequently reopened and the carrier submitted proof of the receipts and expenses chargeable against the lignite coal traffic for the year commencing July 1, 1910, and ending June 30, 1911. State ex rel. McCue v. Northern P. R. Co. 26 N. D. 438, 145 N. W. 135. Upon the proof thus submitted the United States Supreme Court held the rate confiscatory and violative of the 14th Amendment. Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

In a subsequent case, involving the right of a shipper to recover a sum paid in excess of the statutory rate, it was demonstrated, or rather it was conceded, that there was no substantial change in the cost of handling the intrastate lignite coal traffic on the line of the plaintiff railroad at any time between the 1st day of July, 1907, and the 1st day of July, 1911. C. L. Merrick Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 35 N. D. 331, 338, 160 N. W. 140. Hence, it is established by former adjudications that the rate established by the statute was, in fact, as to the plaintiff confiscatory at all times.

It is undisputed that the plaintiff consistently and vigorously assert-

ed that the statutory rate was confiscatory. It refused to put the rate into effect, and resisted the efforts of the state authorities to do so as long as possible. It put the rate into effect only when it had been commanded by the decree of this court and of the Supreme Court of the United States to do so. Such decree was entered in an action brought on behalf of the state of North Dakota by its attorney general, and such decree necessarily inured to the benefit of the shippers or consumers of lignite coal. A final decree in such action would doubtless be *res judicata* upon the railroad company, on the one hand, and those represented by the attorney general, *i. e.*, the state and its people, on the other hand. The only logical and reasonable deduction that can be drawn from the undisputed facts in this case are that the plaintiff did not put the statutory rate into operation, or voluntarily transport coal at the statutory rate, but did so involuntarily and solely because it could no longer refuse to do so without violating the decree of this court and thereby subjecting itself to penalty. It seems clear to me that under such circumstances it cannot be said that the actions of the carrier in accepting and transporting shipments of coal were voluntary, or the contract of carriage freely and voluntarily made. In order that there may be a valid contract, the parties must consent thereto, and the consent must be free and mutual. The plaintiff had no option. It could not refuse to accept shipments of coal, but "it must, if able to do so, accept and carry" the coal offered to it for transportation, and transport the same over its lines. Rev. Codes 1905, § 5673 (Comp. Laws 1913, § 6236). It was compelled, by the act of the legislature and the judicial decree, to accept and carry intrastate shipments of lignite coal at a confiscatory rate, and it was forbidden under penalty to charge a compensatory rate for performing such service. And if it refused to accept and transport shipments at the confiscatory statutory rate and exacted a compensatory one, the shipper might sue and recover the amount exacted in excess of the statutory rate. C. L. Merrick Co. v. Minneapolis St. P. & S. Ste. M. R. Co. supra. The inevitable result was that, by virtue of the legislative enactment and the judicial decree, the plaintiff's property was taken away and handed over to others, without compensation, in violation of constitutional guaranty. This is indisputably established by, or necessarily inferred from, the facts alleged in the complaint.

That a party may recover excessive payments exacted from him by a common carrier for the transportation of goods, under such circumstances as to indicate that the payment was involuntary, is well settled. And, ordinarily, excessive charges paid under protest to a common carrier having goods in its possession, in order to secure possession of the goods, may be recovered. Such payments are generally recognized as being made under duress, sometimes termed "duress of goods." See cases cited in note to Illinois Glass Co. v. Chicago Teleph. Co. 18 L.R.A.(N.S.) 124. There is another class of cases more nearly peculiar to public service corporations in which the courts allow recovery of excessive payments made, not under duress, but under public necessity resulting from the unequal relation of the parties and the dependence of the individual upon the services in carrying on his business. Ibid.

It would seem to follow as a necessary corollary to the rule stated that where a common carrier is compelled to carry goods at a confiscatory rate under such circumstances as clearly to indicate that the service was performed involuntarily, it ought to be entitled to recover from the person who received the benefit of such involuntary service the difference between the amount received and what would amount to a reasonable compensation for the service performed.

But is the right of the carrier (if any) to recover concluded by the decree putting the rate into effect? At the time the case of C. L. Merrick Co. v. Minneapolis St. P. & S. Ste. M. R. Co. supra, was submitted, the writer was inclined (as were, in fact, all the members of this court) to hold that the first decree, which was qualified as "without prejudice," had been superseded by the final decree. And that the rights of the parties in the C. L. Merrick Co. Case must be measured by the final decree in the rate case. But while the C. L. Merrick Co. Case was pending for decision, the Supreme Court of the United States handed down a decision in Missouri v. Chicago, B. & Q. R. Co. 241 U. S. 533, 60 L. ed. 1148, 36 Sup. Ct. Rep. 715. In that case the court held that a decree in a rate case, although qualified "as 'without prejudice,' not to leave open the controversy as to the period with which the decree dealt and which it concluded, but in order not to prejudice the rights of property in the future, if from future operations and changed conditions arising in such future it resulted that

there was confiscation." And that the reservation "without prejudice" was to be considered "as looking forward to the future and providing for the conditions which might then arise." If this is correct, and if such decree conclusively establishes the validity of the rate during the period prior to its rendition, regardless whether such rate is in fact confiscatory, then the rate so established ought to be deemed valid until the decree is set aside and the rate adjudged to be confiscatory. For, as to the period prior to the rendition of the decree, the parties realize that the validity of the rate is being questioned and its confiscatory character is being asserted by the carrier, while thereafter, and as to the period intervening between the date of the rendition of the decree sustaining the rate and the reopening of the case and the subsequent adjudication of invalidity, the shippers know that the rate has been established not only by legislative enactment, but by judicial decree. This may be illustrated by applying the rule to concrete cases. Thus, in the Merrick Case the carrier refused to accept and transport the coal at the statutory rate for the avowed reason that such rate was confiscatory, and exacted from the shipper a compensatory rate. At the time of the shipment, the shipper knew that the validity of the rate was being questioned, and it was in a position to, and probably did, include the rate paid in fixing the price of the coal. In the instant case, the defendant coal company knew that the statutory rate had been sustained by the decree of this court and of the United States Supreme Court against attack by the carrier on the ground that it was confiscatory; and it probably fixed the price of the coal in view of the prevailing freight rate.

It may also be observed that, although the plaintiff's complaint shows that its property has been taken away and handed over to others without just compensation, it does not show, nor can it reasonably be inferred, that plaintiff's loss was occasioned by any act of the defendant. On the contrary, it appears that such loss was occasioned by the actions of the legislature and of the courts. It would have been possible to have protected the rights of the plaintiff, as well as of the shippers, by proper provision in the first decree, but no such provision was made. And while it is apparent that plaintiff has sustained loss, and that someone has received a benefit corresponding to such loss, it does not necessarily follow that the defendant received such benefit. It is quite

as, and in fact more, likely that the freight rate was reflected in the price of the coal, and that the benefit of the decreased rate was received by the purchasers and consumers of the coal.

The order sustaining the demurrer should be affirmed.

ROBINSON, J. (dissenting). This is an appeal from an order sustaining a general demurrer to the complaint. It avers that at different times between the 30th day of July, 1910, and the 1st day of June, 1915, the plaintiff received and transported coal by the carload for the defendant between points in North Dakota; that the defendant by reason thereof became obligated to pay to the plaintiff the lawful and reasonable rates for such transportation; that the defendant has at all times refused to pay such reasonable rates, and has paid only the rates prescribed by chapter 51 of the Laws of 1907. It avers that the plaintiff refused to comply with chapter 51, and the attorney general brought a suit to compel such compliance. The state supreme court sustained the same. State ex rel. McCue v. Northern P. R. Co. 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869. The United States Supreme Court affirmed the decision without prejudice because of defective proof. 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423. That by reason of said decisions and by compulsion during part of the year 1910 and until June, 1915, the plaintiff put in force the rates prescribed by chapter 51. That in July, 1911, on due application the state supreme court made an order reopening its judgment and appointing a referee to take additional testimony, and on such testimony it was again adjudged that the plaintiff keep the rates prescribed by chapter 51. State ex rel. McCue v. Northern P. R. Co. 26 N. D. 438, 145 N. W. 135. That on June 11, 1915, the judgment of the state court was reversed and the action dismissed, with costs, $1,878.82. 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

The complaint avers that § 142 of the state Constitution is the sole authority for the regulation of rates, and it provides that the rate fixed by the legislative assembly or Board of Railroad Commissioners shall remain in force pending the decision of the courts, and that during the time of said shipments until July, 1915, by reason of the wrongful mandates of the courts, the plaintiff was compelled to accept and trans-

port coal at the rates fixed by chapter 51, which rates were not reasonable. And that at reasonable rates for the services rendered for the defendant, at its request there is due to the plaintiff an additional sum in excess of $26,000.

Disregarding some errors and omissions which counsel agree to waive, the complaint fairly shows that the plaintiff performed services for the defendant at its request in the transportation of coal, and that by compulsion the plaintiff accepted for such services $26,000, less than the reasonable value of the same, and the defendant has refused to pay such reasonable amount. Now it is manifest that if one party may compel another to perform services at less than the reasonable value of the same, he may compel performance without any value at all. If a party may take the services or the property of another without just compensation, he may take it without any compensation, and that is simple robbery. Of course, if the plaintiff voluntarily performed the services for the compensation received—as contended by the defendant—then it cannot recover an additional sum. The defense contends that at the date of the first decree of the United States Supreme Court, the statutory rate was lawful because it was not adjudged unlawful on the testimony submitted, but in that there is a fallacy. If chapter 51 fixed the rate at half the reasonable value or less than the reasonable value, the rate never became lawful by reason of a failure to make proof or the necessity of an experiment to demonstrate the fact. It is quite possible that on a trial the evidence may show that the services were voluntary and made without protest at the compensation fixed by statute, but the averments of the complaint are otherwise.

Here is a fine specimen of specious reasoning. It must be conceded that at the date of the first decision of the United States Supreme Court the statutory rate was lawful. Therefore the decree declaring the same lawful was not erroneous, and therefore said decree only compelled the plaintiff to obey a valid law. Can it be said that a decree of a court compelling the defendant to comply with the valid law is coercive?

The question is, Was the law valid? If it was a valid law at the time of the first decree, it was valid at the time of the second decree and it has always been valid. If a statute was void at the time of the

second decree, it was equally void at the time of the first decree though the evidence failed to show it. The first decree was expressly based on the failure of proof regarding the reasonable value of the services. Hence, on the question of the constitutionality of the law, the United States Supreme Court expressly declined to express an opinion. When the case was reopened and further testimony submitted, the court held that the maximum rates fixed by chapter 51 are unreasonable, requiring the carrier to transport the commodity at a loss, and that "the state exceeded its authority in enacting the statute, which amounts to an attempt to take the property of the carrier without due process of law in violation of the 14th Amendment." Northern P. R. Co. v. North Dakota, 236 U. S. 586, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

The complaint shows, by force of this statute and the court decisions, the plaintiff has been compelled to carry loads of coal for defendant at a loss or without just compensation, and that such loss amounts to over $26,000. Hence, the complaint does state a good cause of action.

Order sustaining demurrer should be reversed.

STATE OF NORTH DAKOTA, Respondent, v. HOBART ROSENCRANZ, Appellant.

(168 N. W. 650.)

Assault and battery — with dangerous weapon — intent to do bodily harm — prosecution for — conviction of defendant — petit jury — special panel — regularly summoned by judge — regular panel having been discharged — proceedings proper.

1. In a criminal prosecution in which the defendant was found guilty of the crime of assault and battery with a dangerous weapon with intent to do bodily harm, it is *held* that no error was committed in bringing the action to trial before a special panel of petit jurors regularly summoned by the judge of the district court, in accordance with § 815, Compiled Laws of 1913, the regular panel having been discharged at the conclusion of the regular session of the term.

Condition and appearance of place of assault — day after assault — competent to show.

2. Evidence as to the condition of a wheat field, near the highway upon which an assault was committed, on the day after the assault is *held* properly admissible, it appearing that the defendant and his accomplices emerged from the wheat field prior to making the assault.

Crime — commission of — persons concerned in — aiding and abetting — accomplices — principals.

3. Under § 9218, Compiled Laws of 1913, which provides that "all persons concerned in the commission of a crime, whether it is a felony or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed," a verdict finding the defendant guilty of an assault with a dangerous weapon is *held* to be proper where it appears that he aided and abetted his accomplices who used the dangerous weapon.

Opinion filed June 21, 1918.

Appeal from Ramsey County District Court, *C. W. Buttz,* J.

Affirmed.

D. J. O'Connell, for appellant.

It has been held, under statutory provisions similar to those of this state, that when the jurors selected from the regular panel are absent considering their verdict in another case, the court may summon or order a second jury on a special venire; but otherwise the right to summon a second jury is denied.

A defendant is entitled to a trial by jurors of the regular panel. Bates v. State, 19 Tex. 122; Dean v. State, 100 Ala. 102, 14 So. 762.

A person charged with the commission of a crime cannot be held where the only evidence offered shows that he was merely in the crowd, and that someone else without his knowledge or participation used a weapon, and a crime was committed. Comp. Laws 1913, § 9218; Bibby v. State (Tex. Crim. Rep.) 65 S. W. 193; Brown v. State, 28 Ga. 199.

Where the defendant had no knowledge of the presence of a dangerous weapon, and took no part in the act and did nothing to produce the result that followed, unless the act was done pursuant to a conspiracy previously formed, he should not be held responsible. Wool-

weaver v. State, 50 Ohio St. 277, 40 Am. St. Rep. 667, 34 N. E. 352; R. v. Caton, 12 Cox, C. C. 624; State v. May, 142 Mo. 135, 43 S. W. 637.

The established rule is that where for instance two men combine to fight a third with fists, and death accidentally results from a blow inflicted by one, the other also is responsible for the homicide. But, if one resort to a deadly weapon without the knowledge or consent of the other, he only is liable. State v. Howard, 112 N. C. 859, 17 S. E. 166; Cecil v. State, 44 Tex. Crim. Rep. 450, 72 S. W. 197; Williams v. State, 81 Ala. 1, 60 Am. Rep. 133, 1 So. 179; State v. Darling, 216 Mo. 450, 115 S. W. 1002.

The proof must show beyond a reasonable doubt that defendant had knowledge of the use of the weapon by his codefendant, and by some act of defendant he aided and abetted in the commission of the crime. Bibby v. State, supra.

J. H. Ulsrud, State's Attorney, and *F. T. Cuthbert,* for respondent.

It is not error to bring to trial a criminal action before a special panel of jurors regularly summoned by the judge of the district court, the regular panel having finished its work and having been discharged. Objection to such procedure is purely technical and without merit. Nothing is disclosed to show that defendant did not have a fair trial. Comp. Laws 1913, § 11,013; State v. Travy, 34 N. D. 498.

Clearly the district court has the power to so order. Comp. Laws 1913, §§ 815, 829; Greene v. State, 53 Tex. Crim. Rep. 490, 22 L.R.A.(N.S.) 706, 110 S. W. 920; Queenan v. Oila, 11 Okla. 261, 61 L.R.A. 324; Johnson v. State, 59 N. J. L. 535, 38 L.R.A. 373; Pitsnogle v. Western Maryland R. Co. 119 Md. 673, 46 L.R.A.(N.S.) 324, 87 Atl. 917.

The provisions of the statute relating to the summoning of jurors is directory, and not mandatory, and prejudice must be shown for any irregularity. 16 R. C. L. §§ 48, 49; Levy v. Wilson (Cal.) 10 Pac. 272; State v. Mayo, 42 Wash. 540, 7 Ann. Cas. 881; Elias v. Territory, 1 Ariz. 1153; Dean v. State, 100 Ala. 102.

"Where several persons are acting together with a common intent and design to commit a crime, and each performs some part of the crime, they are all guilty as principals, although all are not actually present when the offense is finally consummated. They are present

in the eye of the law at the place of the crime, where each and all in their own station co-operate to a common end." Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 321; 12 Cyc. 183; Com. v. Knapp, 9 Pick. 496, 20 Am. Dec. 491; Re Jaques, 5 N. Y. City Hall Rec. 77.

BIRDZELL, J. This is an appeal from a judgment of the district court of Ramsey county, entered upon the verdict of a jury which found the defendant guilty "of the crime of assault and battery with a dangerous weapon with intent to do bodily harm without a justifiable or excusable reason."

It appears that the assault of which the defendant was convicted was committed on one Halvor Ekre, under the following circumstances: Ekre lived at Denbigh, North Dakota, and upon the evening of the date of the alleged assault, July 11th, was *en route* to his home in an automobile with his family. As they rode along the highway leading toward their home, their car struck some obstacle and about the same time some shots were heard. Ekre promptly stopped the car, and as he did so the defendant and his son Martin were seen coming from the wheat field on the right-hand side of the road, and another son Rance, from the wheat field on the left side. It appears that the defendant approached the car, seized Ekre about the head, struck him several blows with his fist, and pulled him out of the car. It further appears that Martin Rosencranz struck Ekre over the head with a club or ball bat, rendering him unconscious.

The first assignment of error argued by the appellant is that the court erred in denying the defendant's challenge to the panel of jurors. It appears that the regular jury panel which had been called for the term had been discharged by the court and an entire new panel ordered. It seems that prior to the convening of the regular November term of the court a petit jury had been regularly called, and that the court remained in session for a period of about three weeks, trying cases with the aid of the jury so impaneled. Sufficient reasons existed for the nonattendance of six of the panel, and six more were excused from service by the court. After the somewhat protracted session of the November term, it became necessary to adjourn the term to a date in January. Upon adjournment, the trial court discharged the jury and issued an order for a new panel. Section 815 of the

Compiled Laws of 1913 provides that "no jury shall be summoned except by order of the judge of the district court, who shall issue an order to the clerk of such court requiring a jury to be summoned, and in such order shall specify the number of petit jurors to be summoned and the time and place where they shall appear. Such order may be issued at any time within thirty days prior to the first day of the term of the district court at which the jury is to attend *or at any time during the term.*" It is plain that sufficient reasons existed in this case to warrant the court in discharging the panel called for the regular session of court, and it is not even contended that there was any irregularity in the calling of the panel for the adjourned session of the term. See Green v. State, 53 Tex. Crim. Rep. 490, 22 L.R.A.(N.S.) 706, 110 S. W. 920; State v. Mayo, 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881. It is not even argued that the rights of the defendant were in any way prejudiced by the trial before the jury which rendered the verdict. Nor does it appear that his substantial rights have been invaded. If it be assumed that the defendant should have been tried before the regular jury impaneled for the regular term, it would not follow as of course that the conviction should be reversed. Comp. Laws 1913, § 11,013. Prejudice could not be presumed from the mere fact that the trial was before a jury not drawn from the original panel.

It is next argued that error was committed in permitting a witness for the state to answer the following question: "Did you find any evidence there in the wheat field of where men had been hiding,—any marks of any kind?" This question was asked of a witness who saw the wheat field the day following the alleged assault. The question asked though somewhat leading, was not improper. It was clearly permissible to place before the jury the condition of the wheat field in so far as it might bear evidence of circumstances connected with the alleged assault. It is true that there would be ample opportunity to create a suspicious condition during the time intervening between the alleged assault and the time when the witness observed the wheat field, but these considerations bear more properly upon the weight to be given to the evidence by the jury and afford proper subjects of argument rather than preclude its admissibility.

It is next urged that the trial court erred in instructing the jury

upon the question of criminal responsibility of one who aids another in an assault. It is suggested that the evidence does not show that the defendant had a weapon of any kind. Section 9218 of the Compiled Laws of 1913 provides that "all persons concerned in the commission of a crime, whether it is a felony or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." There was ample evidence before the jury to the effect that the defendant aided and abetted his son who used the dangerous weapon, and there is no question but what the above quoted provision of the statute is applicable to the defendant's offense and makes him guilty as a principal.

The judgment is affirmed.

CHRISTIANSON, J., being disqualified, did not participate, and the Honorable FRANK FISK, Judge of the Eleventh Judicial District, sat in his place.

VIRDEN C. BUNTING, Respondent, v. CHARLES CREGLOW, George A. Gibbs, Harry Kelley, and the Upper Michigan Land Company, a Corporation, Appellants.

(168 N. W. 727.)

Contract — action to cancel and rescind — trial de novo — real estate — reconveyance — material facts — misrepresentation as to — reliance on.

1. In a trial *de novo* of an action to cancel and rescind a contract and to obtain a reconveyance of property conveyed thereunder, the evidence is ex-

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NOTE.—It is the general rule, subject to many exceptions, that a false representation, although fraudulently made, is not actionable unless relied and acted upon by another, to his injury. The representation must be in regard to a material fact, must be false, and must be acted upon by the other party in ignorance of its falsity, and with a reasonable belief that it is true, as will be seen by an examination of the cases collated in 30 L.R.A.(N.S.) 55, as to whether fraudulent representation by vendor of extent or proportion of land of particular kind included within the tract sold is actionable where purchaser inspects the land.

amined and *held* to establish that there were misrepresentations of material facts upon which the plaintiff relied in entering into the contract.

Contract to convey real estate — fraudulent representations — quality of land — agreements — warranties — as part of consideration — that purchaser has inspected the land — is not relying upon representations of seller — waiver of claim on account of — rescission on ground of fraud — not precluded from.

2. Where a contract induced by fraudulent representations concerning the quality of land embraced therein contains a provision to the effect that the purchaser agrees and warrants, as a part of the consideration, that he has inspected the premises, and is not relying upon the representations made by the vendor, and waives any claim on that account, the provision does not preclude a rescission of the contract on the ground of fraud.

Contract for sale of land — rescission — action seeking — on ground of fraud — necessary defendants joined — all answering — except one nonresident — service on all — land conveyed by plaintiff — as consideration for contract involved — in state — jurisdiction to cancel contract — court has.

3. In an action brought to rescind a contract on the ground of fraud, all the necessary parties being joined as defendants, all appearing and answering except one who is a nonresident and who was served by publication, the land which plaintiff conveyed as the consideration for the conveyance sought to be set aside being within the state, it is *held* that the court has jurisdiction to rescind the contract and cancel the conveyance made by the plaintiff.

Rescission of contract — action for — all benefits surrendered — by plaintiff — defendants — all proper parties made — original status between — not restored — answering defendant — cannot complain.

4. Where, in an action to rescind, the plaintiff has surrendered all the benefits which he received under the contract and has joined all necessary parties as defendants, an answering defendant cannot complain that the original status, as between the defendants themselves, was not completely restored.

Opinion filed June 21, 1918.

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

Affirmed.

Statement of facts by BIRDZELL, J.

This is an appeal from a judgment entered in the district court of Bowman county, rescinding a contract and canceling a certain conveyance made in pursuance thereof. The action arose on the following

facts: The plaintiff and respondent, Bunting, was the owner of certain lands in Bowman county, North Dakota, and the defendants and appellants have owned or were interested in disposing of certain lands in the upper peninsula of Michigan. Some time prior to March 1, 1915, one Anderson interested the plaintiff in a proposal to exchange his lands in North Dakota for the lands in upper Michigan. By reason of a previous transaction, Anderson knew of Bunting's interest in and slight acquaintance with lands in the upper Michigan peninsula, and, according to Bunting's testimony, he knew also that Bunting would not consider the acquisition of any lands there unless they were good clay lands. It appears further from Bunting's testimony that, during all of the preliminary conversations he had with Anderson concerning the proposed deal, he was assured by Anderson that the lands he was proposing to exchange for the North Dakota lands were of clay soil of good quality and had some timber growing on them. Before making the deal, the plaintiff went to St. Paul, where he met defendant Creglow, with whom he had been acquainted for some time, and Creglow introduced him to defendant Kelley, who accompanied the plaintiff to upper Michigan upon an inspection trip. That was in the winter time, while the lands were covered with snow. The plaintiff and Kelley got off the train at Rudyard, Michigan, a vicinity in which there were a number of improved farms. When the plaintiff was ready to start on his tour of inspection, Kelley stated that he was sick and unable to accompany him, but suggested that the plaintiff go out with one Goltz; Kelley informing the plaintiff, according to plaintiff's testimony, that he could rely upon any statements made by Goltz, as he was a good, straight farmer. According to the plaintiff, the inspection trip was made largely with a view to ascertaining the lay of the land; but this is disputed by the defendants, who state that the inspection was to serve every purpose and to go to satisfy the plaintiff as to the character of the lands for which he was bargaining. However this may be, it appears that the plaintiff was at a disadvantage so far as soil inspection was concerned, for the land was covered with snow and the facilities for making a thorough inspection were lacking. Travel being somewhat difficult, and also owing to excuses made by Goltz, the plaintiff's inspection trip only covered a small portion of the entire tract embraced in the deal and was of short duration. The

plaintiff did not use a spade and none seems to have been provided for the purpose of inspecting the character of the soil. He claims to have relied upon the statements of the defendants in this matter.

As Kelley and the plaintiff were returning to St. Paul, the latter sought to interest him in a proposal to resell the land for him at a profit. After Bunting's return he was approached by Anderson relative to the closing of the deal, and the deal was closed with the understanding that Anderson was to get his commission from the defendants. It appears that the parties Kelley, Briggs, and Creglow, held a contract from the Upper Michigan Land Company for the lands in question, and after this deal was closed by a contract executed by Creglow and Bunting, at Creglow's suggestion, Bunting entered into another contract with the Upper Michigan Land Company in consummation of the same deal. This contract was performed by the plaintiff in deeding his North Dakota lands to defendant Gibbs. Kelley, Gibbs, and Creglow released the obligation of the Upper Michigan Land Company to convey the lands to them, with the understanding that such contracts as they held could be satisfied by the conveyance direct to Bunting, they being likewise released from further obligation to the Upper Michigan Land Company. Bunting executed eight promissory notes of $986 each, payable to the Upper Michigan Land Company, and paid $1,912 in cash. Gibbs paid Bunting $688 in cash.

About three or four months after the contract was performed, as above indicated, Bunting returned to Michigan, made a careful inspection of the lands, and found that the soil was not clay soil, but that the entire tract was a barren waste of sand. Upon his return to St. Paul, he took the matter up with defendant Creglow, who, according to his (plaintiff's) testimony, said: "I am confident that the boys have given you a dirty deal and I will do my best to see that it is righted." Much of the testimony referred to above as that of plaintiff Bunting is disputed by the defendants, but, in so far as the case turns upon disputed facts, our conclusions will be set forth in the opinion.

Feetham & Feetham and *Christopherson & Christopherson,* for appellants.

The burden of proving that the agent had authority to make the

representations claimed was upon plaintiff. Corey v. Hunter, 10 N. D. 5; Fargo v. Cravens, 9 S. D. 640, 70 N. W. 1053.

The burden of proof of agency rests upon him who affirms it, and the proof must be clear and specific. 1 Am. & Eng. Enc. Law, 968.

Agency may be created and authority may be conferred by a precedent authorization or subsequent ratification. Comp. Laws 1913, § 6328.

"An oral authorization is sufficient for any purpose except that an authority to enter in a contract required by law to be in writing can only be given by an instrument in writing." Comp. Laws 1918, § 6330.

In this state all contracts for the sale of lands must be in writing. The agent had no written contract to act for defendants, and therefore he could not be defendants' agent to sell, clothed with proper authority. He had no ostensible or implied authority to make representations concerning the land, and there has been no ratification of the acts of the so-called agent by defendants. Union Trust Co. v. Phillips, 63 N. W. 903.

"A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified." Comp. Laws 1913, § 6331.

An agency cannot be established by any act or statement of the pretended agent. Gordon v. Trust Co. 6 N. D. 454.

"Not only in sales of lands or of personal property, but also in other business transactions, the law allows a party some latitude in making commendatory statements to induce another to deal with him, and holds that the other cannot complain if he is imprudent enough to act upon them, instead of investigating for himself and exercising his own judgment. Such expressions cannot be made the basis of a charge of fraud. . . . When nothing is said or done to prevent the other party from making an examination or investigation for himself."

"Simplex commendatio non obligat." 14 Am. & Eng. Enc. Law, 118.

Whether plaintiff made a good or a bad contract is in no way controlling in this case. 24 Am. & Eng. Enc. Law, 611.

"Where there has been an independent examination of the land, on the part of the purchaser, there is no ground for an action based upon

deceit." Crocker v. Manley, 164 Ill. 282, 56 Am. Rep. 196; 14 Am. & Eng. Enc. Law, 111, 612.

"Granting relief against an executed contract has been said to be an exertion of the most extraordinary power of a court of equity." Atlantic Delaine Co. v. James, 94 U. S. 214; Morse Arms Mfg. Co. v. Winchester Repeating Arms Co. 33 Fed. 184.

"It is no part of the duty of a court of equity to relieve a party from a foolish bargain after it has been fully consummated." Rockafellow v. Baker, 41 Pa. 319, 80 Am. Dec. 624.

Plaintiff expressly agrees in his contract that he has purchased the land, not relying upon any statements or representations made to him, but upon his own investigation and examination of the land, and he is estopped to deny these statements in his written contract. 11 Am. & Eng. Enc. Law, 387.

"A bill to cancel a deed conveying land is not a suit affecting title to land within the meaning of statutes requiring such suits to be instituted in the county wherein the land lies." 18 Enc. Pl. & Pr. 790; Bullit v. E. Kentucky Land Co. 99 Ky. 324; Kendrick v. Wheatley, 3 Dana, 34; Parish v. Oldham, 3 J. J. Marsh. 344.

"A court can acquire no jurisdiction by publication, to render a personal judgment against a nonresident defendant who makes no appearance in the action." 17 Enc. Pl. & Pr. 39, 116; Pennoyer v. Neff, 95 U. S. 714.

This nonresident defendant was a necessary party defendant. The rule that the absence of parties affected by the relief sought is fatal does not yield to the statute regulating demurrers to an ordinary complaint. Osterhoudt v. Board of Supervisors, 98 N. Y. 239; McDougall v. New Richmond Co. 125 Wis. 121; O'Connor v. Irvine, 74 Cal. 435; 15 Enc. Pl. & Pr. 688.

This rule is so strict that the appellate court will reverse on this ground, though the point was not raised on the trial. Hoe v. Wilson, 9 Wall. 501.

Scow & Young, for respondent.

This transaction on the part of defendants was conducted by an agent. The acts and statements of this agent amounted to a fraud upon the plaintiff. The defendants, as principals, are bound by the

fraud of their agent. 1 L.R.A. 144, note; 31 Cyc. 1583; 2 L.R.A. 209, note; 10 R. C. L. 325.

"The general rule is that one, whether a corporation or an individual, who seeks to enforce and derive a benefit from a contract undertaken to be made in its or his behalf by another, must adopt not only the entire contract, but the means by which the contract was procured." Union Trust Co. v. Philips (S. D.) 63 N. W. 903; Stackpole v. Hancock, — Fla. —, 45 L.R.A. 814.

When a vendor refers a vendee to a third person for information, he is bound by the statements of such third person. 12 R. C. L. 403; Barron v. Meyers (Mich.) 109 N. W. 862.

One who is induced by fraudulent representations of an agent acting within the scope of his authority to enter into a contract for the purchase of land, with such agent's principal, may rescind on discovering the fraud. Ballard v. Lyon (Minn.) 131 N. W. 320; McKinnon v. Vollmer (Wis.) 6 L.R.A. 121; Gunher v. Ullrich (Wis.) 52 N. W. 88; Craig v. Ward, 1 Abb. App. Dec. 454, 2 Keyes, 287; 2 Transc. App. 281; 3 Abb. Pr. N. S. 235, affirming 36 Barb. 377; 20 Cyc. 85, note; 31 Cyc. 1289.

This is a clear case of ratification by adopting the contract made by the agent and attempting to reap all its benefits. Clark v. Ralls, Iowa, 24 N. W.

The liability of defendants is just the same as it would be had they authorized specifically every act and statement of their agent. Law v. Grant, 75 Wis. 548; McKinnon v. Vollmar, 75 Wis. 83, 6 L.R.A. 121, 17 Am. St. Rep. 178, 43 N. W. 800; Gunther v. Ullrich, 82 Wis. 222, 33 Am. St. Rep. 32, 52 N. W. 88; Fintel v. Cook, 88 Wis. 487, 60 N. W. 788; Matteson v. Rice (Wis.) 92 N. W. 1109.

The plaintiff did not get the land he was induced to believe he was obtaining. Natural justice, in such case, demands that defendants should restore to him the property taken from him, and equity will compel restoration. Sweezey v. Collins, 36 Iowa, 589; Wilcox v. University, 32 Iowa, 367; Seeberger v. Hobert, 55 Iowa, 756, 8 N. W. 482; Mohler v. Garder, 73 Iowa, 582, 53 N. W. 647; Hood v. Smith (Iowa) 44 N. W. 903.

Representations may be innocently made; yet if made as positive statements of fact, and not as mere opinions, and relied upon by the

other party, to his detriment and to the extent that he acts upon them, believing them to be true, when in fact they are false, equity will afford relief. Mohler v. Garder (Iowa) 35 N. W. 647; Groppengiesser v. Lake, 36 Pac. 1036; Smith v. Bricker, 53 N. W. 250; Brett v. Van Auken, 68 N. W. 891.

Where a statement of value is made as a statement of fact, and accepted as such, it is actionable. Hetland v. Bilstad, 118 N. W. 422; 35 L.R.A. 430, note; 12 R. C. L. 270–280.

It is the duty of a vendor to disclose latent defects, of which he has knowledge. His concealment and failure to do so amount to a fraud. Liland v. Tweto, 19 N. D. 568.

One who actively conceals the condition of a mine, thwarts investigation, and misrepresents the significance of apparent conditions, cannot take advantage of the rule that the law will not aid a purchaser who fails to avail himself of the ordinary means of information. Tooker v. Alston, 16 L.R.A.(N.S.) 818, 159 Fed. 599; Hays v. Meyers, 17 L.R.A.(N.S.) 284, 32 Ky. L. Rep. 832; Gruber v. Baker (Nev.) 9 L.R.A. 302; Dirks Trust & Title Co. v. Koch (S. D.) 143 N. W. 952; Weikel v. Stevens, 142 Ky. 513, 34 L.R.A.(N.S.) 1035; Friday v. Parkhurst, 13 Wash. 439, 43 Pac. 362.

A purchaser is not bound to make an investigation as to the truth or falsity of the representations, but can rely absolutely upon them. Fargo Gas & Coke Co. v. Fargo Gas & E. Co. 4 N. D. 219; Barron v. Meyers (Mich.) 109 N. W. 882; Mannel v. Schafer (Wis.) 115 N. W. 801; Knapp v. Schemmel & Armstrong, 124 N. W. 309.

Acts done in affirmance of the contract can amount to a waiver of the fraud only where they are done with full knowledge of the fraud and of all material facts, and with the intention clearly manifested, of abiding by the contract and waiving all right to recover for the deception. Bisch v. Von Lillienthal, 34 Wis. 350; Rhoda v. Annis, 75 Me. 17, 46 Am. Rep. 354; Oswald v. McGehee, 28 Miss. 340; Jackson v. Armstrong, 50 Mich. 65; Gauldin v. Shehee, 37 L.R.A. 611, note; Brett v. Van Auken (Iowa) 69 N. W. 891; Circle v. Potter (Kan.) 111 Pac. 479; 20 Cyc. 93.

"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." In this case defendants possessed

knowledge of facts, not open to view, as to the true condition of the land. The plaintiff did not know of these things and they were concealed and withheld from him. The parties did not occupy the same position in this respect and therefore plaintiff is not estopped. 16 Cyc. 726, 741.

Suits for specific performance or for rescission of contracts for the sale of land are transitory, and not local. The land here sought is in North Dakota; the court has jurisdiction. Kendrick v. Wheatley, 3 Dana, 34; Bullitt v. Eastern Kentucky Land Co. 99 Ky. 324, 36 S. W. 16; Todd v. Lanchester, 104 Ky. 427, 47 S. E. 336.

BIRDZELL, J. (after stating the facts). The trial court found that Anderson was the agent of the defendants Creglow, Gibbs, and Kelley, and that they were consequently bound by the representations that he made. The appellants' counsel challenges this finding and contends that, under the facts disclosed by the record and the testimony given, the plaintiff has not sustained the burden of proving the agency to exist. In answer to this contention it need only be stated that the record clearly establishes that Anderson negotiated the deal, and it makes no difference whether he was originally authorized by the defendants to sell the land or not. Having taken the benefits of the contract negotiated by Anderson, they must be held to have assumed its burdens and to be bound by whatever representations were made inducing the plaintiff to contract. This proposition is so elementary that the citation of authorities is unnecessary. However, it is contended, in opposition to the principle stated, that, under §§ 6330 and 6331 of the Compiled Laws of 1913, an oral ratification is not sufficient. Section 6330 provides that an oral authorization (of an agent) is sufficient for any purpose, except that an authority to enter into a contract, required by law to be in writing, can only be given by an instrument in writing. Section 6331 provides that a ratification can be made only in the manner that would be necessary to confer original authority for the "act ratified or, when an oral authorization would suffice by accepting or retaining the benefit of the act with notice thereof." Counsel argues that these statutes are merely declaratory of the pre-existing common law. In this respect counsel are clearly in error, for it has long been well established that the provisions of the Statute

of Frauds, requiring contracts for the sale of an interest in lands to be in writing, have no effect whatsoever upon an agency contract, and that any authorization of an agent which was sufficient under the common law would be sufficient to authorize him to execute a contract binding his principal for the sale of the lands. This rule is distinctly changed by § 6330, above referred to. But we need not determine in this case whether the ratification is sufficient to hold the defendants bound to their contract. This is not an action to enforce an executory contract for the sale of the lands. The contract is executed and the action is one to escape its consequences on the ground that it was induced by fraudulent representations. The Statute of Frauds has no application to an executed contract. It is only when an attempt is made to hold one bound to a contract within its terms that its provisions are applicable. Brown, Stat. Fr. §§ 116, 117. If counsels' position were correct, it is clear that the Statute of Frauds would become a most convenient instrument for the perpetration of fraud, instead of a means for its prevention.

It is next argued that none of the defendants made any statements or representations which would justify a rescission of the contract. This argument depends, in part at least, upon the effect of the ratification of Anderson's agency. The effect of that ratification being as above indicated, this argument does not go far enough, because the defendants are bound by Anderson's representations regardless of any representations that might or might not have been made by them personally.

It is next urged that, even assuming that the representations were made as claimed, the evidence of reliance by the plaintiff upon them was not sufficiently convincing to justify a rescission of the completed transaction, and also that the plaintiff is estopped by his own representations of nonreliance in the written contract. There are some circumstances tending to indicate that the plaintiff relied upon his own inspection of the land to determine its quality, such as the fact that he had asked Creglow to warrant that the lands were clay, and Creglow had refused, and that he had gone to upper Michigan and investigated the lands; but these are explained. He says that the investigation was for the purpose of determining the lay of the land, and not its quality; and the fact that the inspection was made during the winter season when

the land was covered with snow, together with the extreme care which was apparently exercised to prevent the plaintiff from obtaining a correct impression as to the condition of the soil, tends to destroy the effect of the inspection by the plaintiff, and to indicate that he was in fact relying upon the subtle representations of Anderson and his coagents in the deal. We are impressed that the findings of the trial court upon this question are substantiated by the circumstances disclosed by the record, and by the weight of the testimony.

In the contract which plaintiff signed with the Upper Michigan Land Company, the following clause appears: "The said party of the second part hereby agrees and warrants, as a part of the consideration of the sale to him of said land, that he has inspected said premises, on his own behalf, and that in making this purchase and in executing this contract he is not relying upon any representations made by the party of the first part or by any agent or servant thereof, and explicitly waives any claim on that account." The presence of the foregoing clause in the contract tends rather to cast suspicion upon the transaction than to stamp it with the seal of fairness and good faith. It does not strengthen the legal position of the vendors of the land to so express the doctrine of *caveat emptor* as to make it appear that the purchaser warrants as a part of the consideration that he has inspected the premises. In so far as the above provision may amount to a release defeating the legal consequences of actual fraud before its presence has become known to the party signing it, it may properly be regarded as of no effect in law. Furthermore, it is not apparent how the answering defendants can derive any benefits from this clause in the contract with the Upper Michigan Land Company. It is not claimed that there was any such clause in the first contract that was executed.

It is next claimed that the Upper Michigan Land Company is an indispensable party to a proceeding in which it might be sought to rescind the contract under which the conveyance of plaintiff's land was made, and that the jurisdiction over the answering defendants Creglow, Kelley, and Gibbs, is not sufficient to warrant the exercise of the equitable powers of the court to secure the complete undoing of the transaction. If the appellants' contention were correct in this respect, it would follow that the state courts would be powerless to grant relief

in any case where the defendant is a nonresident, even if there were but two parties to the transaction, one of which is a nonresident.

The contention altogether overlooks the fact that the powers of the courts of equity are now generally coextensive with the subject-matter of the litigation, and that their judgments and decrees may be given full effect by direct action upon any subject-matter that is within their jurisdiction. Equity jurisdiction can no longer be said to be exercised strictly *in personam*. It is at least quasi *in rem*. See Pom. Eq. Jur. §§ 135, 171, 428, 1317, and 1318. It appears that all necessary parties have been made parties defendant; that three of the defendants appeared voluntarily; and there is a finding, not controverted, that the Upper Michigan Land Company was "duly served." The question raised, therefore, must be determined not upon the basis that the foreign corporation, which was a party to the contract, was not made a party to the action; but rather upon the basis that all of the parties to the contract were joined as parties defendant, that the court had personal jurisdiction over three of the defendants and jurisdiction over the fourth defendant by publication in pursuance of the order entered to that effect.

In the existing state of the record as to parties, no question is raised as to the right of the plaintiff to enforce the judgment as a personal judgment against a nonresident party served only by publication. The doctrine of Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, is consequently not applicable. Furthermore, the plaintiff is the party prejudiced by the inability of the court to render a judgment binding as a personal judgment or decree against the nonappearing defendant rather than such defendant.

Neither does the record present a case strictly analogous to that of Shields v. Barrow, 17 How. 130, 15 L. ed. 158; for, as above indicated, all of the parties to this contract have been made parties defendant, which was not true in the case of Shields v. Barrow. In the opinion in that case, Mr. Justice Curtis indicated that the rule applied as to parties would not necessarily be fatal to the action if the indispensable parties were constructively before the court. In referring to the Act of Congress of February 28, 1839, regulating the equity practice of the circuit court of the United States, he quoted with approval the previous decision of the court in Mallow v. Hinde, 12 Wheat. 198, 6

L. ed. 600, dealing with the question as follows: "The act says it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court in Mallow v. Hinde, supra, 198, when speaking of a case where indispensable parties were not before the court, 'We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdictions; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either *actually or constructively before the court.*'"

In the case at bar, all of the parties to the contract have been made defendants, and all are either actually or constructively before the court. Not being concerned in this proceeding with any question as to the plaintiff's ability to make the decree wholly effective in so far as it may be favorable to him, it is clear that the court had jurisdiction of the subject-matter of the action and sufficient jurisdiction over all of the parties to enter an appropriate judgment. The judgment was in every way proper in that it required the plaintiff to surrender all the benefits that he had received under the contract, and to assign it so that the defendants would be free to adjust their rights as between themselves. If the defendants, or any of them, do not care to come in and assert their interest in the contract thus assigned, or the rights that may have been theirs *inter sese,* they are in no position to complain of the decree. It is not enough that one or more defendants say that the judgment is wrong because the original status has not been completely restored. They must, at the same time, show wherein they are prejudiced. It is not claimed that the plaintiff has not completely surrendered the benefits that he had received; nor is it contended that the restoration is not complete in so far as he is able to make it complete. If the nonappearing defendant is a bona fide assignee of Creglow's contract, it has not availed itself of its opportunity to show such fact; and if the appearing defendants are prejudiced by reason of payments made to the Upper Michigan Land Company to induce it to contract with Bunting, they should rather be required to establish the exact extent of the prejudice than permitted to use the mere possibility

of prejudice as a shield to protect them against the consequences of their own fraud.

The judgment is in all things affirmed.

ROBINSON, J. (concurring). Defendants appeal from a judgment for the rescission of a land trade on the ground that it was obtained by fraud and false representations. Under the statute a party may rescind a contract when his consent was given by mistake or obtained by fraud or undue influence. In this case it appears beyond all question that the defendants Creglow, Gibbs, and Kelley contrived to "gold brick" the plaintiff. By gross fraud, misrepresentations, they induced him to convey to Gibbs 1,120 acres of good land in Bowman county at $35 an acre, amounting to $39,200, in exchange for 2,320 acres of white sand land in twp. 45, range 4, of Upper Michigan peninsula. They claimed to have a contract with the Upper Michigan Land Company to sell them the land at $20 an acre, amounting to $46,400, and that on the contract (which plaintiff had never seen), the balance due was $7,888. This balance the plaintiff assumed and they paid him the difference, $688.

The original contract between the plaintiff and the defendant was dated February 10, 1915, and signed by Charles Creglow and the plaintiff. Creglow agreed to assign to plaintiff a contract for the sale of the land by the Upper Michigan Land Company, subject to the payment of $7,888, which plaintiff assumed. Creglow agreed to give plaintiff a copy of his contract with the Michigan Land Company, but afterwards, when a copy was demanded, Creglow claimed that it included other lands. Hence, to replace the first contract he volunteered to give plaintiff a contract direct from the Michigan Land Company. The new contract was given and dated March 1, 1915, and it contained this clause: "The party of the second part (the plaintiff) agrees and warrants that he has inspected the premises, and that in making the purchase and agreement he is not relying upon any representations made by the first party or any agent or servant thereof, and expressly waives any claim on that account."

As such a clause is never found in an honest contract, it is strong evidence of the alleged fraud. The party who dictated that clause knew that misrepresentations had been made, and desired to hedge

against the same. To put such a clause in a contract is like an ostrich putting his head in the sand to hide its body.

In the brief of counsel for appellant, it is said that to induce the Michigan Land Company to contract with the plaintiff to convey the land to him in consideration of $9,860, Gibbs, Kelley, and Creglow must either have paid or agreed to pay the difference between that and $46,400. That argument assumes that the judges are very simple and easily hoodwinked, but we conceive it quite possible and even probable that Gibbs, Kelley, and Creglow were part of the Michigan Land Company, or that they stood in with it, and that they never made a good-faith contract to purchase the land for $46,400. Such a representation was merely a bait for suckers like the plaintiff, but Gibbs and Company were not suckers. They never agreed to purchase a worthless lot of white sand at $46,400. These three real defendants employed W. G. Anderson, of St. Paul, to aid them in making the contract. He kept after the plaintiff week after week for three months, assuring him that the Michigan land had a good clay subsoil, and that said lands were fully as good as land near Sault Ste. Marie, which the plaintiff had seen and knew to be well worth $25 to $30 an acre.

In February, 1915, before making the trade, one of the defendants took plaintiff to see the land, and he passed an hour in trying to go over the land on snow shoes, but in June, 1915, he went over the land with the county surveyor, and they passed three days in digging holes into each 40-acre tract. They dug 200 holes and found nothing only white sand. The testimony of the surveyor is absolutely conclusive, and it shows that the land was worthless. It is needless to cite and to argue the evidence. The case is too plain. When it appears that a party has made a contract which no person of common sense would make if correctly informed, the fair presumption is that he was induced to make such contract by fraud and misrepresentations. The plaintiff has fully complied with all the conditions necessary to a rescission of the deal. Really it does seem that counsel should know better than to appeal such a case as this.

Judgment affirmed.

PETER BROWN and H. Froehlich, Appellants, v. JOHN STECKLER, Daniel Heidt, J. H. Ely, Frank Wanner, J. B. Fisher, Peter Heiser, Rudolph Frank, and George Frank, Respondents, and BROTHERHOOD OF AMERICAN YEOMEN, a Corporation, Garnishee.

(1 A.L.R. 753, 168 N. W. 670.)

Act of legislature — title of — fraternal beneficiary societies, orders or associations — regulating — provisions of act — title broad enough to cover — money or benefit — payable by association — attachment — garnishment — not liable to — Constitution.

1. The title, "An Act Regulating Fraternal Beneficiary Societies, Orders, or Associations," is sufficiently comprehensive to include a provision in the act that the money or other benefit to be paid by the association and the fund for the payment thereof shall not be liable to attachment or garnishment, either as against the insured or his beneficiary, and does not violate § 61 of the Constitution, which provides that "no bill shall embrace more than one subject which shall be expressed in its title."

Statutes — fraternal beneficiary society — money or other benefit — not liable to attachment or garnishment — Constitution — laws — equal protection.

2. Section 5053 of the Compiled Laws of 1913, which provides that "the money or other benefit . . . provided or rendered by any" fraternal beneficiary society "shall not be liable to attachment" or garnishment, either against the association or beneficiary, is constitutional, and is not in violation of § 11 of article 1 of the state Constitution, which provides that "all laws of a general nature shall have a uniform operation;" nor of § 2 of article 1, which provides that "the government is instituted for the protection, security, and benefit of the people;" nor is it in violation of the 14th Amendment of the Constitution of the United States in that it denies equal protection of the laws to citizens and persons; nor is it unconstitutional because in violation of § 208 of the Constitution of North Dakota, which provides that "the right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law, and a reasonable amount of personal property; the kind and value shall be fixed by law."

Opinion filed July 6, 1918.

NOTE.—On the constitutionality of statute exempting proceeds of life or benefit insurance, see note in 1 A.L.R. 757.

Garnishment to secure the proceeds of a life insurance certificate.

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

Judgment for defendants. Plaintiffs appeal.

Affirmed.

Thomas H. Pugh and *Otto Thress,* for appellants.

While there is a noted difference in the government of beneficial and fraternal societies and the ordinary "old line" or stock insurance companies, yet it is generally settled that the contract for the payment of dues and assessments to indemnify them or their nominees against loss for certain causes, such as death, is essentially a contract of insurance, and the rights and liabilities of the parties thereto are governed accordingly. 29 Cyc. 62, and cases cited.

The beneficiary takes the money under the contract, and not by inheritance. 3 Am. & Eng. Enc. Law, 2d ed. 999; Modern Brotherhood v. Lock (Colo.) 125 Pac. 556.

The legislature may determine what differences in situation, circumstances, and needs call for the enactment of laws to suit all persons within such created class, but if the classification is based upon an invidious and unreasonable distinction with reference to similar kinds of property, the court will interfere and correct the error. 7 Cyc. 185.

The marks of distinction on which the classification is founded must, in the nature of things, be such as will, in some reasonable degree at least, account for or justify the restriction of the legislation. Edmunds v. Herbrandson, 2 N. D. 270, 50 N. W. 970; State v. Hammer, 42 N. J. L. 439, and cases cited.

"Courts will look not to its form or phraseology merely, but to its substance and necessary operation." Nichols v. Walter, 37 Minn. 264, 33 N. W. 800; State v. Pugh, 43 Ohio St. 98, 1 N. E. 439; Angell v. Cass County, 11 N. D. 265, 91 N. W. 72; Vermont Loan & T. Co. v. Whithead, 2 N. D. 82, 49 N. W. 318; Angell v. Cass, 11 N. D. 265, 91 N. W. 72; Beleal v. N. P. R. Co. 15 N. D. 318, 108 N. W. 33; State v. Mayo, 15 N. D. 327, 108 N. W. 36; Gulf, etc. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 666; Morton v. Holes, 17 N. D. 154, 115 N. W. 256; State v. Hamilton, 20 N. D. 592, 129 N. W. 916; Re Mallou (Idaho) 22 L.R.A.(N.S.) 1123, 1125, 102 Pac. 373; 6 R. C. L. 406, 407, 417, 419; Ex parte Sohncke (Cal.) 82 Pac. 956.

"The guaranty of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances." Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 4 Enc. U. S. Sup. Ct. Rep. 362.

Because of its exceptions the statute in question infringes against the inhibition of our state Constitution. State Const. art. 208; 11 R. C. L. 492, and cases cited; Williams v. Donough (Ohio) 63 N. E. 84; May, Ins. 4th ed. § 1; Com. v. Weatherbee, 105 Mass. 149.

The statute is in violation of the Constitution for other reasons.

"No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." Comp. Laws 1913, § 5053; State v. Nomland, 3 N. D. 427, 57 N. W. 85; Powers Elev. Co. v. Pottner, 16 N. D. 359, 113 N. W. 703; State v. Burr, 16 N. D. 581, 113 N. W. 594; State v. Peake, 18 N. D. 101, 120 N. W. 47; Wabash R. R. Co. v. Young (Ind.) 69 N. E. 1003; People v. Congdon (Mich.) 43 N. W. 986; State v. Chappel (Minn.) 65 N. W. 940; Ives v. Norris (Neb.) 13 N. W. 276; West Point Water & Power Co. v. State (Neb.) 68 N. W. 507; Pierson v. Minnehaha County (S. D.) 134 N. W. 212; Divet v. Richland County, 8 N. D. 65, 76 N. W. 993; Johnson v. Grady County (Okla.) 150 Pac. 497; Holmberg v. Houck, 16 Neb. 337; New York etc. R. Co. v. Montclair, 47 N. J. Eq. 591; Pratt v. Browne (Cal.) 67 Pac. 1082; Lamer Canal Co. v. Amity Land & Irrig. Co. (Colo.) 77 Am. St. Rep. 261; Burcher v. People (Colo.) 93 Pac. 14; Kate v. Herrick (Idaho) 86 Pac. 873; Vernon v. State (Mich.) 146 N. W. 338, Ann. Cas. 1915D, 128; Shepard v. Connolly (Mich.) 141 N. W. 556; Loomis v. Mack (Mich.) 150 N. W. 370; Rowe v. Richards (S. D.) 142 N. W. 664; Met. Casualty Ins. Co. v. Basford (S. D.) 139 N. W. 795.

"The Constitution has said that the title must be an index to the law, and the courts may not sanction as a valid enactment any part of a statute to which the finger of the index does not point." Malin v. La Moure County, 27 N. D. 140, 145 N. W. 582; State v. Young (S. D.) 157 N. W. 325; State v. Burlington & M. R. R. Co. (Neb.) 84 N. W. 254.

Casey & Burgeson, for respondents.

Fraternal beneficiary societies are organized not for profit, but for the mutual benefit of their members and their beneficiaries. "They are usually formed not as insurance companies, but as social or benevolent associations; insurance being an incident, and not the main purpose of the organization, and the insurance feature is adopted not for the purpose of gain, but for the object of benevolence." 29 Cyc. 7.

"The fact that the amount to be exempted is not limited by the statute does not take from its force." Harvey v. Harrison, 89 Tenn. 470, 35 L.R.A. 603.

"The exemption laws are made for the purpose of protecting the poor and unfortunate, and should be liberally construed by the courts, and the right of such debtors should be fully upheld without stint or grudging." Herschbach Bros. v. Cassout, 197 Ill. 188.

"Exemption statutes are to be literally construed to effect their intent and purpose." Cook v. Allee, 93 N. W. 93; Ballou v. Gile, 50 Wis. 614, 7 N. W. 561; Recor v. Recor (Mich.) 106 N. W. 82; Geer v. Horton (Mass.) 34 N. E. 269; Hamilton Nat. Bank v. Amster, 134 Tenn. 537, 184 S. W. 5.

"Death benefits payable by a beneficiary association held not subject to garnishment in the hands of the association at the suit of a judgment creditor of the beneficiary." Ogle v. Barron, 247 Pa. 19, 92 Atl. 1071; 20 Am. Dig. p. 929.

Such money or benefits are not subject to attachment or garnishment. Craven v. Roberts, 60 Pa. Super. Ct. 140; 22 Am. Dig. p. 954; Emmert v. Schmidt, 68 Pac. 1072.

The statute is not in violation of any constitutional provision. 63 N. W. 627; First Nat. Bank v. How (Minn.) 67 N. W. 994.

Bruce, Ch. J. In this case the proceeds of a certificate of insurance in a fraternal insurance company are sought to be garnished in an action brought to recover on a debt owing by the beneficiary, and the only question raised by the specification of errors is the constitutionality of § 5053 of the Compiled Laws of 1913, which provides that "the money or other benefit, charity, relief or aid to be paid, provided or rendered by any association authorized to do business under this article, shall not be liable to attachment by trustee, garnishee or other

process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder, or of any beneficiary named in a certificate, or any person who may have any right thereunder."

The first point raised is that the statute violates § 61 of the state Constitution, which provides that "no bill shall embrace more than one subject which shall be expressed in its title."

Section 5053 of the Compiled Laws of 1913 first appears as § 11 of chapter 90 of the Laws of 1901. The title of this act is, "An Act Regulating Fraternal Beneficiary Societies, Orders, or Associations."

We think that there is no merit in the contention.

In the case of First Nat. Bank v. How, 65 Minn. 187, 67 N. W. 994, the supreme court of Minnesota passed upon a similar act and a similar contention. The act was entitled, "An Act to Provide for the Incorporation and Regulation of Co-operative or Assessment Life Endowment and Casualty Insurance Associations and Societies." Laws 1885, chap. 184. The Minnesota court held that the clause in question was germane to the general subject of the act, and was so intimately connected with the subject of the incorporation and regulation of such associations that it could be properly included in the title. This case has many companions and is, no doubt, sound in its conclusions. It is certainly in accordance with the rulings of this court; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924. See Hamilton Nat. Bank v. Amster, 134 Tenn. 537, 184 S. W. 5.

The appellants also claim that the statute violates § 11 of article 1 of the state Constitution, which provides that "all laws of a general nature shall have a uniform operation."

They also claim that it violates § 2 of article 1, which provides that "all political power is inherent in the people. Government is instituted for the protection, security and benefit of the people and they have a right to alter or reform the same whenever the public good may require."

They also claim that it violates the 14th Amendment to the Constitution of the United States, in that it denies the equal protection of the laws to citizens and persons.

They argue, and no doubt correctly, that the contract for the payment of dues in a fraternal association is essentially a contract of in-

surance, and that the rights and liabilities of the parties thereto are governed accordingly. 29 Cyc. 62. They also argue, and no doubt correctly, that the beneficiary takes the money under the policy of assurance by contract, and not by inheritance. 3 Am. & Eng. Enc. Law, 2d ed. 999; Modern Brotherhood v. Lock, 22 Colo. App. 409, 25 Pac. 556. They argue, therefore, "that the beneficiary under a policy in a fraternal association is allowed by the statute to occupy a different position from a beneficiary in a so-called old line company, in other words, that the legislature has not only attempted to create two classes of insurance companies, going so far as to confer on one class special favors and immunities and exempting such class from the processes of law to which all citizens ordinarily are subject; but that it also creates two classes of persons called beneficiaries, and upon the one class has conferred its favors and immunities, exempting them from the usual process for the collection of debts to which all classes of citizens should be subject; and that it also creates two classes of creditors, one of which is left its right to invoke the ordinary processes in the collection of its debts, and the other which is discriminated against." They cite from the case of Edmonds v. Herbrandson, 2 N. D. 274, 14 L.R.A. 725, 50 N. W. 970, wherein this court states that "the classification must be natural, not artificial; it must stand upon some reason, having regard to the character of the legislation. . . . The true principle requires something more than a mere designation by such characteristics as will serve to classify; for the characteristics which thus serve as a basis for classification must be of such a nature as to mark the object so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction having reference to the subject-matter of the proposed legislation between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such in the nature of things as will in some reasonable degree, at least, account for or justify the restriction of the legislation."

They also cite the well-known case of Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431, wherein the Supreme Court of the United States said: "We have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the

law which is enjoyed by other persons or other classes in the same places and in like circumstances.'"

They also cite the case of Williams v. Donough, 65 Ohio St. 499, 56 L.R.A. 766, 63 N. E. 84, wherein the supreme court of Ohio held that § 3631–18, of the Revised Statutes of Ohio, which provided that benefits rendered by fraternal associations should not be liable to be appropriated in any way to the debts of the members or beneficiaries, were in violation of the Constitution in that they conferred upon some members of a class privileges not enjoyed by others equally situated.

Although, however, we agree with much of counsel's argument and are fully conversant with the authorities cited, we are unable to believe that the statute which is before us is unconstitutional.

As far as the parties who are before this court are concerned all that the statute does is to provide that fraternal mutual beneficiary societies, orders, and associations may create a fund which shall be exempt from execution as against the debts of its beneficiaries. It merely provides that the members of these associations may make charitable gifts to the beneficiaries. The creditors are not affected, because the donors of that fund owed them nothing, and because the beneficiaries have given no consideration for the gift and have in no way dispossessed themselves of money or of property on which their creditors had a claim or a lien. It is clear that, without the aid of the statute and by the intervention of a trustee, the donors could have given to the beneficiaries the benefit of this fund exempt from seizure by the creditors of such beneficiaries, at any rate to the extent that such fund is necessary for the latter's reasonable support, and there is no proof in the case at bar that the sum provided was in excess of such wants. Not only, indeed, was the amount which was payable under the certificate only $801.61, but the courts may take judicial notice of the fact that the benefits of fraternal associations are almost always very limited in amount. See Broadway Nat. Bank v. Adams, 130 Mass. 431; Geer v. Horton, 159 Mass. 259, 34 N. E. 269; Stow v. Chapin, 21 N. Y. S. R. 38, 4 N. Y. Supp. 496; Brandon v. Robinson, 18 Ves. Jr. 429, 34 Eng. Reprint, 379, 11 Revised Rep. 226, Comp. Laws, 1913, §§ 5364, 5369.

It is clear to us that the statute before us merely attempts to permit a fraternal association to accomplish this same result, and for that

purpose to act as a trustee for its members, and that this can be legally done. Re Howe, 61 Minn. 217, 63 N. W. 627, overruling Re Howe 59 Minn. 415, 61 N. W. 456.

Nor is there any merit in the charges of class legislation. The objects of the garnishee defendant (the Brotherhood of American Yeomen) are fully set forth in division 2, § 3, of its by-laws. This section provides that: "The objects of this association shall be the mutual uplifting of members of the association, the practice of fraternal love, to lose no opportunity to point out to a failing or weaker member a path to success, to withhold nothing from a member that can benefit him, and especially to point out to him any danger threatening him or his beloved ones, and to bestow substantial benefits upon him and his beneficiaries as may be permitted by the laws of the state wherein this association shall operate, to care for the sick and indigent members, and to comfort the sick and bereaved in times of sorrow and distress."

Not only is this true, but § 5053, Compiled Laws 1913, expressly limits the payment of death benefits "to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the members."

The court also may take judicial notice that in almost all of the fraternal associations the amount of the insurance or benefit is limited to a comparatively small amount, whereas in the so-called old line companies there is practically no limit to the policy which has usually a cash surrender and loan value, can be used as collateral security for the debts of the insured, and not merely for the benefits of his relatives or dependents, and is often taken out as a business venture and for business purposes. We may also judicially notice the fact that the fraternal associations serve a peculiar purpose in affording insurance for those of moderate means. These considerations fully justify the classification complained of. Such a classification, indeed, is far less arbitrary than that which was sustained, in the case of the German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1911, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612, wherein the Supreme Court of the United States held that an act exempting farmers' mutual insurance companies, organized and doing business under the laws of the state of Kansas, and insuring only farm property, from a legislative scheme for the regulation of fire insurance rates, was not invalid, nor did it

deny the equal protection of the laws even though it was not applicable to other insurance companies which also insured farm property. See also Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132, 62 L. ed. 1025, 38 Sup. Ct. Rep. 444; Hamilton Nat. Bank v. Amster, 134 Tenn. 537, 184 S. W. 5; Ogle v. Barron, 247 Pa. 19, 92 Atl. 1071; Craven v. Roberts, 60 Pa. Super. Ct. 140; Emmert v. Schmidt, 65 Kan. 31, 68 Pac. 1072.

The judgment of the District Court is affirmed.

HERMAN STOEBER, Respondent, v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Appellant.

(168 N. W. 562.)

Railway company — killing of animals by — negligence — presumptive evidence of — facts in case — presumption may be overcome by.

1. The statute makes the killing of animals by a railway company presumptive evidence of negligence; but when, as in this case, the facts in regard to the killing are all put in evidence, the presumption of the statute does not apply. The proved facts clear away and supersede all presumptions.

Gross negligence — of plaintiff — right of way — permitting animals to trespass on — railway company — not guilty of negligence.

2. In this case it appears that plaintiff was guilty of gross negligence by permitting horses to trespass on the defendant's right of way at an early hour in the morning of March 31st, when the horses should have been in their stable. Defendant was guilty of no negligence which in any manner contributed to or caused the killing of the horses.

Opinion filed February 9, 1918. Petition for rehearing denied July 9, 1918.

NOTE.—In the absence of a statute, the courts are practically unanimous in holding that a presumption of negligence does not arise against a railway company from the mere fact of injury to live stock by its trains, as will be seen by an examination of the authorities collated in a note in 15 L.R.A. 39, on presumption of negligence from injury to live stock by railway train. On duty of railroad employees to keep a lookout for live stock on track, see note in 24 L.R.A.(N.S.) 858.

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

Defendant appeals.

Reversed.

Albert Weber and *John E. Greene* (*John L. Erdall* of counsel), for appellant.

It is not the duty of men in charge of locomotives attached to trains to keep a constant lookout for trespassing animals. Munger v. Railroad Co. 5 N. Y. 349; Locke v. Railroad Co. 15 Minn. 350, Gil. 283; Stacey v. Railway Co. (Minn.) 43 N. W. 905; R. R. Co. v. Melton, 2 Lea, 262; Mears v. Railway Co. (Iowa) 72 N. W. 509; Rattanbury v. R. Co. (Mich.) 137 N. W. 679; Bostwick v. R. Co. 2 N. D. 449, 450; Hodgins v. R. Co. 3 N. D. 382; Wright v. R. Co. 12 N. D. 159; Corbett v. R. Co. 19 N. D. 450; Reinke v. R. Co. 23 N. D. 182.

The railway company is released from liability where the owner of animals persistently allows the gates in the fence to remain open, and permits such animals to stray through and to trespass upon the right of way. Such acts constitute gross negligence which prevents recovery. Swanson v. R. Co. (Minn.) 82 N. W. 670, 49 L.R.A. 625, notes, 626 and 630; Mannell v. R. Co. (Iowa) 45 N. W. 568; Peterson v. R. Co. (Wis.) 56 N. W. 639.

Bagley & Thorpe, for respondent.

Plaintiff established the prima facie negligence of defendant by proving the killing of the animals. Comp. Laws 1913, § 4644.

Defendant's headlight on the engine was equipped with a light of only 600 candle power. Such a light does not meet the requirements of our statute, and is of itself negligence *per se.* Comp. Laws 1913, § 4695; Morrison v. Lee, 22 N. D. 251, 133 N. W. 548; Wright v. Mpls. St. P. & S. Ste. M. R. Co. (N. D.) 96 N. E. 324; Campbell v. Walker (Del.) 78 Atl. 601; King v. Laycock Power House Co. (Ind. App.) 92 N. E. 741; Greyhek v. Stern, 154 Ill. App. 385; Palmer v. St. Louis & S. F. R. Co. 142 Mo. App. 440, 127 S. W. 96; Wabasha R. Co. v. Beedle, 173 Ind. 437, 90 N. E. 760; Cook v. Chicago etc. R. Co. 153 Ill. App. 596; Short v. Philadelphia, B. & W. R. Co. (Del.) 76 Atl. 363; Neiman v. Channellene Oil & Mfg. Co. (Minn.) 127 N. W. 394; Louisville & N. R. Co. v. Hames (Ga.) 68 S. E. 805.

It is the rule that where the statute requires an act to be done, a

failure to do it as required is negligence *per se*,—will be declared negligence as a matter of law. Houston & T. C. R. Co. v. Wilson, 60 Tex. 142; Ind. B. & W. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121; Kelley v. Anderson (S. D.) 87 N. W. 579; A. & W. P. R. Co. v. Wyly, 65 Ga. 120; Fane v. Philadelphia Rapid Transit Co. 228 Pa. 471, 77 Atl. 806; Moore v. Maine C. R. Co. 106 Me. 297, 76 Atl. 891; O'Leary v. Chicago, R. S. & P. R. Co. (Iowa) 103 N. W. 302.

Our legislature having passed the law by which railroad trains are required to have headlights on their engines in main-line service of at least 1,200-candle power light when measured without a reflector, it must be presumed that such power light only is sufficient, and that any light of less power is insufficient and its use negligence *per se*. Hanger v. Chesapeake & O. R. Co. (W. Va.) 73 S. E. 713; Alabama G. S. R. Co. v. Jones, 71 Ala. 487; Western R. Co. v. Mitchel, 148 Ala. 35, 41 So. 427, 39 L.R.A.(N.S.) 271.

The question of whether or not defendant was required to keep a lookout is not in this case. Defendant did keep a lookout, and because of this the question here is, if defendant's engine had been provided with the light required by our statute, could the enginemen not have seen the stock in time to have prevented the killing. Jonesboro S. C. & E. R. Co. v. Guest, 81 Atk. 267, 97 S. W. 71; W. R. Co. v. Moore, 169 Ala. 284, 53 So. 744; Ford v. St. Louis R. Co. 60 Ark. 363, 50 S. W. 864; Oweutt v. Pac. R. Co. 85 Cal. 291, 24 Pac. 661; Chicago R. Co. v. Reid, 24 Ill. 144; Cincinnati R. Co. v. Hiltzhauer, 99 Ind. 486; Grayville v. Chicago R. Co. 112 Iowa, 738, 84 N. W. 846; Palmer v. St. P. R. Co. 38 Minn. 415, 38 N. W. 100.

The burden being upon defendant company to overcome the presumption of negligence, and it having failed to show a compliance with the provisions of our statute, that presumption was not overcome. Campbell v. Mobile & O. R. Co. 154 Ky. 582, 157 S. W. 931.

ROBINSON, J. This is an action to recover from defendant for the negligent killing of several horses while trespassing on its right of way. The verdict was for $980. Defendant appeals from the judgment and from an order denying a motion for a new trial or a judgment notwithstanding the verdict.

One horse was run into and killed February 4, 1916, and for this

the defendant has offered to pay $150, the full value and a little more than the value of the same. Six horses were run into and killed by a passenger train on March 31, 1916, at 6:40 A. M. The question is one of negligence. The railway runs through the plaintiff's farm. His buildings are about a quarter of a mile north of the track. The railway has been fenced with gateways opposite a private crossing of the defendant. The gateways he failed to keep closed. He failed to keep his horses in the stable, where they should have been at 6:40 A. M., and by negligence he permitted them to break away, run through the gates which were left open, trespass on the right of way, and get killed. This contributory negligence of the plaintiff is clear and certain.

In regard to the neglect of the defendant it is fairly conceded that at the time of the accident the headlight on defendant's locomotive was of only 600 candle power, when the statute required a headlight of 1,200 candle power, and it is contended that with a legal headlight the engineer would have seen the horses in time to stop the train.

However, it does appear that in crossing the plaintiff's farm the road runs through a depression or valley, and that at the time of the accident a fog in the valley was so dense that it was opaque,—much the same as a dense fog arising from the steam of a locomotive. The testimony clearly shows that the lack of powerful headlights was not the proximate or real cause of the accident, and that no headlight would have been sufficient to penetrate the fog and discover the horses in time to stop the train. It is shown that at the time of the accident the engineer was making a vain attempt to look through the fog, yet that fact is wholly immaterial.

In this state the law is well settled by repeated adjudications that railway companies are not required to keep a lookout from their locomotives for stock trespassing on their right of way outside of public crossings, depot grounds, and similar places. That in such a case as this the killing of stock trespassing on a railway track is negligence of the company only after the discovery of the stock in a place of danger. Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co. 23 N. D. 182, 135 N. W. 779; Corbett v. Great Northern R. Co. 19 N. D. 452, 125 N. W. 1054. Clearly at the time of the accident when the horses should have been in their stable the defendant was under no obligation to keep a lookout for the horses, and a lookout would have been of no

avail even with the most powerful headlight. The statute makes the killing of animals by a railway company presumptive evidence of negligence; but when as in this case the facts in regard to the killing are put in evidence the presumptions of the statute do not apply. The proved facts clear away and suspend all presumptions.

The whole defense and the expenses of the litigation have been on the claim for the killing of the six horses on March 31, 1916, and not on the killing of the one horse for which the defendant offered to pay $150, which was more than its value.

Hence, it is ordered and adjudged that on payment of said $150 to the clerk of the court for the use of the plaintiff, the District Court shall enter judgment in favor of the defendant notwithstanding the verdict.

GRACE, J. (dissenting). The action is maintained to recover from the defendant the value of certain horses killed by the defendant railway while such horses were upon defendant's railway, such horses having without any wilful negligence of the plaintiff escaped from plaintiff's premises and gone upon the right of way. One horse was killed February 4th, and six on March 31, 1916, at about 6:40 A. M. It appears that the railway runs through plaintiff's farm. His buildings are situated 80 rods or more on the north side of the track. The right of way of the railway company is fenced on either side of the railroad on plaintiff's land. Extending over the right of way and railroad at a certain point on plaintiff's land is a private railroad crossing, constructed in compliance with § 4645, Comp. Laws 1913. Immediately in line with such crossing on either side of the right of way is a gate. Under said section it is the right of any private landowner, situated as plaintiff, to have such crossing, and it is the duty of the railroad company to keep the same in good repair. It is the duty of the defendant to keep the whole of the crossing extending from the line of right of way on one side to the line of right of way on the other side, all in good repair. The fence on either side of the right of way belongs to the defendant. It is also its duty to keep that in good repair and to keep the gates in good repair at the crossing. It is also the defendant's duty to keep that part of the crossing where the gates are situated in such condition that the gates may be easily opened or

closed. It appears in this case that large quantities of snow had collected at the gates, thus making it very difficult for the same to be opened or closed. It is a matter of common knowledge in this northwestern country that fences or gates will impede the progress of snow and cause it to bank up about the gates or fences. It is a matter of common knowledge that railway companies construct snow fences for the purpose of stopping the snow at such fences, and thus preventing it from getting on the right of way, and thus interfering with the operation of the railroad. It is also a matter of common knowledge that railroads have section crews who go over usually every day all of the railroad tracks within their respective sections. It appears to us that it is the duty of the railroad company to keep its crossing and causeway all in such condition that the gates in the fence referred to could be easily opened or closed.

Several of the states have statutes providing for the erection and maintenance of the fences and gates upon the right of way of the railway company, and such statutes have been construed so far as the gates are concerned to mean that they shall maintain the gates closed. That is, that they shall exercise some diligence to see that the gates are kept closed. West v. Missouri P. R. Co. 26 Mo. App. 344; Nicholson v. Atchison, T. & S. F. R. Co. 55 Mo. App. 593; Estes v. Atlantic & St. L. R. Co. 63 Me. 309; Waldron v. Portland, S. & P. R. Co. 35 Me. 422; Jacksonville, T. & K. W. R. Co. v. Harris, 33 Fla. 217, 39 Am. St. Rep. 127, 14 So. 726; Chicago, B. & Q. R. Co. v. Sierer, 13 Ill. App. 261; Wabash R. Co. v. Perbex, 57 Ill. App. 62; Aylesworth v. Chicago, R. I. & P. R. Co. 30 Iowa, 459; Wait v. Burlington, C. R. & N. R. Co. 74 Iowa, 207, 37 N. W. 159.

There is another rule adopted by other courts directly opposite to the rule which we have referred to. We are of the opinion, however, that the rule we have stated is a reasonable and salutary rule. And we are of the opinion that where, as in this state, the statute provides for private crossings and proper maintenance of them by the railroad company, and the proper maintenance of the cattle guards and causeways on such right of way, and also provides for the erection and maintenance of fences upon the right of way of the railroad company under certain conditions, that it is therefore the duty of the railroad company to maintain such private crossings and such fences and gates

in proper condition, and that it is the duty of the railroad company to exercise reasonable care to keep such fences in good repair and such gates closed; and that it must necessarily follow that if the defendant exercised no care in and about the maintenance of its gates in proper condition, and the maintaining of the right of way where such gates are situated in such condition that the gates could easily be opened or closed, and exercised no care about such private crossing to see that such things were done, it is guilty of negligence.

Our statute also provides that locomotives shall have headlights of not less than 1,200 candle power. It is conceded in this case that the locomotive in question did not have a headlight of more than 600 candle power. The majority opinion brushes this matter aside as immaterial. We do not think it is immaterial. The testimony in this case shows that the engineer was keeping a lookout. If this is true, and there had been a 1,200-candle power headlight instead of a 600 on the locomotive, the engineer might have seen the horses and thus averted the damage. We are of the opinion that the railroad company is not relieved from all duty except at public crossings, depot grounds, and similar places. In addition to this, we are of the opinion that they must use all reasonable care and caution to prevent the killing or injuring of stock, even though such stock get upon the right of way and roadbed of the defendant at other places than public crossings and public places. Railroad companies should not be put in a different class than other property owners. The owner of any property must use it with an ordinary degree of care so as not to damage others in their property. In all probability the railroad company would not be held to as high degree of care in passing over the distance between one public crossing and another, but certainly it cannot be said that it shall be relieved from all care and be under no obligation to exercise caution in the use of its property so as to be irresponsible in any damage which it may do by reason of its lack of caution and reasonable care, under the circumstances. The failure of the defendant to have a legal headlight as provided by statute was a question of negligence properly submitted to the jury. The further question of the density of the fog, whether the fog was so dense that the engineer by the exercise of proper caution and care could not have seen the horses, was a question of fact for the jury. The jury decided all questions of fact in favor of the

plaintiff. Under the theory of the majority decision, no matter how much valuable stock might accidentally be upon the right of way of the defendant, or railroad track, not in a public place, the defendant would be under no obligation to use any care to prevent injury or damage. We do not believe such rule is a salutary one, nor that it is the weight of authority, and it is contrary to our express statute.

Section 4644, Comp. Laws 1913, is as follows: "The killing or damaging of any horses, cattle or other stock by the cars or locomotives along a railroad shall be prima facie evidence of carelessness and negligence on the part of the corporation."

There is no dispute in this case but that plaintiff established a prima facie case. He established the ownership of the horses and the fact of their killing. It then became incumbent upon the defendant to overcome the prima facie case thus established by the plaintiff by showing that it was free from any negligence. After the submission of the testimony of the defendant, which defendant claimed showed or tended to show that it was free from negligence, the question of negligence became a question of fact for the jury, and the jury could find, after the defendant had given its evidence upon which it relied to show it was not negligent, that such testimony overcame the prima facie case established by plaintiff. The jury by its verdict, however, found in favor of the plaintiff, thus necessarily finding under all the testimony that the defendant was guilty of negligence, and as a result thereof plaintiff sustained a loss to the extent of the value of the horses killed by the defendant's locomotive and train. The question of the negligence of the defendant as well as that of the contributory negligence of the plaintiff, if any, were questions of fact to be submitted to the jury, and which were submitted to the jury and determined in favor of the plaintiff. The decision of the majority and the reasons therein set forth for reversing the judgment entirely nullifies § 4644. The decision in effect holds that the defendant on its line of railway between public crossings, or any other places than public crossings or public places, is under no necessity to keep any lookout in order that it may not do damage to stock. This holding nullifies the statute above quoted. That statute does not point out any particular place or places upon the railroad where, if stock are trespassing, the company shall not be liable if it, through its negligence or want of proper care, kills or injures

such stock. That statute includes all of the defendant's line of railway within this state whether it be at public crossings, public places, or upon defendant's line of railway between public crossings. That statute makes no exception. Why then should it not be given effect in the manner in which its plain terms indicate? If the legislature wishes to enact a law that the killing or injuring of stock on the line of defendant and other railroad corporations, not at public places and on its line between public crossings, is not actionable negligence, the legislature in all probability has authority to do so. But until the legislature does enact such a law, certainly it is not within the power, nor is it the duty of the court, to proceed just as if such law were upon the statute books. The section above referred to is plain and can have but one construction, and that is that the killing or damaging of stock by the cars or locomotives along any point of the railroad is prima facie evidence of carelessness or negligence on the part of the railroad. This is the meaning of the statute, and the only meaning it has. In this case the defendant failed before the jury to clear itself from its negligence, and the verdict of the jury should stand. The verdict of the jury should not be lightly disregarded. We should not too easily forget that the jury is one of the main elements of our government. To it is delegated the exclusive right of passing upon questions of fact in actions for the recovery of money only. In such case the right of the trial by jury and the right of the benefit of its verdict has its inception in the Constitution. The rights, powers, and duties of the jury in a case such as the one at bar are entirely separate and distinct from any powers possessed by the court, and the court is without either constitutional or statutory authority to interfere with the verdict of the jury when the same is supported by testimony in the action. The court in this case cannot say that the verdict is not supported by testimony. The very fact that the plaintiff has made a prima facie case under the statute is sufficient to sustain the verdict, and certainly, after all the testimony is submitted on behalf of the plaintiff and defendant and the jury then finds a verdict in behalf of the plaintiff, the verdict of the jury becomes conclusive upon all questions of fact, and the court is without any authority in such case to interfere with such verdict.

PER CURIAM. In the petition for rehearing filed herein, the respondent directs attention to that portion of the majority opinion wherein it is stated that the plaintiff was negligent in allowing his horses to get upon the right of way of the defendant company, and that he should consequently be barred from recovery on account of such contributory negligence. We are of the opinion that the question of the defendant's liability does not properly depend upon the question of contributory negligence, but that it does depend wholly upon the defendant's negligence. That portion of the opinion referring to the question of contributory negligence is therefore to be regarded as *dictum*.

The petitioner also contends with much force that the decision in this case negatives the effect of § 4644 of the Compiled Laws of 1913. The section reads: "The killing or damaging of any horses, cattle or other stock by the cars or locomotives along a railroad shall be prima facie evidence of carelessness and negligence on the part of the corporation." While the effect of this statute was carefully considered at the time the conclusions stated in the majority opinion were announced, it might be well to state briefly the reasons which led to the conclusions as to the meaning of the statute. The statute does not announce a rule of liability. Nor does it evidence any attempt on the part of the legislature to require railroad corporations to compensate for the killing of all live stock that may be killed by their cars or locomotives. The statute only creates a presumption of negligence taking the place of evidence which would otherwise be required to establish it. See Hodgins v. Minneapolis, St. P. & S. Ste. M. R. Co. 3 N. D. 382, 56 N. W. 139; Corbett v. Great Northern R. Co. 19 N. D. 457, 125 N. W. 1054; Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co. 23 N. D. 182, 135 N. W. 779. A statute which would attempt to create an absolute liability would be of doubtful constitutional validity. See cases cited in 25 L.R.A. 162, note. In view of the fact that the statutory presumption arises without any evidence of negligence, it has been held in this jurisdiction that less evidence is required to rebut it than would be necessary if the plaintiff made proof of actual negligence. Reinke v. Minneapolis, St. P. & S. Ste. M. R. Co. supra. Inasmuch as the statute only purports to lay down a rule of evidence which dispenses with the necessity of the plaintiff, in the first instance, offering proof of negligence, it would seem that the duty of the court in determining the

weight and sufficiency of the evidence would be the same as though the statute did not exist, except that, where the statutory presumption is relied upon, the plaintiff's case has not the advantage of being supported by evidence.

Without the statute, it would be the duty of the court to determine the question of the sufficiency of the evidence to show negligence, and in doing so it would be required to consider the testimony offered by both the plaintiff and defendant. To hold that the statute changes the law in this respect would be tantamount to saying that, in every case where live stock is killed or injured by cars or locomotives along a railroad, the case must be submitted to a jury, no difference how conclusively the defendant may be able to establish the lack of negligence. That the statute has not changed the law in this respect has long been settled in this jurisdiction. Hodgins v. Minneapolis, St. P. & S. Ste. M. R. Co. supra; Cumming v. Great Northern R. Co. 15 N. D. 611, 108 N. W. 798.

The error into which counsel have fallen is apparently attributable to the inclination to treat the statute as prescribing a rule of liability instead of a rule of evidence.

In the case at bar, it is only by the remotest speculation that negligence could be found, if any weight is to be attached to the testimony of the defendant's witnesses. Their testimony is not contradicted upon any material question; but, on the contrary, the circumstances surrounding the accident tend to support it. The apparent conflict in the testimony relative to the foggy condition of the atmosphere is wholly explained by the difference in time to which the testimony of the different witnesses relates. The record shows clearly that the accident occurred at about 5:40 in the morning, and the testimony of the plaintiff's witnesses as to the condition of the atmosphere relates to a time approximately an hour later. In this state of the record, the jury was not warranted in disregarding the testimony of the defendant's witnesses, which shows conclusively that the defendant was not negligent.

The order of reversal, however, should be modified to the extent of allowing the plaintiff and respondent to recover the costs incurred in the lower court prior to the time of the offer of judgment for $150.

With this modification of the original order, the petition for rehearing is denied.

GRACE, J., adheres to his original dissent.

ROSA ZITTLE, Respondent, v. JOHN E. WURTH, Appellant.

(168 N. W. 630.)

Work and labor — domestic services — amount — action to recover — trial — verdict — judgment — sustained by evidence.

For general services as maid of all work in defendant's hotel, the plaintiff sues to recover $4 a week, amounting to $76.25. Judgment for the same was duly given in justice court and in the district court.

The case is very simple. There is no error. The verdict is well sustained by direct and convincing testimony.

Opinion filed July 9, 1918.

Appeal from the District Court of Walsh County, Honorable *W. J. Kneeshaw*, Judge.

Defendant appeals.

Affirmed.

E. Smith-Petersen, for appellant.

A person who has never before worked in a hotel, or in the same locality, is not competent to testify upon the question of the value of her services in doing such work. Swan Co. v. Middlesex, 101 Mass. 173.

Where a nonexpert witness shows that from common experience and observation he knows of the subject-matter about which he is testifying, he is qualified; but in the absence of such showing he is not competent. Alt v. California Fig. Co. (Neb.) 7 Pac. 173.

The burden of establishing a contract is upon the person alleging and seeking to enforce it. His claim must be a legal claim. Hartman's Appeal, 3 Grant, Cas. 234; Fitch v. Peckham, 16 Vt. 150; Hall v. Finch, 25 Wis. 278.

Expectation of receiving pay for services rendered is not enough. Van Buren v. Reformed Church, 62 Barb. 495.

If plaintiff was to render certain services to defendant in return for his hospitality in taking her in when she was in poor health, and it was so intended, then she is not entitled to a recovery. Moulin v. Columbet, 22 Cal. 508.

It is not necessary that there be a special contract that plaintiff was to receive nothing for her services, to prevent recovery. It is enough if the circumstances show that her services were to be a charge against defendant. Ibid.; Taylor v. Brewer, 1 Maule & S. 290; Livingston v. Achiston, 5 Cow. 531.

H. C. DePuy, for respondent.

A witness may testify to the reasonable value of his own services. No one is more competent to do so. Mercer v. Vose, 67 N. Y. 56; Edwards v. Fargo & S. R. Co. 4 Dak. 549, 33 N. W. 100; 17 Cyc. 116 and cases cited.

Where there is no existing family relation, and where there is no agreement, one who performs services for another who is in a position to refuse or accept the same, but who actually accepts them and avails himself of their benefits, the law implies a promise to pay reasonable compensation, and a recovery may be had. 40 Cyc. 2808.

Robinson, J. The plaintiff brought this action against defendant in justice court to recover from defendant for services in his hotel from October 25, 1916, to March 11, 1917. In justice court and in the district court on the verdict of the jury the plaintiff recovered a judgment for $76.25 and interest. The defendant appeals to this court. The verdict is well sustained by convincing testimony and the appeal has no merit. There was no merit in the defense.

At Conway, defendant ran a hotel of eighteen rooms, kitchen, dining room, and office. His wife had left him with four small children, and he had no help only Annie Wherman, who in February, 1917, became the mother of a child conceived at the hotel. Under such conditions defendant was fortunate in securing the services of the plaintiff at $4, $5, or $6 a week, though he claims he did not agree to pay her anything, and that she worked for her board, and that she was not competent to testify to the value of her services. But little or no testimony is needed to show to judges or jurors of any common sense that $4 a week is very moderate pay for a woman of twenty-seven years doing

general hotel work. She testifies: "I washed dishes, cooked, did laundry and washing, baked pies and bread, washed clothes, worked all over the house, carried out the slops and brought in the water," and defendant told her to do it. After working six weeks she wanted to leave, and defendant would not let her go. Her testimony is entirely convincing. It far outweighs the testimony of the defendant. The charge of the court is manifestly correct. The case is simple. The defense has not the least merit.

Judgment affirmed.

R. H. BOWMAN, Respondent, v. ARITON RETELIEUK, John E. Burke, et al., Appellants.

(168 N. W. 576.)

Mortgage liens — action to cancel — mortgage barred by limitation — mortgage not paid — equity — action does not appeal to — will not lie.

The purpose of this action is to cancel mortgage liens on the ground that the mortgages have not been paid and that they are outlawed. Such an action does not appeal to equity, and this court has several times held that it does not lie.

Opinion filed May 3, 1918. On petition for rehearing July 9, 1918.

Appeal from the District Court of Ward County, Honorable *K. E. Leighton,* Judge.

Defendants appeal.

Judgment reversed.

E. T. Burke, for appellants.

The pendency of the first action between these same parties and involving the same subject-matter is a complete bar to this present action, so far as appellants are concerned. The issues made by our answer there were the same as here. Comp. Laws 1913, § 7446, cases cited.

Foreclosure is not a proceeding *in rem,* but is an action *in personam,* and the Statute of Limitations may be waived. Colonial & U. S. Mtg. Co. v. N. W. Thresher Co. 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 8 Ann. Cas. 1160; Bacon v. Mitchell, 14 N. D. 454, 4 L.R.A.

(N.S.) 244; Boucofski v. Jacobson, 26 L.R.A.(N.S.) 898; O'Toole v. Omlie, 16 N. D. 126; Adams v. Dickson, 66 Am. Dec. 608.

The plaintiff is in no position to plead the Statute of Limitations. He is in no better position than the mortgagor. He bought what title he has at sheriff's sale. Board Church Fund v. Seattle Church, 19 Wash. 455, 53 Pac. 671.

The Statute of Limitations is tolled; the issues are still pending in another and prior action. But, equity and good conscience require that the mortgage debt be paid as a condition to its cancelation. Board Church Fund v. Seattle Church, 19 Wash. 455, 53 Pac. 671.

"He who seeks equity must do equity."

If he wishes the mortgage canceled he must pay the debt secured. Tracy v. Wheeler, 15 N. D. 248, 107 N. W. 68.

McGee & Goss, for respondent.

The object and purpose of our amended statute upon the subject of defenses, in actions to quiet title, was to correct or change the rule applying to pleading by way of reply. Scott v. District Court, 15 N. D. 259; Sess. Laws 1909, chap. 3; Comp. Laws 1913, § 8152; Rev. Codes 1905, § 7527.

Outlawed encumbrances and bankruptcy discharge may now be pleaded by way of reply, and such defenses are available to a mortgagor or to one claiming title to the mortgaged premises under and in privity with the original mortgagor. Rev. Codes 1913, § 7358; Rev. Codes 1913, § 8152.

The mortgage here in question was outlawed at the commencement of this action. The statute has conclusively run against it. Colonial Mtg. Co. v. N. W. Thresher Co. 14 N. D. 147; Paine v. Dodds, 11 N. D. 189.

The mortgagor merely gave the mortgagee a remedy for the collection of the debt from the land, by an action to be brought against whomsoever might be the owner when the remedy became available. Colonial Co. v. Flemmington, 14 N. D. 181; Paine v. Dodds, 14 N. D. 189, 197; Mtg. Co. v. N. W. Thresher Co. 14 N. D. 147.

"The commencement of an action will not stop the running of the Statute of Limitations against a suit founded on a different cause of action." 25 Cyc. 1290; Lang v. Chocteau R. Co. 117 C. C. A. 146.

"Where the Statute of Limitations had run at the time the claim

for a lien was made, the equitable claim of a lien became a new and distinct cause of action." U. P. R. Co. v. Nyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; Whalen v. Gordan, 37 C. C. A. 70, 95 Fed. 305.

"A suit to establish a personal judgment as an equitable lien, but in a separate and distinct cause of action does not relate back to the commencement of the original action and is subject to the defense of limitations." 17 R. C. L. 227, 228, 872; Simpson v. Mercantile Co. L.R.A. 1915B, 1221; Hunter v. Ins. Co. 3 L.R.A.(N.S.) 1187.

"An injunction against the commencement of an action does not save the running of the Statute of Limitations unless the statute so provides." Osborn v. Lindstrom, 9 N. D. 1, 46 L.R.A. 755, 81 N. W. 72; Barclay v. Blackington, 127 Cal. 189, 59 Pac. 834; Lagerman v. Casserly, 23 L.R.A.(N.S.) 672 and note (Minn.) 120 N. W. 1086.

The mere pendency of an action between the same parties does not stay the Statute of Limitations from running.

"The defense of the bar of the Statute of Limitations applies strictly to the particular action to which it is pleaded, and hence if that suit be not brought within the statutory period the bar of the statute cannot be avoided by showing that another action has been brought by plaintiff against defendant on some cause of action within the period limited by the statute." 25 Cyc. 1290; 117 C. C. A. 146, 153.

ROBINSON, J. This action is for the cancelation of a mortgage lien. Both parties claim under a common grantor. The complaint is in effect that in 1904 Retelieuk made two mortgages, which have been assigned to Burke, and they have not been paid, and under a subsequent mortgage and the foreclosure of the same the plaintiff has become the owner of the title to the land in question. The plaintiff says to Burke: "My grantor gave you two prior mortgages which have not been paid though more than ten years have elapsed since such mortgages became due. Therefore I demand that your mortgages be canceled, with costs."

Now, the plaintiff stands in the place of his mortgagor and for him says in effect: "It is more than ten years since I gave you those two prior mortgages, and I have failed to pay either principal or interest.

Therefore I demand that the mortgages be canceled, with costs, and the court gave judgment that the mortgages be canceled, with $51.40 costs.

It seems quite ridiculous for a party to base a cause of action on an averment that he gave a mortgage and never paid it, and it is clearly contrary to the well-considered decisions of this court. Tracy v. Wheeler, 15 N. D. 248, 250, 6 L.R.A.(N.S.) 516, 107 N. W. 68.

But it is claimed that the law has been changed by chapter 3, Laws of 1909, which purposed to amend a section of chapter 5, Laws of 1901, in regard to a reply. It reads: "No reply shall be necessary on the part of the plaintiff except when the defendant in his answer claims a lien or encumbrance upon the property which prior to the commencement of the action was barred by the Statutes of Limitation or which shall have been discharged in bankruptcy. . . . The plaintiff may reply, setting up such defense and avail himself of the benefit thereof." Now if it was the purpose of the statute to change the substantive law under the guise of changing the form of pleading, then it is not an amendment and the purpose of the act is not expressed by its title. The title of chapter 3, Laws of 1909, relates merely to a matter of pleading,—a reply,—and not to any substantive act. If the purpose of this act was to give a party a right to maintain an action to cancel an outlawed mortgage, then that purpose should have been expressed in its title. Doubtless it is competent for a party to show by his pleadings that he gave a mortgage and disregarded his obligations for ten years and "to avail himself of the benefit thereof." But, as this court has held, such benefits amount to nothing and give no cause of action. It is vain for a party to plead the default of himself or his grantor as a cause of action or of benefits. The law does not offer a reward for the violation of contract.

Judgment reversed.

GRACE, J. I dissent.

BIRDZELL, J. (concurring). Without expressing any opinion upon the merits of the proposition advanced by respondent's counsel as an original proposition, I concur in holding that the judgment of the trial court must be reversed by reason of the controlling precedents in this

jurisdiction which are cited in the concurring opinion of Mr. Justice Christianson.

In view of the argument, however, that § 152 of the Compiled Laws of 1913 establishes a contrary rule, it seems to me proper to briefly state the reasons why this statute does not have the effect contended for. The portion of the statute relied upon is as follows: "No reply shall be necessary on the part of the plaintiff, except when the defendant in his answer claims a lien or encumbrance upon the property, which, prior to the commencement of the action, was barred by the Statutes of Limitation, or which shall have been discharged in bankruptcy, or which constitutes only a cloud, the plaintiff may reply setting up such defense and avail himself of the benefit thereof."

It will be noted that the statute is entirely silent as to the effect of a reply setting up the Statute of Limitations or a discharge in bankruptcy. In so far as the right of the mortgagor to have the lien of such mortgage annulled is concerned, a reply setting up these defenses would clearly preclude the defendant mortgagee from recovering a personal judgment against him.

The statute in fact only carries into the action for the determination of adverse claims the general rule of pleading according to which one relying upon the Statute of Limitations or a discharge in bankruptcy for a defense is required to plead it. Other sections of the statute governing actions to determine adverse claims (§§ 8151 and 8153 particularly) clearly contemplate that in such action there may be a personal judgment, as against a party to the proceeding, except a defendant served by publication and not appearing.

In order to establish a proper procedure whereby the plaintiff may avoid having a personal judgment entered against him upon a mortgage barred by the Statute of Limitations or bankruptcy, the statute in question was necessary, and it seems clear that when the statute is given this effect it secures to the plaintiff the "benefit" of such defense. If it had been intended to give to the plaintiff the right to have his title cleared of such a lien, in my opinion the language of the statute would have been much different from what it was.

CHRISTIANSON, J. (concurring specially).

I concur in the opinion prepared by Mr. Justice Robinson, for the

reason that the principle upon which the opinion is based has become so firmly established by the decisions of this court that it would constitute judicial legislation of the most radical kind to interfere with the rule as established. In Tracy v. Wheeler, 15 N. D. 248, 6 L.R.A. (N.S.) 516, 107 N. W. 68 (decided April, 1906), this court first held that a real estate mortgage securing a just debt which has not been paid will not be canceled at the suit of the mortgagor or one standing in his shoes, on the ground that the Statute of Limitations has run against the right to enforce it. The doctrine was reaffirmed in Boschker v. Van Beek, 19 N. D. 104, 122 N. W. 338; Keller v. Souther, 26 N. D. 358, L.R.A.1916B, 1218, 144 N. W. 671, and D. S. B. Johnston Land Co. v. Mitchell, 29 N. D. 510, 151 N. W. 23. In Keller v. Souther, 26 N. D. 358, L.R.A.1916B, 1218, 144 N. W. 671, the rule was held applicable, even though the plaintiff was a remote grantee of the mortgaged premises, and neither he nor the mortgagor personally were liable for the payment of the indebtedness, the mortgage having been executed by and to secure the debt of a third person.

It is contended by counsel for the plaintiff that the legislature enacted chapter 3 of the Laws of 1909 (the statute quoted in the opinion prepared by Mr. Justice Robinson) for the purpose of abrogating the rule announced in Tracy v. Wheeler, supra. It is asserted that the statute was not called to the court's attention in any of the subsequent cases wherein the rule announced in Tracy v. Wheeler, was reaffirmed, and is invoked for the first time in this case. The statute in question was adopted by the legislature in 1909. The purpose of the enactment, as declared in the title, was "to Amend § 7527 of the Code of 1905 Relating to Actions to Determine Conflicting Claims to Real Property." The section relates merely to matters of procedure, *viz.*, a reply in a statutory action to determine adverse claims. The rule announced in Tracy v. Wheeler was one of substantive law, and it seems that the legislature cannot be said to have intended to change this rule by enacting a section relating to a matter of procedure in a statutory action to determine adverse claims. The statute relating to such action was enacted for the specific purpose of authorizing that particular form of action. The section under consideration was enacted for the purpose of prescribing certain rules of procedure therein. It should be limited to and applied for the purpose for which it was enacted. Man-

ifestly, there ought not to be and cannot be one rule with respect to the cancelation of an outlawed mortgage in an action to determine adverse claims, and another rule when cancelation of such mortgage is sought in an action of some other nature or character.

BRUCE, Ch. J., concurring.

On Petition for Rehearing.

PER CURIAM. Plaintiff has filed a petition for rehearing wherein it is contended that the former opinion overlooked and failed to give proper consideration and effect to the statute enacted by the legislature in 1909. This statute is quoted in the opinion prepared by Mr. Justice Robinson. It is argued that as this statute was enacted after the decision was handed down in Tracy v. Wheeler, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68, that the legislature intended to abrogate the rule announced in that decision. It is said that "the legislative intent by the amendment was not to adhere to the old rule, but to obliterate it."

It is stated that the legislature amended the statute at the first opportunity after the decision in Tracy v. Wheeler was handed down. This argument is unsound and based upon erroneous premises. The decision in Tracy v. Wheeler was handed down in April, 1906. The next legislative assembly convened in January, 1907, but the statute upon which plaintiff relies was not enacted until 1909. The statute does not purport to have any application in any action except one to determine adverse claims. Its avowed purpose is to prescribe a rule of procedure in such actions. The case of Tracy v. Wheeler was not an action to determine adverse claims. It was an equitable action to cancel a specific mortgage. The complaint described the specific mortgage sought to be canceled with particularity, and gave the book and page of its record in the office of the register of deeds. The prayer for judgment was not "that the defendants be required to set forth their adverse claims, and that the validity, superiority, and priority thereof be determined" (as in actions to determine adverse claims), but the prayer was that the lien or encumbrance claimed by virtue of the specific mortgage described in the complaint be adjudged null and

void, and plaintiff's title quieted as against such claim. The rule announced in Tracy v. Wheeler was not one of procedure, but one of substantive law. And we are entirely satisfied that the members of the legislature did not have any intention in enacting this statute to abrogate and abolish a rule of substantive law.

In order that there may be no misunderstanding of our position with respect to the propositions involved in this case, we deem it proper to say that all the members of the court are agreed that the legislature had no intention of changing the rule announced in Tracy v. Wheeler et al. by the enactment of the statute relied upon by the plaintiff. And the majority of the court are agreed that the rule announced in that decision has become so well established that it ought not to be altered or abrogated by a judicial decision. If the rule is wrong, let the legislature abrogate it. The dissenting member of the court is, however, of the opinion that the rule announced in Tracy v. Wheeler is so fundamentally wrong that that decision and the subsequent decisions following it ought to be overruled.

BENJ. W. MAGNUSON and J. W. Magnuson, Copartners as Magnuson Brothers, Respondents, v. W. F. STIEHM, Appellant.

(168 N. W. 613.)

Accounting — action for — evidence — findings — judgment.

The action is one of accounting. Evidence examined and *held* to sustain the findings and judgment of the trial court.

Opinion filed May 25, 1918. Rehearing denied July 9, 1918.

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

F. B. Lambert, for appellant.

"If a buyer of personal property does not pay for it according to contract, and it remains in the possession of the seller after payment is due, the seller may rescind the sale or may enforce his lien for the

price in the manner prescribed by chapter 99 on Liens." Comp. Laws 1913, § 5966.

"One who sells personal property has a special lien thereon dependent on possession for its price, if it is in his possession when the price becomes payable; and may enforce his lien in like manner as if the property was pledged to him for the price." Comp. Laws 1913, § 6864.

"The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled." Comp. Laws 1913, § 7153; Talbot v. Bowd, 11 N. D. 81.

Hanchett & Johnston, for respondent.

The defendant was not entitled to any damages arising out of the lumber transaction. He was not entitled to the price he had paid for same, when he still retained title and possession. Comp. Laws 1913, § 7156.

GRACE, J. Appeal from the district court of McHenry county, North Dakota, Honorable A. G. Burr, Judge.

This action is conceded by both parties to be an action for accounting. It is not necessary to set out the pleadings, but we will refer to them after we have stated the facts for the purpose of indicating where the burden of proof lies in this action, this being one of the main contentions in the case.

On the 19th day of October, 1915, the defendant sold his stock of lumber then located at Drake, North Dakota, to the plaintiffs. Such sale was by written contract. It is unnecessary to set out the contract in full; it is only necessary to state that the contract provided that plaintiff bought and defendant sold the stock of lumber at the 1915 invoice price as shown by the books and shipping bills, and in addition thereto the sum of $5. The contract further provided that the defendant until December 1, 1916, was to be allowed to purchase lumber and building material from the plaintiffs at 10 per cent above invoice price laid down in the yard during such period. The right of the defendant to purchase lumber from the plaintiffs under such contract to December

1, 1916, was limited to a dwelling house in Drake and all building and lumber materials needed by the defendants on the farm in the Drake territory then owned by him. The stock of lumber was situated on lots 14 and 15 in block 2 in the original town site of Drake. There is a covenant in the contract that the defendant would lease such lots to the plaintiffs at $8 per month for a period of three years from the date of the contract, with the privilege, to said plaintiff, to extend said lease for two years, and a provision, in the lease, that the plaintiffs might purchase said lots for $800 at any time during the life of the lease. The foregoing is the substance of the contract and all that need be referred to.

Plaintiffs went into immediate possession and all the rough lumber outside of the sheds was inventoried or listed. The inside lumber or that in the shed was not listed. There is some controversy about some lumber claimed to have been burned or partially burned in one of the sheds. Checking up an inventorying of all this finishing lumber seems to have been completed in the month of February, 1916.

It is conceded that the plaintiffs paid the defendant $3,150. We refer now to plaintiffs' amended complaint, which first states that the plaintiffs claim $494.50 for lumber and material sold back to the defendant after the purchase of said lumber stock by the plaintiffs. Referring to the pleadings, it is found the amended complaint states cause of action for lumber and material sold the defendant for $494.50, which lumber and material was sold to defendant under that clause of the contract above referred to, where defendant had the privilege of purchasing lumber until December 1, 1916, at cost price, at the yard, plus 10 per cent. The complaint goes on further to allege the purchase of the stock of lumber under the contract, and alleges the payment of $3,150 on that account, and alleges that said amount was sufficient to pay and did pay any and all sums which the defendant might have coming from the plaintiffs for the purchase price of said lumber under said contract, and alleges there is nothing due from the plaintiffs to the defendant upon such account, and the prayer, in the plaintiffs' complaint, asks that it be adjudged that there is nothing due from the plaintiffs to the defendant, and asks for judgment of $494.50 against defendant.

The answer alleges there are mutual obligations existing between plaintiffs and defendant, then sets out the contract in full, and alleges

the failure and neglect of the plaintiffs to comply with the contract, and alleges that the plaintiffs owe the defendant $236.73 on principal and $40 interest, and further alleges that the plaintiffs failed and refused to allow the defendant the full price agreed to in their contract; that the plaintiffs failed and refused to allow the defendant the full rights agreed to in their contract and refuse to give him credit for materials and lumber, and failed to deliver the defendant lumber and building material he ordered from time to time in accordance with his contract, even when they had such building material on hand, thus compelling the defendant to go elsewhere and pay the regular retail price for such stock, and alleges that plaintiffs have overcharged the defendants for lumber and building material purchased under said contract. The answer then concludes with a prayer for an accounting, and that the defendant have judgment for the amount found to be due.

The merest inspection of the pleadings discloses that the plaintiff seeks to recover nothing excepting the account for $494.50, which was lumber sold by plaintiffs to the defendant, under that clause of the contract to which we have previously referred, for defendant's use. Plaintiff, in his complaint, claims that part of the original contract, which had reference to the payment for the stock, had been satisfied by the payment of $3,150, and claims the contract was fully completed in this regard. It would appear, therefore, that the plaintiffs were not seeking an accounting of the whole transaction, but simply the recovery for the $494.50 item, most of which was concededly due them. The defendant, however, comes in and sets up the contract in full, and alleges there are mutual accounts existing between the parties, and demands a full accounting of all the transactions. With the pleadings in this state, we agree with the conclusion of the trial court that the burden of proof was with the defendant. The plaintiffs' claim being conceded that there was $3,150 paid on the purchase price, and plaintiffs claiming that was the whole of the purchase price, and claiming that to be a payment in full for all the material, the burden is on the defendant to show it was not.

The amount of the value of the property at the time of the making of the contract was an unknown quantity, and it would appear to us that the burden of proof was on defendant to show the amount of property, to wit, lumber and building material which he sold plain-

tiffs and the value thereof; and especially is this true where plaintiffs allege the payment of a sum of money, and alleges that to be a full payment of the property so purchased under the contract. This view appears to be still more reasonable when it is remembered that the defendant purchased all the lumber and building material in question, and as such purchasers received the invoices and had greater opportunity to ascertain the value of the stock of lumber as determined by the invoices, or, if they were lost, then by submitting other competent evidences of value, than would the plaintiffs. For these reasons, we think, in this case, the burden of proof was clearly on the side of the defendant.

The defendant claims there was a settlement agreed upon for the amount shown in exhibit 33, which was $3,443.50 less $49.50, or $3,394. Exhibit 33 is claimed to show a total which is claimed to be a total invoice price as shown by exhibits 6 to 18 inclusive.

It is clear from the testimony, there was no settlement on the basis claimed by defendant, ever entered into by the parties. It is also equally clear from the answer, that there was no settlement on the basis claimed by the defendant. There was no attempt, in the defendant's answer, to plead the settlement. If the defendant relied upon the settlement which he claims he made, he would not be asking for an accounting. He would have alleged the settlement and the amount thereof and set it up as a counterclaim against the claim of the plaintiffs. The defendant does not do this, but sets up various grounds for recovery against the plaintiff. For instance, that the plaintiffs failed and refused to allow the defendant the full price in the contract, and refused to give him credit for lumber and material returned; that they refused to deliver to the defendant the lumber and building material he ordered from time to time, in accordance with his contract, even when they had such building material on hand, thus compelling the defendant to go elsewhere and pay the regular retail price, and for this the defendant claims damages. The defendant is also claiming for rents alleged to be owing him from the plaintiffs; and the defendant further alleges that he has applied to the plaintiffs for a settlement and an adjustment of their accounts, and has offered to produce his books and compare the same with the plaintiffs; and the plaintiffs refused and still refuse to adjust said mutual accounts. It is not neces-

sary to discuss, further, defendant's claim of settlement on the basis alleged by him. There was no such settlement.

If the findings of the trial court are not against the preponderance of the evidence, such findings should be sustained and the judgment affirmed. What evidence is there to sustain these findings?

The main evidence adduced in addition to the oral testimony of the witnesses is that of exhibit 3, which is a book alleged to contain the inventory and price of the stock of lumber, made in pencil by one Prychal. It totals $3,091.21. Exhibit 19 is an inventory of the same stock and prices which was prepared by Ben Magnuson, which totals $3,232; and exhibits 6 to 18 set forth the prices of the same stock, which exhibits were prepared by the defendant and total $3,394. Each of these exhibits was admitted in evidence, and we think the first two are sufficient to sustain the findings and judgment of the trial court. Prychal, who made exhibit 3, was an experienced lumberman in charge of the Bovey Shute Lumber Company at Drake, which was a line yard. He testified that he arrived at the prices stated in the inventory by an examination of his own invoices. He testified that, in 1915 and 1916, he was familiar with the 1915 invoice prices for western lumber at Drake, so that there is no doubt of his qualification as a witness. He made up a list of the lumber that was in the Stiehm yard in 1916. It was about a year after the plaintiffs purchased the same, and describing how this list was made out, in his testimony, he says:

Q. And how was that list made out?

A. Well, in the first place, we were called over there, myself and my man, and we each had a book; I had one and my man had one. Mr. Stiehm had one, and his son, Mr. Stiehm, also had one, and his daugher also took a copy of this from Mr. Stiehm's book and from his son's book.

Q. Was Mr. Magnuson there?

A. He also had a book.

Q. A book with a list of this lumber?

A. Yes.

Q. Mr. Stiehm was there with a book, a list of this lumber?

A. Yes. In other words, a five way check.

Q. Mr. Stiehm's son had a book?

A. Yes.

Q. How many copies were being made at the time?

A. Two copies. I was making one and Mr. Weber and Miss Stiehm, Mr. Stiehm's daughter.

Q. And was the list you made up checked up with the list Mr. Stiehm and Mr. Magnuson had?

A. Yes.

Q. And was it all checked over so as to see it was accurate and correct?

A. Certainly.

Q. I will now show you this book marked exhibit 3, and ask you if that is a list of lumber and building material which you made up at that time?

A. Yes, sir.

Prychal's testimony further shows he put the price on it at the 1915 invoice price. In other words, the value of the material set forth in exhibit 3 was valued according to the invoice price which Prychal paid for the same kind of lumber in 1915, and when exhibit 3 was finally completed, Prychal obtained the amount we have before stated. Defendant seeks to show there was a difference in price to line yards and independent yards, and that Prychal had not shown himself qualified to testify as to the price of lumber to independent yards. We do not find, however, there was any actual difference of prices shown, nor the amount thereof. It is clear that Prychal was well qualified as a witness to know the value of lumber in 1915 and 1916, and his testimony was competent, and he must be conceded to be a disinterested witness. He also testified there was no difference between the prices to the line yards and the prices to independent buyers. Exhibit 19 strongly tends to support the findings of the trial court. Exhibit 6 to 18 supports the claim of defendant, but there is nothing about exhibits 6 to 18 which gives them greater weight than the other exhibits, 3 and 19. Exhibits 6 to 18 were thirteen pages of items of the stock, giving prices of the stock, and was prepared by the defendant. We are quite clear that the findings of the court and the judgment are quite well sustained by competent testimony and evidence.

The defendant complains that the plaintiffs refused to sell him lumber and neglected to furnish lumber under that clause of the contract which provides that the defendant should be permitted to purchase lumber for a certain house in Drake and certain farm buildings until December 1, 1916, at wholesale and invoice price plus 10 per cent. There is no showing that plaintiffs refused to sell lumber to defendant under the terms of said contract when they had such lumber on hand and in stock. There is no showing that defendant notified the plaintiffs just what kind of lumber he was going to need, and, under the contract as it stands, we do not believe defendant was bound to have on hand, under penalty of damage, just what lumber defendant was going to call for. The reasonable interpretation of said part of the contract is that until December 1, 1916, defendant had the privilege of purchasing, from the plaintiffs, such lumber as defendant desired to purchase and plaintiffs had on hand, at 10 per cent above wholesale or invoice price, for use as provided by the contract. There is nothing obligatory on the plaintiffs to keep on hand any specific kind of lumber or material which defendant might so purchase at 10 per cent above wholesale price; neither did the plaintiffs bind themselves to keep any particular kind of lumber on hand out of which to satisfy defendant's demands. The clause in the contract was only a privilege extended to defendant for a certain time to purchase such lumber and material as the plaintiffs kept on hand at a lower rate than the regular retail price, and there was no agreement to deliver any specific kind or quality of lumber, and, in this regard and for the reasons above stated, the case is clearly distinguishable from that of Talbot v. Boyd, 11 N. D. 81, 88 N. W. 1026. In that case, the defendant agreed to exchange an equal number of bushels of wheat in February, 1908, with the plaintiff for certain other wheat, the defendant's wheat being seed wheat. The plaintiff, in that case, was to haul his wheat to the elevator and deliver the storage tickets to the defendant. Plaintiff complied with his part of the contract and demanded the seed wheat from the defendant, which was not forthcoming, and the plaintiff recovered damage for the breach of the contract. The facts and the contract in the two cases are very different, and hence we cannot see that Talbot v. Boyd was really in point.

Defendant makes claim for certain posts, claiming that he retained

possession, therefore had a lien on them under § 5966, Compiled Laws 1913, and § 6864. And we read the evidence, however, the posts were part of the stock sold to the plaintiffs, and such sale being completed, plaintiffs took immediate possession. This is conceded by the defendant where, in his brief, he uses the following language: "It is conceded by both parties that under the foregoing contract possession was immediately given, by the defendant to the plaintiffs, of the lumber yard and the stock therein contained; that at once, after going into possession, plaintiffs and defendant inventoried all of the rough lumber outside of the sheds, and within a week had completed such inventory," etc.

Defendant could not turn over possession of the yard and the stock and still retain possession. If he turned over possession which he did, he had no possession left out of which any lien could arise under the sections quoted. We hold that he had not possession of such posts and is entitled to no lien.

The only remaining question we consider is the question of rents, and in this regard we do not think the defendant has shown himself entitled to any rent. The item of $50 for rent of the lumber sheds clearly could not be recovered, as under the contract the plaintiffs were to have the use of the sheds as long as they should remain on the premises. The $20 item for lot 7 in block 2 is claimed by reason of a pile of building material being allowed to remain on the rear end of the lot abutting the lumber yard lots. The $25 charge for lot 15 in block 3 is claimed for leaving a pile of posts which were part of the posts purchased from the defendant upon a lot which adjoins the defendant's residence. Plaintiffs testify that defendant told him the posts could remain where they were until sold out, and that they need not move the same. If this be true, defendant could not recover the $25. Most of the posts were sold shortly after the purchase of the lumber shed. We do not think defendant is entitled to recover anything for this charge. The plaintiffs also testify that the defendant told them they might let the lumber remain on lot 7 in block 2 until sold. It also appears that this lot fronts upon Main street, and was rented to another party who had a place of business on the lot. We do not think defendant is entitled to recover anything by reason of the $20 claim for rent.

The learned judge of the district court appears to have given care-

ful consideration to this case; and the case being one of accounting, his findings and conclusions ought to receive careful consideration.

We are convinced, and are of the opinion, that the findings of the trial court are well sustained by the evidence.

The judgment appealed from is affirmed, with costs.

B. C. LEIFERMAN, Respondent, v. ELDON WHITE and Samuel La Due, Copartners, Doing Business as White Ice Cream Factory, Appellants.

(168 N. W. 569.)

Personal injuries — resulting from the handling of an electric light suspended by a cord — damages — action to recover — res ipsa loquitur — doctrine of — verdict — evidence to support.

In an action for personal injuries alleged to have been sustained by reason of burns and an electric shock occasioned by the handling of an electric light suspended by a cord, the evidence is examined and *held* to present a proper case for the application of the doctrine of *res ipsa loquitur*, and that there was sufficient evidence to support the verdict of the jury in favor of the plaintiff.

Opinion filed May 25, 1918. Rehearing denied July 9, 1918.

Appeal from District Court, Ward County, *K. E. Leighton*, J. Affirmed.

Palda & Aaker, and *E. T. Burke*, for appellants.

NOTE.—As to whether the doctrine of *res ipsa loquitur* applies, to cast on the company the burden of negativing its negligence in the premises, where a company furnishing electricity for lighting purposes has installed wires and appliances to convey into a building electricity for domestic and lighting purposes, and one in such building taking hold of an incandescent lamp in a reasonably prudent manner, to turn on the light, is severely burned and shocked by an escape of electricity from the lamp or its connecting part, see notes in 22 L.R.A.(N.S.) 1183, and 32 L.R.A.(N.S.) 848, on applicability of rule *res ipsa loquitur* to accident on private property, due to escape of electricity from disordered electrical appliances.

On sufficiency of evidence of negligence of person injured by hand coming in contact with a defective insulated electric wire, see note in 100 Am. St. Rep. 524.

Res ipsa loquitur, if thoroughly understood and intelligently applied, is one of the wisest and most wholesome of legal doctrines. It much resembles the doctrine of circumstantial evidence in criminal cases. If a man is found dead near a damaged wire carrying death dealing voltage of electricity, it may well be presumed, in the absence of an eyewitness, that he was killed through the negligence of the electric company. Houston v. Tractor Co. 155 N. C. 4.

But the fact of the damaged wire, or overcharge of electricity is just as much a part of the proof required as is the fact of the accident itself. Western Coal Co. v. Garner, 22 L.R.A.(N.S.) 1183.

In all such cases the plaintiff is required to show defective electrical appliances in addition to proof of the accident. Ibid. Fitzgerald v. Southern R. Co. 6 L.R.A.(N.S.) 337, 361, note; Colfax v. Harter (Iowa) 100 N. W. 508.

Circumstantial evidence or *res ipsa loquitur* cannot speak anything that the circumstances themselves do not show. If the circumstances show an accident, and also defective apparatus, negligence upon the part of the person whose duty it is to maintain the same is presumed. Hoffman v. Power Co. 91 Kan. 450.

E. R. Sinkler, and *M. O. Eide,* for respondent.

The question as to whether the electric light from which plaintiff received the injury was in the same condition when examined by the experts as when plaintiff was injured, or whether in the meantime it had been tampered with, was one for the jury. Boyd v. Portland Electric Co. 66 Pac. 578.

We can eliminate all direct evidence of negligence and still have sufficient facts and circumstances to warrant the jury in finding negligence on the part of defendant and to sustain the verdict, under the doctrine of *res ipsa loquitur.* The facts and circumstances point conclusively to negligence. This whole question was one for the jury, and the jury having found negligence, even though such finding may be based upon circumstantial evidence alone, such finding ought not to be disturbed. Especially is this true where, as in this case, the defendant put witnesses upon the stand and offered proof to overcome the presumption of negligence. Boyd v. Portland Electric Co. 66 Pac. 528; Uggla v. West End R. Co. 39 Am. St. Rep. 481; Winkelman v. Kansas City Electric Light Co. 83 S. W. 99.

In case of injury where the agency causing the injury is under the control of the defendant, and the injury is such as in the ordinary course of things would not have occurred if the defendant had exercised proper care, the rule of *res ipsa loquitur* applies. Fitzgerald v. Southern R. Co. 6 L.R.A.(N.S.) 361, note; Western Coal Co. v. Garner, 22 L.R.A.(N.S.) 1183 note; 9 R. C. L. (electricity) 30; Alabama v. Appleton, 26 Ann. Cas. 1184, note; Alexander v. Nanticoke Light Co. 17 Am. Neg. Rep. 354, note; Denver Com. Elec. Co. v. Simpson, 31 L.R.A. 566; Harter v. Colfax Electric Light Co. 100 N. W. 508; Gilbert v. Duluth General Electric Co. 100 N. W. 654; Phelan v. Louisville Electric Co. 6 L.R.A.(N.S.) 460; Turner v. So. Power Co. 32 L.R.A.(N.S.) 852; Delahunt v. United Tel. Co. 20 Am. Neg. Rep. 727; Hebert v. Lake Charles Ice Co. 100 Am. St. Rep. 524, note; Denver Com. Ele. Co. v. Lawrence, 73 Pac. 41.

BIRDZELL, J. This is a personal injury action and comes to this court upon an appeal from a judgment in favor of the plaintiff and from an order denying a motion for a new trial, or, in the alternative, for a judgment notwithstanding the verdict. The facts are as follows: The plaintiff, at the time of the injury complained of, was employed by the defendants, who conducted a confectionery business and ice cream factory at Minot, as copartners under the name of White Ice Cream Factory. On the 8th day of May, 1915, the defendants directed the plaintiff to sort potatoes which were situated in the basement of the building occupied by them. The basement was lighted by means of electric lights suspended from the ceiling by cords. While there is some conflict in the testimony relative to the directions given to the plaintiff by White, it appears either that the plaintiff was directed not to touch the light that was suspended on a long cord, or that he was directed to be careful not to break the light. The plaintiff went to work sorting the potatoes about 1 o'clock in the afternoon, and after he had been at work a short while, one Davy, a foreman having direct supervision over plaintiff's work, heard an outcry from the basement and was the first to go down to determine what the trouble was. He found the plaintiff lying against the wall, with blood running down his face from a wound over his eye. When found by Davy, the plaintiff had the electric light globe and wire in his hands. In falling, he

had torn the wire from the fixture in the ceiling. Davy, with the aid of another employee, Lowe, who had been called to assist, helped the plaintiff up and put water on him to revive him. Plaintiff claims to have received an injury on the hand, in the nature of a burn, and a cut over one of his eyes. He sought medical attention at once, and later, on the same afternoon, went back to work. His testimony shows, however, that, by reason of the shock and the injuries received, he was unable to work for considerable time after the day of the accident. There was no direct evidence going to show any negligence on the part of the defendants in connection with the electric wiring or with the character of the current used in the building. There is some testimony, however, going to prove an admission on the part of Davy, the foreman, to the effect that he had some knowledge of a dangerous condition of the wiring. The testimony referred to is that of one George Prem, who testified that on the day plaintiff was hurt he was in White's store and heard Davy say in substance that "if the thing (meaning the wire cord) had not been pulled out of the ceiling, Lieferman would have been killed," and that, "when he heard Lieferman holler, he knew what was the matter and went and turned off the switch." In addition to this testimony there is evidence given by expert witnesses called by the defendants, to the effect that electric appliances such as those in question, in approved condition with perfect insulation, can be handled without giving a shock to a person taking hold of the bulb; further, that all of the wiring and the socket were inspected and found to be perfect and the insulation found to be perfect; also that the socket was of standard make and of a kind that was in general use. The jury returned a verdict in favor of the plaintiff for $750, upon which judgment was entered.

Error is predicated upon the refusal of the trial court to grant defendants' motion for a directed verdict at the close of the plaintiff's case, and upon the denial of the motion for judgment notwithstanding the verdict, or for a new trial. Upon this appeal it is contended by the appellants: First, that the evidence is insufficient to show that the plaintiff sustained any injury; second, that, if injured, the injury was occasioned by a risk assumed by the plaintiff as being incident to his employment; third, that plaintiff was guilty of contributory negligence;

and, fourth, that the evidence shows no negligence on the part of the defendants.

The first three contentions are so lightly treated in the brief of the appellants that we can scarcely regard them as being seriously urged upon this appeal. Furthermore, an examination of the record shows that, so far as these contentions are concerned, there was undoubtedly ample evidence upon which to submit the case to the jury. All of the evidence, however, going to establish the plaintiff's version of the case upon these matters, was disputed, and the defendants attempted upon the trial to discredit a large part, if not all, of it by impeachment. But this attempt resulted in creating issues as to the credibility of witnesses, which could only be decided by the jury. The verdict of the jury having been against the defendants, it must be assumed that the attempt to discredit the plaintiff's witnesses upon these matters failed.

The appellants support the fourth contention by a well-considered argument, which merits the serious attention of this court. The chief argument is that, as the plaintiff has introduced no direct testimony going to establish negligence on the part of the defendants, there is no issue to be presented to the jury. On the other hand, the respondent contends that, having shown the circumstances surrounding the accident, chief of which was the finding of the plaintiff in a dazed, stupefied, or unconscious condition, with the electric appliances in his hands which had been torn loose from the fixture, and with a burn on his arm and a cut over one eye, a situation was presented justifying an inference of negligence by the jury. In short, it is contended that, according to the doctrine of *res ipsa loquitur,* it became incumbent upon the defendants to establish that they had exercised that degree of care in the fulfilment of their duties to the plaintiff which would excuse them from any responsibility for his injuries. We cannot adopt the limited application of the doctrine of *res ipsa loquitur* for which the appellants contend. The appliance in question was shown to have been under the control of the defendants, and the accident was such as would not have happened in the ordinary course of events had proper care been used. It is in just such circumstances that the law allows the jury to draw the inference of fact that the defendant was negligent. If the circumstances afford a reasonable explanation and one wholly consistent with the exercise of due care on the part of the defendant the eviden-

tiary value of the circumstances themselves as proof of negligence would be lessened. As we understand the doctrine of *res ipsa loquitur,* it merely permits the jury to draw upon their experience in determining whether or not a given set of circumstances is consistent with the exercise of reasonable care on the part of the defendant. It takes the circumstances themselves as evidence of negligence, because it is reasonable to do so. Surely there can be nothing unreasonable in allowing the facts surrounding the accident in question to be weighed by the jury as circumstantial evidence of negligence on the part of the defendant. This is all that is accomplished by the doctrine of *res ipsa loquitur.* If any doubt existed upon this point in the instant case, it would be largely dispelled by taking into consideration the testimony of the defendants' own expert witnesses.

The witness McGuire testified as follows:

Q. If a bulb is defective or if the insulation is defective in an electric light, a man may receive an electric shock?

A. It is possible if it is defective. . . .

Q. Is it not a fact that persons have received shocks while the light was burning? Turning it on?

A. Not from perfect insulation. . . .

A. I said he would not receive a shock if the insulation were perfect.

Q. If it is imperfect, would he?

A. Yes.

The testimony of the expert witness Nelson is substantially to the same effect. There can be no doubt that, from the evidence descriptive of the accident itself, a jury would be warranted in finding that the accident was occasioned by an electric shock received by the plaintiff while handling an appliance which, in ordinary circumstances, would not have been sufficiently dangerous to occasion any injury; and when these circumstances are viewed in the light of the expert testimony, it cannot be said that the jury was unwarranted in inferring that something was wrong, with either the current or the appliance. The testimony of the defendants' own witnesses goes far to establish that the defect, if any existed, was in the appliance; since it was shown by them

that perfect insulation would have prevented one handling the appliance from receiving a shock. The witness McGuire also testified that a current of 110 volts, which is that ordinarily used in lighting a building of this character, is what was supplied to the building in question. True, defendants' evidence goes further to establish that the wire and socket found in the hands of the plaintiff were perfect in their insulation; but it appears that several weeks elapsed between the time of the accident and the inspection of the wire and socket used as an exhibit in this case, and that they were in the control of the defendants during all of the time. As a general proposition, the credibility of an explanation offered to rebut a prima facie case afforded by an accident of this character is a question for the jury. Curtis, Electricity, § 592. We are aware of no principle that requires the restriction of the doctrine of *res ipsa loquitur* to an extent which would preclude its application to a situation such as is presented in the instant case. On the contrary, we regard the principle as clearly applicable. Curtis, Electricity, § 597.

One of the principal cases relied upon by the appellants is that of Harter v. Colfax Electric Light & P. Co. 124 Iowa, 500, 100 N. W. 508, where it was said by the court: "The maxim, *Res ipsa loquitur,* does not apply to such a case as this, for there is no evidence that the accident was due to a dangerous current knowingly or even negligently sent into the hotel by the defendant company." But an examination of that case discloses that it is not an authority for such a limited application of the doctrine as the appellants contend for. The action in that case was against the power company which supplied the current; the wiring was in control of another and had been done by an independent agent; and the injury was occasioned primarily by the negligence of the person who had wired the premises, in fastening the wires so insecurely that they fell upon the plaintiff. Manifestly, under such circumstances, the jury would not be warranted in inferring negligence on the part of the defendants from the bare facts descriptive of the accident.

As we view the record in this case, it cannot be said as a matter of law that the jury was not warranted, under all of the evidence, in find-

ing that the plaintiff's injuries were caused by the negligence of the defendants.

Finding no error in the record, the judgment of the District Court is affirmed.

CHRISTIANSON, J. (dissenting). I dissent. In my opinion the doctrine of *res ipsa loquitur* has no application in this case. This doctrine is not one of substantive law, but is a rule of evidence. In all cases the party who seeks to recover damages for injuries occasioned by the negligence of another must show that the injury is more naturally to be attributed to the negligence of the defendant than to any other cause. The doctrine, *res ipsa loquitur,* does not dispense with this rule. It merely determines the mode of proving, or what shall constitute prima facie evidence of, negligence. The phrase, *res ipsa loquitur,* means literally that "the thing itself speaks," or "the thing speaks for itself." As applied by the courts, the doctrine designated by the phrase means that the very occurrence of the accident, under the circumstances shown in proving the accident itself, imports negligence. In other words that, from the facts and circumstances proved with respect to the occurrence of the accident, reasonable men may infer that it was occasioned by reason of the negligence of the party sought to be charged.

"The 'res' in the maxim, *Res ipsa loquitur,* is not simply an accident resulting in injury, but the accident and the surrounding circumstances, and the doctrine does not permit a recovery without some proof of negligence, but, if the occurrence was such that it could not have happened without negligence according to the ordinary experience of mankind, the doctrine is applied, though the precise omission or act of negligence is not specified." Robinson v. Consolidated Gas Co. 194 N. Y. 37, 28 L.R.A.(N.S.) 586, 86 N. E. 806.

"The ordinary application of the maxim is limited to cases of an absolute duty, or an obligation practically amounting to that of an insurer. Cases not coming under one or both of these heads must be those in which the circumstances are free from dispute, and show not only that they were under the exclusive control of the defendant, but that in the ordinary course of experience no such result follows as that complained of. It is sometimes said that the mere happening of an accident in this class of cases raises a presumption of negligence, but

this is hardly accurate. Negligence is never presumed. If it were, it would be the duty of the court, in the absence of exculpatory evidence by the defendant, to direct a verdict for the plaintiff, whereas in these cases the question is for the jury. The accurate statement of the law is not that negligence is presumed, but that the circumstances amount to evidence from which it may be inferred by the jury." Minneapolis General Electric Co. v. Cronon, 20 L.R.A.(N.S.) 816, 92 C. C. A. 345, 166 Fed. 659.

The doctrine was defined by Erle, Ch. J., in giving his judgment in a noted case, thus: "Where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." Scott v. London & St. K. Docks Co. 3 Hurlst & C. 596, 159 Eng. Reprint, 665.

"This definition," says Thompson (1 Thomp. Neg. § 15), "has met with such general approval at the hands of judges in subsequent cases that it has become, so to speak, a legal classic. The meaning is not that the mere happening of an accidental injury is, of itself and in the abstract, presumptive evidence of negligence; it is that, in the numerous cases which fall within the above definition of the principle, the fact of the accident, when viewed in connection with the circumstances under which it took place, tends to demonstrate negligence, subject to explanation."

The maxim sprang into existence by reason of the vast increase in modern times of the use of powerful machinery, harmless in normal operation, but capable of serious human injury if not constructed or managed in a certain mode. Wyldes v. Patterson, 31 N. D. 282, 316, 153 N. W. 630. The particular force and justice of the doctrine, regarded as a rule throwing upon the party charged with negligence the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him, but inaccessible to the injured person. Wigmore, Ev. § 2509. Professor Wigmore, in discussing the doctrine and its application, advances the following considerations that ought to limit its application: (1) The apparatus must be such that in ordinary in-

stances no injury is to be expected, unless from a careless construction, inspection, or user; (2) both inspection and user must have been at the time of the injury in the control of the party charged; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action at the time of the party injured. Wigmore, Ev. § 2509.

The application of the doctrine depends upon the facts and circumstances of each individual case. It cannot be invoked between employer and employee, unless it appears from the circumstances attending the accident that except for some negligence of the master, either of omission or commission, the accident could not have happened. Feingold v. Ocean S. S. Co. 61 Misc. 638, 113 N. Y. Supp. 1020. See also Cederberg v. Minnesota St. P. & S. Ste. M. R. Co. 101 Minn. 100, 111 N. W. 955.

In applying the doctrine against an electric light company, when a person was injured while adjusting an electric light in his residence, by an electric shock transmitted from outside wires entirely without fault on his part and in a manner which would not have happened if the wires had been in proper condition, the United States Supreme Court stated the doctrine of *res ipsa loquitur* thus: "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 56 L. ed. 680, 32 Sup. Ct. Rep. 399.

Bearing these principles in mind, it is difficult to understand how the doctrine can be said to have any application in the case at bar. It is not contended that the electric light involved in this case was either installed or operated by the defendant. On the contrary, it appears from the record that it was connected with and lighted by current furnished by the Electric Light Company which operates the lighting system of the city of Minot. It was an ordinary electric light,—such as was installed in the various homes and business places in the city of Minot, and for that matter generally throughout the state and country. The defendants maintain a small ice cream factory. They

had some potatoes in the basement. The plaintiff was engaged to sort these potatoes. Some conversation was had with respect to the light. He was either directed not to touch it, or else to be careful not to break it. There is no contention that he was ordered to move it. He endeavored to do so, however, and it was while attempting to do so that he was injured.

The defendants were bound to exercise due care in protecting their employee from injury. What constitutes due care is to be "estimated on a consideration of the facts of each particular case." It is such care as reasonable and prudent men would use under the same or similar circumstances. Conversely, the defendants, as masters, were not required to exercise any higher standard of diligence or skill than that which a reasonably prudent and careful man may be supposed to exercise under the circumstances. Labatt, Mast. & S. §§ 906, 907.

The work in which plaintiff was engaged was certainly not peculiarly dangerous. It is such work as might be performed in the cellar or basement of almost any farmhouse and in many, if not most, homes in the cities of this state. If it is true that the very happening of the accident in the case at bar imports negligence, then it is equally true that the happening of a similar accident in any home imports negligence. Either there is a duty incumbent to have electric lights tested, or there is not. Will it be contended that this is a practice or custom followed by persons of ordinary prudence and care, or even by persons of extraordinary prudence and care? I think not. I am firmly of the opinion that the doctrine of *res ipsa loquitur* has no proper application in this case.

GRACE S. YOCUM and E. L. Yocum, Appellants, v. WILLIAM E. CHISMAN and J. J. Conboy, Copartners Doing Business as Chisman & Conboy, Respondents.

(168 N. W. 621.)

Land — conveyance — subject to mortgages — grantees assuming and agreeing to pay — payments made by grantors — action to recover back — lost deed.

1. In this case the plaintiff conveyed to the defendants a quarter section

of land subject to five mortgages. Then they had to pay on the fifth mortgage $550 and interest, and they sue to recover the same on the ground that by the deed which was lost defendants assumed and agreed to pay all the mortgages.

Agreements in deed — evidence conflicting — burden of proof.

2. The plaintiffs each swear that the deed contained such a covenant. The defendants swear it did not, and the trial court found it did not, and that defendants did not in any manner assume or agree to pay the mortgages.

Trial court — findings of — weight to be given them — evidence — proof — burden of.

3. We may not all agree concerning the weight to be given to the findings of the trial judge, but we must all agree that in such a case some weight should be given to the findings. We must all agree that great weight is to be given to the undisputed fact and the probabilities; also that plaintiffs have the burden of proof, and it is for them to sustain their appeal by convincing evidence.

Testimony — not convincing — in favor of either party — burden of proof.

4. On the whole, the case is not free from doubt. There is no convincing weight of testimony in favor of either party. Hence, as the burden of proof is on the plaintiffs, the judgment is affirmed.

Opinion filed June 3, 1918. Rehearing denied July 10, 1918.

Appeal from the District Court of Ransom County, Honorable *Frank P. Allen,* Judge.

Plaintiffs appeal.

Affirmed.

Barnett & Richardson and *H. R. Turner,* for appellants.

"The contract by which a grantee assumes the payment of existing encumbrances is separate and distinct from the conveyance. It may be and often is embodied in the deed; but it may be a separate writing or it may rest entirely in parol." Moore v. Booker, 62 N. W. 607, 609.

Kvello & Adams, for respondents.

"The grantee of mortgaged land does not incur a personal liability for the payment of the mortgage debt enforceable by the mortgagee, merely because the deed recites it is made subject to mortgages; such personal liability is created only by a distinct assumption of the debt or a contractual obligation to pay it." 27 Cyc. 1343 and cases cited.

"The omission to insert in a deed a covenant that the grantee will

assume or pay a mortgage is strong evidence that the parties did not intend that grantee should be liable." 27 Cyc. 1348, note 27, title, Mortgages.

"If the deed had contained an express contract of assumption it would ordinarily be sufficient by itself." 27 Cyc. 1348, text.

ROBINSON, J. The plaintiffs aver that in May, 1914, they made to defendants a deed to a quarter section of land which was subject to certain mortgages; that in consideration thereof defendants assumed and agreed to pay the mortgages; that they failed to pay the same and, hence, the plaintiffs had to pay on a mortgage $625. The plaintiffs appeal from a judgment against them.

The deed was lost and the question is: Did the deed contain a covenant for the grantees to assume and pay the mortgages? The plaintiffs each swear that the deed contained such a covenant. The defendants swear it did not, and the trial court found it did not, and that defendants did not in any manner assume or agree to pay the mortgages.

We may not all agree concerning the weight to be given to the findings of the trial judge, but we must all agree that in such a case some weight should be given to the findings. We must all agree that great weight is to be given to the undisputed fact and the probabilities; also that plaintiffs have the burden of proof and it is for them to sustain their appeal by convincing evidence.

Defendants were in the real estate business. Chisman made out the deed himself on a regular blank, and such a form never has a printed covenant that the grantees shall assume or pay mortgages. If the deed had any such covenant, it was written or dictated by Chisman, and it is very improbable that he should do it.

The land was mortgaged for more than its value. In 1909 the plaintiffs purchased it for $6,400, turning in a stock of goods for $2,000. The mortgages were: $3,000; a commission mortgage $225; a third mortgage to the bank at Lisbon $1,000; the mortgage to defendants $900; a fifth mortgage to Stevenson (father of Mrs. Yocum) $550.

The total, with interest, amounts to $37.50 an acre.

It is improbable that defendants should have bargained to buy the land at that price. Their mortgage was prior to that of Stevenson's and they did not have to pay it. They knew they could redeem from a foreclosure and cut off the Stevenson mortgage. They did not consider the Yocum deed worth recording unless they could find a purchaser for the land at $37.50 an acre.

In regard to the clause in the deed that defendants assumed and agreed to pay the mortgages of record and that each mortgage was actually specified, the testimony of plaintiffs is not at all convincing, and indeed it is highly improbable, and the same is true of the testimony of each plaintiff concerning another deed marked exhibit "H." Concerning a copy of a letter marked exhibit "C" which plaintiffs put in evidence as a copy of a letter sent by them with their deed to the defendants, it is no cogent proof. It did not change or vary the terms of the deed. It was no part of the contract. It may never have been read by the defendants. Yet on the whole, the case is not free from doubt. There is no convincing weight of testimony in favor of either party. Hence, as the burden of proof is on the plaintiffs, the judgment is affirmed.

GRACE, J. (dissenting). A preliminary statement of the facts in this case will greatly assist in gaining a clear conception of the issues involved therein. From about the 1st day of October, 1913, until about the 8th day of April, 1914, plaintiffs were the owners of the premises described as the S. W. ¼ of section 1, township 135, range 57, Ransom county, North Dakota, which land they had purchased from or through the defendants in the fall of 1908, subject to the following encumbrances: A first mortgage to one Williams for $3,000; a commission mortgage to the same party for $225; third mortgage to defendants for $1,000; fourth mortgage to defendants for $900; and fifth mortgage to Stevenson for $550. These encumbrances amounted to about $37.50 per acre, and, according to the testimony, approximated the actual value of the land per acre.

The defendants had sold one of their mortgages to a bank, which mortgage they described as the second mortgage, which is the $1,000 mortgage, but, in fact, is the third mortgage on the land. The bank

foreclosed that mortgage, and the bank, getting possession of the land, sold it for $36 per acre, which was something less than the encumbrances against the land. Stevenson had notice and knew of the foreclosure above referred to during the time such foreclosure was being made.

The plaintiffs had moved from said land to the city of Fargo, prior to the execution and delivery by the plaintiffs of said land by warranty deed to the defendants, which deed became lost and was never recorded. The real issue in this suit is whether or not said lost deed contained a certain stipulation to the effect that the defendants, in said warranty deed from the plaintiffs, assumed and agreed to pay all the encumbrances then of record, which would include all the encumbrances we have heretofore enumerated. The plaintiffs claim that such clause was in said deed and immediately followed the enumeration of the mortgages in said deed which were described as mortgages of record. The defendants strenuously deny that said assumption clause and agreement to pay said mortgages was in said warranty deed, and this is the only issue in this case.

The plaintiffs were compelled to and did pay the $550 mortgage to Stevenson and bring this action against the defendants to recover under the alleged contract of the defendants to assume and pay said mortgage, together with the other mortgages then of record. The answer is a general denial.

The evidence relative to the issues involved in this case as above set forth consists mostly of letters passed back and forth between the plaintiffs and defendants. There are five letters which have a direct bearing upon the issue in this case. They were exhibits A, B, C, D, and E. Exhibit A is a letter written by E. L. Yocum from Dickinson, North Dakota, to the defendants. The letter was properly addressed, stamped, and placed in the postoffice, and the presumption is that it was received by the defendants. As these letters have a direct bearing upon the assumption clause in question, alleged to have been in the deed by plaintiffs and denied to have been in the deed by the defendants, the letters will tend to show whether or not such assumption clause was actually in the deed. Exhibit A is as follows:

Dickinson, N. D., Feb. 11, 1914.

Chisman & Conboy,
Lisbon, N. D.

Gentlemen:—

Your favor of the 9th inst. at hand and sorry to note the condition of affairs in regard to that land, but you will see that we are powerless in this matter, as you say there will be nothing in this sale for us (after the mortgages are paid).

Now, if you will accept the land for what there is against it we will have to let it go, that is all there is to it; but I have no money to put into this land, as it takes absolutely every cent that I can rake and scrape to bearly live. Now Mr. C. K. Myhre, at Nome, wants this land, and I have priced it to him at $40 an acre, and I have received the following letter from him:

"I was in Fargo this week and I tried to look you up but you was out of town, I like to hear from you what to do about that land down there, we would like to list it from you, I am sure we can sell first part of the season. Kindly let me hear from you. We are sending out a lot of lists to Iowa, Illinois, Wisconsin, Minnesota, and Canada, and some buyers are coming here soon to look at this land.

"(Signed) C. K. Myhre,
"Nome, North Dakota."

Mr. Myhre has made an offer of $35 an acre for the whole place and take it himself, and they are of course expecting to get $42.50, as he told me this some time ago.

Now we do not want to stand in anybody's way in this deal at all, we have lost all we have and are at the end of the rope, and I sincerely trust *that you folks can see your way clear to take this off our hand; as you will certainly not lose a cent at $37.50 an acre on the home quarter, and if this meets with your approval and you will pay off the mortgage, we will gladly give you the deed* and try and forget that we ever owned a piece of land as it's a cinch we'll never own another farm.

Please let me hear from you at once so the folks in Ill. may know this is sold, and I might as well tell you that they will have nothing further to do with me down there because they blame this whole affair on me and say the whole matter is that I did not farm the land good

enough, and I'll tell you frankly that it has come to the point where I don't care much what happens.

Very truly yours,

It is clear, from this letter, that the defendants, after they accepted such offer, were to pay the mortgages against the land, and the price of $37.50, as stated in such letter, corresponds with the amount of the mortgages then against the land. Exhibit B is a letter from the defendants addressed to E. L. Yocum, and would seem to be a reply to exhibit A, the letter written by E. L. Yocum from Dickinson to the defendants. It reads as follows:

Lisbon, N. D., 4–2, '14.

Mr. E. L. Yocum,
Fargo, N. D.

Dear Sir:

We are inclosing warranty deed for your signatures, as per your letter of some time ago, we to take the land, subject to the mortgage now against it, which, with taxes, back interest, etc., amounts to over $37.50 per acre. We have offered this land to a party near it for just what there is against it, but there are two brothers of them and one of them has been sick, down in Minn., and so far we have not been able to close with them. They were to take the whole half section. However, the interest on the first mortgage was due last March 1st, amounting to $210, and there is also a balance of some over $125 due on the 1912 interest, and Williamson refuses to let it run any longer, and if it is not paid at once, he will be forced to foreclose the first mortgage, and as we have been putting in money all the time to carry this along, we do not like to pay in any more, when the land is in the shape it is now, and *if we are to take care of this year's interest, and taxes, until we can sell the land, we want title to it, as we have plenty of mortgages on it already, and by the time we get them all paid off it will be a dear piece of land, and if Williamson forecloses his mortgage, it will only add a lot of extra expense on us, and you would lose out also so as a matter of protection to us, we ask you to sign and have acknowledged,*

the inclosed deed, and return to us and we will try to get the whole half section sold, so it will stay sold.

Kindly let us hear from you as soon as possible, and greatly oblige

Yours respectfully,
Chisman & Conboy,
By W. E. Chisman.

Exhibit C is not dated, but it appears to answer exhibit B. Exhibit C is as follows:

Inclosed please find warranty deed properly signed and witnessed and *according to which you assume the mortgages of record as the purchase price.* Hoping this is satisfactory and thanking you for all past courtesies, we beg to remain,

Very truly yours,
The Yocums.

Exhibit D appears to be in answer to exhibit C, and is as follows:

Lisbon, North Dakota, 4–8–14.

Mr. E. L. Yocum,
Fargo, N. D.

Dear Sir:—

We have yours of recent date with deed inclosed, and we expect it is all O. K., as it seems to be properly signed and acknowledged.

Thanking you for your promptness in this matter, we beg to remain

Yours truly,
Chisman & Conboy,
By John Conboy.

Exhibit F simply shows that Mr. and Mrs. Stevenson had notice that the land in question upon which they held mortgage for $550 went to sheriff's certificate, and that they made demand on the Yocums for the payment of the $550. Exhibit F is as follows:

Fargo, N. D., 8–2–15.

Chisman & Conboy,
Lisbon, N. Dak.

Gentlemen:—

Mr. and Mrs. Stevenson have rec'd notice that the land upon which they hold mortgage for $550 is held by sheriff's certificate, and they have accordingly made formal demand for payment from us.

As you gentlemen assumed this mortgage when this land was transferred according to our former correspondence you will therefore kindly attend to this matter at once.

Very truly yours,
E. L. Yocum.

1015 6th St. South, Fargo, N. D.

Exhibit J does not show at what date it was written, and is a letter from Chisman & Conboy to E. L. Yocum at Fargo, North Dakota.

E. L. Yocum,
Fargo, N. Dak.

Dear Sir:—

We have yours of recent date, and note what you say about the land. We are sorry that it has come to this, and only wish we could turn this land and make you something out of it, but we have had our bad luck during the past two years the same as anyone else, and it seems that N. Dak. has a black eye ever since the year of the black rust. Mr. Chisman is in Minn. at present time and will be home Monday morning, and if your proposition is satisfactory to him we will send you the necessary papers to sign. Trusting that we may be able to save something for you out of this deal, we beg to remain.

Yours truly,
Chisman & Conboy.

Exhibit K appears to bear no date, and is a letter from Chisman & Conboy to E. L. Yocum at Fargo, North Dakota, and is as follows:

E. L. Yocum,
Fargo, N. Dak.
Dear Sir:—

On March 1st, there will be two years' interest due on your $3,000 mortgage less what was applied on it last fall out of the crop. Now, if you are not in a position to take care of this matter on March 1st, something else will have to be done with the land. I had an offer of $35 per acre on the half section, but did not submit it to you as I did not suppose you wanted to accept it, but think I can still close the deal if you want to let it go. Let me know at once as you better save something out of it than to let it all go, as they will sure foreclose this mortgage this spring unless the interest is paid up.

Yours truly,
Chisman & Conboy,
By ————————

Exhibits J and K, from their tenor, would appear to have been written prior to the time the other exhibits were written. No question is raised as to the stamping, addressing, and posting of the letters, although proper proof thereof was made as to some of the letters. In fact, it seems to have been conceded or granted that the letters were properly stamped, addressed, and posted; and, this being true, it is presumed they were received by the persons to whom they were thus sent.

We have thus quoted the correspondence in full, as it is about the only means by which it may be, with any degree of certainty, determined whether the assumption clause was, in fact, in the warranty deed of the land in question from the plaintiffs to the defendants.

From a careful reading of all the correspondence, which has been fully set out, it would seem to conclusively appear that it was the intention of both parties, as expressed in such correspondence, that the defendants would assume all the mortgages then of record at the time of the execution of the said warranty deed. The underscored part of the correspondence would seem to be almost conclusive, if not wholly so, that the contract between plaintiffs and defendants, and the understanding and agreement was fully had that the mortgages then of record at the time of the execution of the warranty deed should be assumed

by the defendants. The defendants, when they sent the deed to the plaintiffs to sign, called their attention to the fact that the mortgages of record would amount to about $37.50 an acre. This appearing to have been the real understanding and agreement between the parties as expressed in their correspondence, it causes the testimony of the plaintiffs to greatly outweigh that of the defendants.

The whole correspondence tends to substantiate the testimony of the plaintiffs, and does not, in any manner, tend to strengthen the testimony of defendants. There is some dispute in the testimony as to whether or not the mortgages were enumerated in the deed, or whether they are referred to as the mortgages then of record; but this is not so material, as the amount of mortgages upon the land is conceded by both parties, the important matter being whether or not the defendants agreed to assume and pay such mortgages, and we think the whole correspondence clearly shows that such was intended and agreed to be the contract. The plaintiffs testified positively that such was the contract of the defendants, and their testimony is fully supported by the correspondence in the case. In fact, the conclusion is almost irresistible that the defendants made such agreement. Having concluded that the defendants made such an agreement, they are bound to pay such mortgages in question which the plaintiffs were compelled to pay to the Stevensons.

This case was one properly triable before a jury. The jury, however, was waived by both parties and the case was tried to the court. The findings of fact of the court under such circumstances usually are entitled to great weight, and should not be disturbed unless the findings of fact are clearly against the preponderance of the evidence. This rule is particularly applicable where the major part of the evidence was given by witnesses orally. It does not apply with so much force where the important part of the testimony is to be deduced from records, writings, or correspondence. As we view this matter, the evidence which really is decisive of this case and which goes to the credibility of the witnesses, is furnished by the correspondence thereof, the letters hereinbefore set out in full.

This being true, the findings of the trial court do not have any more weight than they would in a case where the parties were not entitled to a jury trial.

In view of what we have said and the fact that the correspondence almost entirely supports the plaintiffs' testimony, and thus adds to the credibility thereof, we are of the opinion that the findings of the trial court are clearly against the preponderance of the evidence.

On Petition for Rehearing.

PER CURIAM. Plaintiffs have petitioned for a rehearing. In the petition it is asserted that we erred in our former decision in sustaining the findings of the trial court and in holding that the plaintiffs had failed to establish that the deed involved in this controversy contained an assumption clause. It is further asserted that, regardless whether the deed contained such clause, the letters between the parties established a contract under the terms of which the defendants assumed and agreed to pay off all outstanding mortgages against the premises.

The evidence shows that the firm of the defendants had been dissolved. Their papers and letters had been dispersed or destroyed. Hence, no letters were produced by the defendants. The letter exhibit "C," upon which plaintiffs place great reliance, purports to be a copy. It is written with lead pencil. It has no date. It is not a carbon copy, but plaintiffs claim it is a true copy of the original. They admit, however, that they made no copy of the alleged assumption clause in the deed. There is a direct conflict between the testimony of the two plaintiffs as to the contents of the assumption clause. Mr. Yocum says that it was a mere general assumption clause, while his wife testifies that the clause enumerated the different mortgages in detail. There is considerable in connection with the entire transaction and the testimony of the plaintiffs with respect to exhibit "C" and the alleged assumption clause which has more or less bearing upon the credibility of the plaintiffs and the truth of their contentions. The trial judge, who saw and heard the parties, resolved the doubts against the plaintiffs. And we are unable to say that the trial judge erred, or that his findings are against the preponderance of the evidence. We therefore adhere to the conclusions reached in our former opinion.

A rehearing is denied.

JOSEPH WULFKUHL, Respondent, v. E. GALEHOUSE, P. A. Johnson, and Will Workman, School Board of Donnybrook School District, Appellants.

(168 N. W. 620.)

Schools — school buildings — establishment of — petition for — signers of — parents or persons — qualifications of signers.

1. A petition filed with a school board for the establishment of a school and the construction of a school building examined and *held* to be a valid petition and to have been signed by residents of the school district who were parents of or persons charged with the support and having the custody and care of the requisite number of children of school age to entitle said residents to sign such petition.

Children of school age — requisite number and residence.

2. The number of children of school age named in the petition was fifteen, ten of which were of school age and lived within said school district, and not less than 2½ miles from any other school in the school district. Such being the case, petition was sufficient and the petitioners were entitled to the relief asked for in such petition.

Other school district — school building in — proximity of — to residence of signers — not sufficient reason for refusing relief — petition sufficient.

3. The fact that there may be another school and school building in another school district less than 2½ miles from the residence of the children whose names appear upon the petition is not sufficient reason for the refusal to grant the relief asked for in the petition, for such other school districts could not be compelled to admit to its school the children whose names appear upon the petition under consideration.

Opinion filed July 19, 1918.

NOTE.—For authorities discussing the question as to who may petition in relation to school matters, see note in 43 L.R.A.(N.S.) 293, where it is held that persons who are enumerated in other districts are not patrons of the school to which their children are transferred, within the meaning of § 6417, Burns's Anno. Stat. 1908, which requires the petition for change and relocation of a school building to be signed by a majority of the patrons of the school, who have made satisfactory proof that they are actually the parents, guardians, or custodians of children of school age living within the district.

Appeal from the District Court of Ward County, North Dakota, Honorable *K. E. Leighton,* Judge.

Affirmed.

Ben E. Combs, for appellants.

The petition was wholly insufficient and the school board had no jurisdiction. A nonresident of the district is not a proper signer of the petition. Comp. Laws 1913, § 1188.

It is the duty of said board to ascertain whether the prerequisites to jurisdiction exist. 146 N. W. 727.

George A. McGee (*E. B. Goss,* of counsel), for respondent.

Because the statement of the case contains no assignment of errors, the court is without power to examine it. State ex rel. Bickford v. Fabrick, 16 N. D. 94.

A mandamus proceeding is not an action. It is a special proceeding, not triable anew in the supreme court. Rev. Codes 1905, §§ 6741–6743, 7229; Comp. Laws 1913, §§ 7329–7331, 7846.

The mere fact that there is a school building within the required distance in another school district is not a sufficient reason for denying a proper petition of legal signers for the establishment of a school building within their own district. The other school district could not be compelled to admit to its school children residing in another district. State v. Mostad, 158 N. W. 349.

GRACE, J. Appeal from the district court of Ward county, North Dakota, Honorable K. E. Leighton, Judge.

This appeal is from the order of the court granting an alternative writ of mandamus upon the hearing of the petition for the issuance of such writ. This proceeding was brought to compel the officers of Donnybrook School District No. 24 to establish and maintain a school, and to erect a schoolhouse in the southwest corner of township 150, range 87, Ward county, North Dakota, the lines of the school district in question being coextensive with the township lines.

The petition filed with the school board for the establishment of said school and the building of the school building was signed by six purported residents of such school district, and the names and number of children of school age were set forth in the petition. The petition filed with the school board contains the names of fifteen children of school

age. It appears that the school board rejected the petition filed with it for the establishing of said school and the building of the schoolhouse, and such school board, in its answer to the petition for writ of mandamus, claimed that the board ascertained from investigation that there were but eight children of school age legally upon the petition filed with the school board, and that King lived in the village of Donnybrook, within a few blocks of the established school therein, and that Bland lived in the village of Aurelia, and that the children under his custody and care were attending the established school in that village. The answer admits that the four Halden children and the four Wulfkuhl children, whose names were upon such petition, lived more than 2½ miles from the school in said district. The petition was also signed by C. R. Bland. If he were a person charged with the support and having the custody and care of some children of school age, and it does appear that he had two children of school age, and resided in the school district at the time of the signing of the petition, then he would have legal right and it would be proper for him to sign the petition.

There were no specifications of error in this appeal, and this being true, it would seem that this court can review nothing excepting the judgment roll. If we confine ourselves strictly to the judgment roll we must hold that it amply sustains the findings of fact of the trial court and its order made thereon, but even if we consider the testimony as found in the transcript, we think it fully sustains the trial court. Testimony shows that Mr. Bland lived in the district at the time he signed the petition. He had two children of school age, and these with the four Halden and four Wulfkuhl children would be ten children, whereas only nine are required in the petition. The qualifications necessary to sign such petition for establishing a new school and the building of a new schoolhouse are that the petitioner is a resident of the school district and is charged with the support and having the custody and care of a child or children of school age who lives not less than 2½ miles from the nearest school. The petition is sufficient after it is signed by persons having these qualifications at the time such petition is signed and filed with the school board.

We think there is no question from all that can be ascertained from the judgment roll that the petitioners had shown themselves entitled to the establishment of a school and the building of a school building

as prayed for in their petition; and though the testimony is not entitled to be considered by reason of no assignments of error having been made, yet, notwithstanding this, giving full credit to all the testimony contained in the transcript, we are clear that such testimony fully and clearly establishes the right of such petitioners to have said school established and said school building built, even though it be conceded that the petitioner Ribb was not a resident of the school district at the time he signed the petition, and conceded that he should be excluded as a proper signer; but even if Ribb's name is excluded from the petition, there still remain sufficient children of school age who are more than 2½ miles from the school to entitle the petitioners to the relief asked for in their petition.

The fact that there may be another school building in another school district less than 2½ miles from the residence of the children in question avails nothing. The children in question, by securing permission, might attend a school in another district, but such other district could not be compelled to admit them. See State ex rel. Johnson v. Mostad, 34 N. D. 330, 158 N. W. 349.

The order appealed from is affirmed, with costs.

CHRISTIANSON, J. (concurring specially). Under the rule laid down in State ex rel. Bickford v. Fabrick, 16 N. D. 94, 112 N. W. 74, this court cannot consider the sufficiency of the evidence in this case, but the facts found by the trial court must be accepted as correct. No error appears upon the judgment roll, and the facts found by the trial court justify the decision which is made. Hence, that decision should be affirmed.

ROBINSON, J. (dissenting). This is a mandamus proceeding to compel the officers of a township school district to erect a schoolhouse and to establish and maintain a school in the southwest corner of the township. It is brought under Laws of 1911, chap. 166, § 82, Comp. Laws, § 1188. The statute is to the effect that on a certain petition showing that nine or more children of school age resided more than 2½ miles from the nearest school, the school board shall, within 2½ miles from the residence of the children, lease or construct a schoolhouse, and therein establish and maintain a school with a competent teacher.

The answer of the board is that only eight of the children reside more than 2½ miles from the nearest schoolhouse in the district, and that those children are well provided for by free admission to a school within 2½ miles of their residence, and that answer is true. The school board appeals from a judgment against them. The school township consists of thirty-six sections. It is crossed diagonally by two railroads. One school is on section 14, in the village of Donnybrook, and the other on N. W. quarter of section 34 in the village of Aurelia, on the Soo Railroad. This town is only 3 miles from the western limit of the township, so the eight or nine children of the district are well supplied with two good village schools within 2 or 3 miles of them, and with free tuition at another school within 2½ miles of them.

When the petition was heard several of the eight or nine children were living in the villages and going to the village schools on the railroads. This they might well do, even if they had a school within a mile of them. The petition is a little defective in that it fails to show the tract of land on which either or any of the children resided. The chances are that by a straight-line measurement they do not reside more than 2½ miles from the village of Aurelia, and also that the parents of these children would pay but a small part of the expense of constructing and maintaining a special school for them.

Certain it is that on the hearing of such petition the school board must have had some discretion, and in this case it appears they used their discretion wisely. If a schoolhouse had been constructed at an expense of $1,200 and a teacher employed at $600 a year, it is probable the school would not have had more than an average daily attendance of six pupils. Then there is no showing that the school district was in a position to incur and pay an additional expense of $1,800. Mandamus is not a writ of right. It should issue only when the facts and circumstances make a strong appeal to equity. It issues to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. It does not issue to compel performance of an act which is in any way discretionary, unless in case of a gross and manifest abuse of the discretion. Hence, the writ should be denied and judgment reversed.

HENRY LEHMAN, Respondent, v. L. T. COULTER, Appellant.

(168 N. W. 724.)

Chattel mortgage — action to foreclose — equitable action — allegations of complaint admitted by answer — disposes of equitable matters — counterclaim for money demand — also pleaded in answer — jury trial on counterclaim demanded — defendant entitled to jury trial — strict legal right to.

Where one brings an action to foreclose a chattel mortgage, and the answer admits all of the allegations of the complaint, all of the equity matters in such case are disposed of, and there is nothing before the court further to be considered in such equity proceedings; and where the answer, in addition to admitting all the allegations of the complaint in such equity proceedings, pleads two counterclaims for specific amounts for the recovery of money only, and at the time of the trial demands a jury trial,—such jury trial cannot be denied to him, and he is entitled to such jury trial as a matter of strict legal right.

Opinion filed December 19, 1918. Rehearing denied July 19, 1918.

Appeal from the judgment of the District Court of Stark County, Honorable *W. C. Crawford,* Judge.

Reversed.

F. C. Heffron, for appellant.

L. A. Simpson, for respondent.

GRACE, J. This action is brought for the purpose of obtaining judgment for a promissory note in the foreclosure of a certain chattel mortgage given to secure such note, and thereby have the property described in such chattel mortgage sold and the proceeds thereof applied on the judgment.

The answer admitted the execution of the note and chattel mortgage in that it admitted all the allegations of the complaint.

The proceeding to foreclose the chattel mortgage was an equitable action triable to the court. The answer having admitted all of the allegations of the complaint, all of the matters in equity in such case were disposed of, and there remained nothing for the court to do except to give judgment for the relief demanded in the complaint.

The defendant, after admitting all of the allegations of the complaint as above, pleaded two certain counterclaims, in which the defendant affirmed the right to recover certain specific amounts of money against the plaintiff. The first counterclaim was for the sum of $62.50, and the second counterclaim was for the sum of $2,090. Each of said amounts of money the defendant claimed to be due him on account of commissions by reason of making sales or procuring purchasers for certain horses owned by plaintiff. Defendant alleged that plaintiff and defendant entered into a verbal agreement by the terms of which the defendant was authorized to sell, or secure purchasers for the plaintiff for, 200 head of horses more or less. Defendant further alleges in his counterclaims that in pursuance of such agreement he secured a purchaser for one certain stallion for $250, and that the reasonable commission for securing such purchaser was 25 per cent of the purchase price, or $62.50. In his second counterclaim he alleges the securing of a purchaser for 209 head of horses at $100 per head,—in all $20,900, and that the reasonable commission for securing such purchaser was 10 per cent of the purchase price, or $2,090.

The defendant at the time of the trial demanded a jury trial. This was denied by the court; and this presents the only question in this appeal, which is that the court erred in denying defendant's demand for a jury trial.

The defendant's counterclaim was a cause of action against the plaintiff in which the relief sought consisted in the recovery of money only. The answer having admitted all of the allegations of the complaint, it must appear that at the time of the trial there were no equitable issues before the court upon which there was any dispute. All the matters in equity had been admitted by the answer. At the time of the trial there was nothing for the court to do except to try the issue presented by the counterclaims, which was for the recovery of money only. In such case there can be no doubt but that the defendant was entitled to have the issues presented by his counterclaims submitted to the jury, the relief demanded by his counterclaims being for the recovery of money only; and it was reversible error for the court not to grant such demand when timely made. Under the circumstances of this case there is no doubt, under the provisions of the Constitution, and the laws of the state enacted in pursuance thereof, but that the

right of trial by jury is preserved to the defendant. It is unnecessary in this case to enter into a fuller discussion of when the right of trial by jury is preserved in civil actions, it being certain in this case that the defendant was entitled to have the issues submitted by his counterclaims submitted to a jury, the relief demanded being for the recovery of money only, and all equitable issues having been admitted in the answer.

The judgment of the District Court is reversed, and the case is remanded to the lower court for trial by jury only upon the issues presented by the counterclaims, all costs to await the determination of such retrial; then to be taxed against the leasing party.

CHRISTIANSON, J. (dissenting). I am unable to concur in the majority opinion prepared by Mr. Justice Grace.

The instant case is one to foreclose a mortgage. The defendant in his answer admits the cause of action alleged in the complaint, and sets up two counterclaims for commissions claimed to be due him for services performed in selling certain horses belonging to the plaintiff.

It is conceded that the cause of action set forth in the complaint is one properly triable to the court without a jury. But it is asserted that, inasmuch as the cause of action set forth in the complaint was admitted in the answer, there remained no equitable issues to try; that the only issues remaining were the legal ones raised upon the counterclaims, and that defendant was entitled to have these tried to a jury. The sole question presented, therefore, is whether the defendant is entitled to a jury trial of the issues raised by the counterclaims.

Under our statute "an issue of fact *in an action for the recovery of money only or of specific real or personal property* must be tried by a jury, unless a jury trial is waived . . . or a reference is ordered. . . . *Every other issue is triable by the court,* which, however, may order the whole issue or any specific question of fact involved therein to be tried by a jury or by a referee." Comp. Laws 1913, § 7608.

It is well settled that the interposition by the defendant of a legal defense to an equitable cause of action does not change the character of the action or entitle defendant to a jury trial. Gresens v. Martin,

27 N. D. 231, 145 N. W. 823; 24 Cyc. 126; see also Avery Mfg. Co. v. Crumb, 14 N. D. 57, 103 N. W. 410, and Merrett v. Adams County Land & Invest. Co. 29 N. D. 496, 151 N. W. 11. And by the great weight of authority a defendant who pleads a counterclaim in an equitable action is not (in absence of statute) entitled to a jury trial on the issues arising thereon, "notwithstanding the cross demand constitutes an independent cause of action, upon which a separate action might have been brought and a jury trial demanded." 24 Cyc. 127, 128; 16 R. C. L. p. 213, § 30; Johnson Service Co. v. Kruse, Ann. Cas. 1914C, 850, and note (121 Minn. 28, 140 N. W. 118); Gersmann v. Walpole, 79 Misc. 49, 139 N. Y. Supp. 1.

There is no logical reason for holding that defendant's admission of the allegations in the complaint changed or abrogated the rule. Such admission merely dispensed with the introduction of proof upon the issues tendered by the complaint. The issues tendered by the counterclaims would have remained the same even though the allegations of the complaint had been denied. If, in the instant case, defendant had denied the allegations of the complaint, it would have been necessary to have tried and determined the issue thus raised. But a determination thereof would in no manner have affected the issues raised on the counterclaims. These issues would still have remained exactly as they did upon the trial of this case.

While the different forms of civil actions have been abolished by the reformed procedure, the intrinsic distinction between legal and equitable actions has not been destroyed. Black v. Minneapolis & N. Elevator Co. 7 N. D. 129, 133, 73 N. W. 90. The existence of this distinction is recognized in the various states where the reformed procedure has been adopted. It has frequently been recognized by this court and was recognized by the legislature in § 7608, supra. The legislature therein preserved the right of trial by jury in all actions of a strictly legal, as contradistinguished from those of an equitable, nature. In cases of the latter class a right of trial by jury as a matter of absolute right does not exist.

A civil action is a proceeding instituted in a court of justice by a party known as the plaintiff against another party known as the defendant, the object of which is to obtain a judgment against the defendant for the enforcement of a civil right, or the redress or preven-

tion of a civil wrong. Comp. Laws 1913, § 7330. See also Brower v. Nellis, 6 Ind. App. 323, 33 N. E. 672, and Bouvier's Law Dict. It is not necessary to wait until a defendant answers in order to determine the character or object of an action. This is determinable from, and depends upon, the facts set forth in the complaint. While the defendant may raise new issues, he cannot by averments in his answer change the character of the action. This still remains as set forth in the complaint.

The legislature has nowhere intimated that it intended to permit a defendant to change an action from one in equity to one at law, by means of allegations of new matter in the answer. Nor has it said that every issue of fact relating to the recovery of money or of specific real or personal property shall be triable to a jury, or that such issue shall be so triable when presented by defendant as a defense or counterclaim in an equitable action. On the contrary it has expressly and unequivocally said that the absolute right to a trial by jury of an issue of fact exists only when such issue arises *"in an action for the recovery of money only or of specific real or personal property."*

Manifestly the instant case was not such an action. It was concededly one of equitable cognizance, and, hence, properly triable to the court without a jury. Not only is it so classified under our statutes, but "it is a fundamental principle that the right of trial by jury considered as an absolute right does not extend to cases of equity jurisdiction." 7 Enc. U. S. Sup. Ct. Rep. 756.

An action properly instituted as one in equity cannot be transformed by the defendant into one at law. And as a party who institutes an equitable action will be deemed to have waived a jury, even though upon the evidence he may be entitled to either legal or equitable relief, so a party who elects to interpose a counterclaim of a legal nature in an equitable action should (in absence of qualifying statute or constitutional provision) be deemed to have waived the right to have the issues arising thereon submitted to a jury.

In my opinion the trial court was well within its rights in denying a jury trial in this case.

PER CURIAM. The petition for modification of the opinion has been filed with reference to costs only. The opinion in the case reversed the

judgment and remanded the case to the lower court for trial by jury on issues presented by the counterclaim, and provided that all costs in the trial court await the determination of such new trial, then to be taxed against the losing party. The decision of this court was in appellant's favor, and judgment entered in the lower court was reversed. This being true, the appellant is entitled to tax the statutory costs on appeal.

The appellant is entitled to tax the statutory costs on appeal, all other costs to be disposed of as provided for in the decision. There is nothing further in the petition for rehearing, and rehearing is denied.

STATE OF NORTH DAKOTA EX REL. WILLIAM LANGER et al., Plaintiffs, v. FRANK E. PACKARD et al., Defendants and Respondents.

(168 N. W. 673.)

Personal property — for purpose of taxation — may be separated from owner — may be taxed where it is — although not at domicil of owner.

1. For the purposes of taxation, personal property, even though of an intangible character, may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his domicil.

Bills receivable — obligations or credits — owned by nonresident — derived from business in this state — assessable at business domicil — of nonresident, his agent or representative in state in same manner as though owned by a resident.

2. Under the provisions of chapter 229, Laws of 1917, all bills receivable, obligations, or credits owned by a nonresident and derived by him from a business conducted in this state are assessable at the business domicil of said nonresident, his agent, or representative within this state in the same manner

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NOTE.—For authorities discussing the question as to whether personal property having a situs for taxation elsewhere, is subject of taxation in the state of the owner's domicil, see note in 36 L.R.A.(N.S.) 295. As to when debt may have situs for purpose of taxation apart from domicil of creditor, see notes in 2 L.R.A.(N.S.) 637, and 14 L.R.A.(N.S.) 493. On situs as between different states and counties, of intangible personal property for purposes of taxation, see note in L.R.A. 1915C, 914.

as though such bills receivable, obligations, or credits were owned by a resident of this state.

Imposing taxes on tangible personal property — power of — state not deprived of — because owner has removed same from state.

3. The state is not deprived of power to impose taxes on obligations evidenced by bills receivable merely because the owner has removed the bills receivable from the state.

Obligations or debts — owed by citizens of state — to nonresidents — not purpose to tax all — only such as result from business transacted in this state.

4. It was not the purpose of chapter 229, Laws 1917, to impose a tax upon all obligations or debts owed by citizens of North Dakota to residents of other states, but to impose such taxes only upon such credits and obligations as have arisen and have been accumulated in the course of business by one who is actually conducting a business in the state.

Established place of business — in state — nonresident having none — loaning money in state — on applications sent to him by loan brokers — received at home office in another state — moneys remitted to brokers — by checks or draft — on bank at domicil in foreign state — not doing business in this state — such mortgage securities not subject to local taxation — within meaning of law.

5. A nonresident who has no established place of business or any duly authorized agent or representative in this state, and keeps no funds for investment in this state, but loans moneys on applications sent to him by loan brokers, and receives and accepts such applications at his home office in another state, from whence he transmits the moneys to the broker or borrower by draft or cashier's check drawn upon a bank in the state of such nonresident's domicil, is not doing business in this state within the meaning of chapter 229, Laws 1917, so as to subject such mortgage securities to taxation in this state.

Opinion filed July 19, 1918.

Original proceeding by the State on the relation of William Langer and others for the issuance of a writ prohibiting and enjoining the State Tax Commission and others from assessing and listing for taxation certain real estate mortgage securities.

Writ issued.

Lawrence & Murphy, C. A. Pollock, W. S. Lauder, H. R. Turner, Allen W. Wood, and *Butler, Mitchell, & Doherty,* for plaintiffs.

The questions here involved are of great interest and importance, and

if decided by this court it would prevent numerous suits, and would determine the rights of the state as a sovereign power or restrict its operation. There is a great public interest and questions involved which affect the state's sovereignty. State ex rel. Linde v. Packard, 155 N. W. 666–668.

"The term, 'personal property,' in its general sense, is synonymous with 'personal goods.'" State v. Brown, 68 Tenn. 53; Comp. Laws 1913, § 2074.

The law has for its object the taxation of the same kind of property owned by a nonresident as that owned by a resident. It does not require the listing for taxation of any business, or the capital stock in any business, or the right to engage in any business. It is simply a classification of moneys and credits as a species of personal property. Laws 1917, chap. 229.

The state cannot tax property not within its jurisdiction or which is not owned by a resident of the state who is thus within the jurisdiction of the state. 1 Cooley, Taxn. 3d ed. p. 84; Augusta v. Kimball, 91 Me. 605.

"The state has no jurisdiction to tax property of nonresidents which has no actual situs within the state." Com. v. Lehigh V. R. Co. 186 Pa. 235; 37 Cyc. 805.

As to intangible personal property, the general rule is that it can have no situs other than that of its owner's domicil. 37 Cyc. 801, 956; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; New Orleans v. Stemple, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Boyd v. Selma, 96 Ala. 144, 16 L.R.A. 729, 11 So. 393; People v. Park, 23 Cal. 138; Sheeler v. Sohmer, 58 L. ed. 1034.

"Notes and mortgages are of the same nature, and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a state may not declare that, if found within its limits, they shall be subject to taxation." New Orleans v. Stempel, 44 L. ed. 181.

"There must be jurisdiction over either the property of the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction, and enjoys the protection of our state government, it is justly taxable, and it is of no moment that the owner, who

is required to pay the tax, resides elsewhere." Cleveland, etc., R. Co. v. Pennsylvania, 21 L. ed. 187.

"And as respects the power of a state to tax property beyond its jurisdiction belonging to a foreign corporation, it is of no moment whether the corporation be a carrier or a trading company, for a state is wholly without power to impose such a tax." International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. ed. 624.

The physical presence of personal property in this state renders such property taxable here. Blackstone v. Miller, 47 L. ed. 445; 15 Wall. 300; Monongahela R. C. C. & V. Co. v. Assessors, 2 L.R.A.(N.S.) 637; New Orleans v. Stempel, 175 U. S. 317, 44 L. ed. 179, 20 Sup. Ct. Rep. 110; State Assessors v. Comptoir National D' Escompte, 191 U. S. 401, 48 L. ed. 238, 24 Sup. Ct. Rep. 109.

In the cases used by respondents the physical presence of the property in this state was the actual test. With the law of these cases there is no dispute. State Assessor v. Comptoir, etc., 48 L. ed. 232; Billinghurst v. Spink County, 58 N. W. 272.

The board of supervisors of a county cannot by an order fix the situs of a debt for the purpose of taxation; where there is no property in the state, nor agent in possession of property in the state, the situs of the property cannot be fixed within the state. Adams v. Colonial & U. S. Mortg. Co. 82 Miss. 263, 17 L.R.A.(N.S.) 138; State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. ed. 179; State Mut. L. Ins. Co. v. Newark, 62 N. J. L. 74, 40 Atl. 573; Assessors v. New York L. Ins. Co. 54 L. ed. 601.

"The maxim, *mobilia personam sequuntur,* is not an inflexible rule, but, upon the contrary, may be modified or disregarded by the declaratory law of the state in defining promissory notes as tangible personal property, when held or located within its domain." Wheeler v. Sohmer, 58 L. ed. 1033.

Statutes providing for taxation are to be construed strictly against the state and in favor of the taxpayers, and the burdens and liabilities which they impose are to be kept within the strict letter of the law, and not extended beyond its clear terms by any inference, implication or analogy. 37 Cyc. 768; St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 20 L. ed. 192.

"The power to tax is limited to persons, property, and business with-

in the state, and it cannot reach the person of a nonresident." Hillman Land & I. Co. v. Com. L.R.A. 1915C, 904.

The statute does not relate to or cover the taxation of a business. Louisville & J. Ferry Co. v. Kentucky, 47 L. ed. 513; M'Culloch v. Maryland, 4 Wheat. 316, 429, 4 L. ed. 579.

A nonresident who has no established place of business or any authorized agent or representative in this state, and keeps no funds for investment in the state, who loans moneys on applications sent to him by loan brokers and receives and accepts such applications at his home office in another state, from which he transmits the moneys to the broker or borrower by draft or cashier's checks drawn upon a bank in the state of such nonresident's domicil, is not "doing business in this state," within the meaning of the statutes in question, so as to subject the mortgage securities so taken to taxation in this state. United States Sav. & L. Co. v. Shain, 8 N. D. 136, 77 N. W. 1006.

"The taxing power of a state does not extend beyond its territorial limits. Within such limits it may tax persons, property, incomes, or business." State v. Wis. Tax Commission, 152 N. W. 848; U. T. Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. ed. 179; Territory v. Delinquent Tax List, 24 Pac. 182; Holland v. Board of Commissioners, 39 Pac. 575; Adams v. Colonial & United States Mortg. Co. 34 So. 482; Jack v. Walker, 96 Fed. 578, affirmed 100 Fed. 1006; Hathaway v. Edwards, 85 N. E. 28; Com. v. Peebles, 119 S. W. 774; National F. Ins. Co. v. Assessors, 46 So. 117; General Elec. Co. v. Assessors, 46 So. 122; County Comrs. v. Cutler, 3 Colo. 351; Goldgart v. People, 106 Ill. 29; Firesman v. Byrns, 69 Ind. 254; Com. v. Consolidated Casualty Co. 185 S. W. 508.

The residence or domicil of the corporation was in Minnesota. "A corporation cannot have two domicils or residences at the same time. Newport & C. Bridge Co. v. Woolley, 78 Ky. 523; Bank of Augusta v. Earle, 13 Pet. 521, 10 L. ed. 274.

The state may tax moneys and credits of a nonresident "when the money is invested, the debt contracted and the investment controlled by a resident agent of the owner having the evidences of the debt in his possession." Walker v. Jack, 88 Fed. 576; State Tax on Foreign-Held Bonds, 15 Wall. 300; Kirtland v. Hotchkiss, 100 U. S. 498; Sav-

ings & L. Soc. v. Multnomah Co. 169 U. S. 421, 18 Sup. Ct. Rep. 392; Finch v. York Co. 19 Neb. 50, 26 N. W. 589; Billinghurst v. Spink Co. 5 S. D. 84, 58 N. W. 272; Re Jefferson, 35 Minn. 215, 28 N. W. 256; Redmond v. Commissioners, 87 N. C. 122; People v. Ogdensburg, 48 N. Y. 390; Catlin v. Hull, 21 Vt. 152; People v. Smith, 88 N. Y. 567; Hutchinson v. Board, 66 Iowa, 35, 23 N. W. 249; People v. Davis, 112 Ill. 272; People v. Insurance Co. 29 Cal. 534; Herron v. Keeran, 59 Ind. 472; New Orleans v. Stempel, 175 U. S. 309; Bristol v. Washington County, 177 U. S. 133; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395; Holland v. Board of Commissioners, 39 Pac. 575.

The fact that some of the interveners have complied with the foreign corporation act of North Dakota does not enlarge the power of the state to tax the notes in question. Merely obtaining a permit to transact business within the state does not affect the situation unless the authority obtained is exercised. Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; Com. v. Consolidated Casualty Co. 185 S. W. 508.

William Langer, Attorney General, *E. B. Cox,* Assistant Attorney General, and *Frank E. Packard,* for defendants and respondents.

Two subjects may be submitted in one proposed amendment to the Constitution. Const. § 202, § 176, Prior to Amendment, 1914; Gottstein v. Lister, 88 Wash. 462; State ex rel. Hudd v. Timme, 54 Wis. 318, 11 N. W. 785; State ex rel. Morris v. Mason, 43 La. Ann. 590, 9 So. 776; State ex rel. Adams v. Herried, 10 S. D. 109, 72 N. W. 93; Hamlin v. Clark, 136 Ga. 313, 38 L.R.A.(N.S.) 77, 71 S. E. 479; Jones v. McClaughty, 151 N. W. 210; Lobaugh v. Cook, 127 Iowa, 181; Cabert v. Chicago Rapid City & P. R. Co. 171 Mo. 84; People v. Sours, 31 Colo. 369; People v. Provost, 65 Colo. 199; State ex rel. Lantum & N. Stationery & Printing Co. v. Kiplinger, 32 Wash. 831, 70 Pac. 438; Chicago v. Reeves, 220 Ill. 274; Turner v. Hamsey, 163 Pac. 213; State v. Jones, 64 So. 241.

The power to tax is an incident to sovereignty, and is possessed by all state governments without being expressly conferred by the people in the Constitutions. 1 Cooley, Taxn. 3d ed. 7; Judson, Taxn. p. 3; Mercantile Ins. Co. v. Junkin, 19 Ann. Cas. 269, and note on p. 270, 85 Neb. 561.

Intangible personal property has no actual physical situs, and for the

purpose of taxation a legal situs is assigned it. So long as the legislature does not infringe upon the power given to Congress over interstate commerce by the Constitution of the United States, it is entirely within its power to fix a situs either at the domicil of the creditor or the debtor, or at the domicil of neither. Liverpool & L. & G. Ins. Co. v. Assessors, L.R.A.1915C, 914.

The maxim, *mobilia sequuntur personam,* embodies the time-honored general principle of law in relation to situs for the purposes of property taxation of intangible personalty. The general rule has been that the situs of intangibles for the purpose of property taxation was at the domicil of the creditor. Walker v. Jack, 31 C. C. A. 462, 88 Fed. 576; Mackay v. San Francisco, 113 Cal. 392, 45 Pac. 696; Wright v. Southwestern R. Co. 64 Ga. 783; Matsenbaugh v. People, 194 Ill. 108, 88 Am. St. Rep. 134.

But there has been a great departure from such general rule, and now bonds, notes, and other forms of commercial paper constitute not merely evidence of but property itself, thus giving them the same legal situs, as tangible chattels, susceptible of situs determined by physical locality. Blackstone v. Miller, 168 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Wheeler v. Schmer, 233 U. S. 433, 58 L. ed. 1030; Walker v. Jack, 31 C. C. A. 462, 88 Fed. 576; Blain v. Virby, 25 Kan. 501; People ex rel. Westbrook v. Ogdensburg, 48 N. Y. 390, 208 U. S. 14, 52 L. ed. 370.

That there may be a business situs of tangible personal property for purposes of taxation apart from the domicil of the owner is not well established. Monongahela River Consol. Coal & Coke Co. v. Assessors, 2 L.R.A.(N.S.) 637; State Assessors v. Comptoir National D'Escompte 191 U. S. 368, 48 L. ed. 232; Goldgart v. People, 106 Ill. 25.

The next exception to the rule arises where the instruments which evidence the credit are in the hands of an agent of the owner, for the purpose of enabling such agent to transact the business of the owner, and in which business of the owner the credits constitute as it were the subject-matter of the stock in trade in such business. Matzenbaugh v. People, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546; Re Jefferson, 35 Minn. 215, 28 N. W. 256; Adams v. Colonial & U. S. Mortg. Co. 82 Miss. 263, 17 L.R.A.(N.S.) 138, 100 Am. St. Rep. 633;

Re Romaine, 127 N. Y. 80, 12 L.R.A. 408, 27 N. E. 759; Billinghurst v. Spink Co. 5 S. D. 84, 58 N. W. 272; Catlin v. Hull, 21 Vt. 352.

The rule is now, however, that there may be a situs of intangible personalty for taxation purposes apart from the domicil of the owner, although there be neither an agent within the state nor physical presence of the written evidences of credit. This condition arises through legislation. That the legislature has the power to nullify the rule of *mobilia sequuntur personam* is well established and settled. Board of Assessors v. Comptoir National D'Escompte, supra; Met. L. Ins. Co. v. Assessors, 115 La. 698, 203 U. S. 395; Liverpool & L. & G. Ins. Co. v. Assessors, 122 La. 98, 221 U. S. 346, L.R.A. 1915C, 903; Parker v. Strauss, 49 La. Ann. 1173, 22 So. 329; Kimball Co. v. Board of Commissioners, 116 Pac. 644; Jameson v. Com. 90 S. E. 640; Bristol v. Washington County, 117 U. S. 133; DeGany v. Lederar, 239 Fed. 568; Sess. Laws 1917, chap. 229; General Elec. Co. v. Assessors, 121 La. 116; New Orleans v. Stempel, 175 U. S. 309; Met. L. Ins. Co. v. New Orleans, 205 U. S. 395; Blackstone v. Miller, 188 U. S. 205; Kimble Co. v. Board of Commissioners, 166 Pac. 644; Freedom Twp. v. Douglas, 160 Pac. 1147; Gray, Lim. of Taxing Power, ¶ 89; People v. Barker, 23 App. Div. 524, affirmed 155 N. Y. 665; Beale, Foreign Corp. ¶ 488; 37 Cyc. 801.

Our statute is taken from the statutes of Louisiana, where it had been construed, and our court must presume that the North Dakota legislature in adopting it intended to adopt the construction placed upon it by the supreme court of that state. 6 R. C. L. 49.

It is plain that where business is transacted within a state by a nonresident, the credits growing out of such business may be given a local situs and subjected to taxation by an act of the legislature. 6 R. C. L. 47.

The word "business" is one which is used with widely variant meanings. It is used broadly to signify "that which busies" or engages time, attention, or labor as a principal serious concern or interest. Esterbrook v. Hebrew Ladies Orphan Soc. 85 Conn. 289, 41 L.R.A. (N.S.) 615, 82 Atl. 561; Bouvier's Law Dict.; Goddard v. Chaffee, 2 Allen, 395, 79 Am. Dec. 796; Harris v. State, 50 Ala. 127; Webster's New Int. & Century Dict.; Note to Liverpool & L. & G. Ins. Co. v. Assessors, L.R.A.1915C, 914; Words & Phrases, 2d Series, vol. 1, pp.

577, 1915, and vol. 11, p. 108; Strand, 2d ed. 234; Allen v. Com. 188 Mass. 59, 69 L.R.A. 599, 74 N. E. 287; Lemmons v. State, 50 Ala. 130; Baker v. Willis, 123 Mass. 195.

In applying these rules of law to the subject "doing business," the courts hold that the movement of the goods to the first place and their continuance thence to the second point are connected parts of a continuing interstate commerce movement, and that a party could not be subjected to an occupation privilege tax under the law of the state, because of sales consummated at either of the two destinations. The court fixes the circumstances under which goods in transit mingle with the goods of the state and become subject to its taxing power. Hoyman v. Hayes, 236 U. S. 178; General Oil Co. v. Grain, 209 U. S. 211; Goldwell v. North Carolina, 187 U. S. 622; Grenshaw v. Arkansas, 227 U. S. 389; Sioux Remedy Co. v. Cope, 235 U. S. 197; Will v. Bismarck, 36 N. D. 570, 163 N. W. 550; Mpls. & Northern Elev. Co. v. Traill County, 9 N. D. 208; America Harver Co. v. Schaffer, 68 Fed. 750; Haynes v. Briggs, 41 Fed. 468; Singer Mfg. Co. v. Wright, 97 Ga. 114, 35 L.R.A. 497.

"A foreign corporation which establishes a domicil here, and brings its property into the jurisdiction, and mingles it with the general mass of commercial capital, is taxable here." So. Cotton Oil v. Wemple, 44 Fed. 44; People v. Trust Co. 96 N. Y. 387; People v. Mining Co. 105 N. Y. 76; Tidewater Pipe Co. v. Assessors, 57 N. J. L. 516; People ex rel. v. Roberts 152 N. Y. 59; Judson, Taxn. 1917 ed.; Com. v. American Bell Tel. Co. 129 Pa. 217; People v. American Bell Tel. Co. 117 N. Y. 241; United States v. American Bell Tel. Co. 29 Fed. 17; Cheney Bros. Co. v. Massachusetts, 146 U. S. 323; Davenport v. Miss. & M. R. Co. 12 Iowa, 539; Latrobe v. Baltimore, 19 Md. 13; People v. Eastman, 25 Cal. 601; State v. Earl, 1 Nev. 394; Arapahoe County v. Cutter, 3 Colo. 349; People, Jefferson v. Smith, 88 N. Y. 576; Grant v. Jones, 39 Ohio St. 506; State v. Smith, 69 Miss. 79; Holland v. Silver Bow County, 15 Mont. 460, 27 L.R.A. 797.

CHRISTIANSON, J. This is an original proceeding in this court against the members of the state tax commission, the county commissioners, and county auditor of Cass county and the assessor of the city of Fargo, to prevent them from assessing and listing for taxation certain real estate mortgage securities belonging to the relators.

The jurisdiction of the court has not been challenged. On the contrary, the attorney general of the state (who appears as one of the relators) and the members of the state tax commission (who appears as respondents) join in the request that this court assume jurisdiction.

The relator Wheeler, who is a resident of the state of Minnesota, avers "that he is engaged in the real estate and loaning business and in the purchase and sale of mortgages, bonds, credits, and other securities held and owned by him until collection thereof; that at times in the furtherance of his lawful occupation and business he advances and loans to citizens of the state of North Dakota moneys, and takes therefor notes, bonds, obligations, and other evidences of debt secured by mortgages upon real and personal property, and at times purchases the same, and for that purpose employs an agent in the state of North Dakota to take applications for loans, cause to be executed notes and mortgages, and forward the same to petitioner, who forwards to the agent the moneys for said loans, which is by said agent delivered to the borrower within the state of North Dakota, which said promissory notes, mortgages, and credits, however, are not held in the state of North Dakota, but in the actual possession of the petitioner in the state of Minnesota; in some cases, however, after the time of assessment and levy, are at short periods in the possession of said agent in the state of North Dakota for collection purposes only, and never except for a few days, and that not until after all property in said state is listed for taxation for that year. That said bonds, notes, negotiable instruments, and mortgages are in different and various counties of the state of North Dakota, and are of different and varying values and are of different degrees, namely, first, second, and third mortgages; and that the equity in the property securing said evidences of indebtedness vary greatly in degree and time, and that the interest of this affiant therein is not subject to arbitrary classification, but depends wholly upon the circumstances surrounding the particular piece of property involved and the particular evidence of indebtedness and security involved; that the properties securing said evidences of debt are located in various taxing districts of the state of North Dakota, and subject to the particular jurisdiction where levies are and have been made for the purpose of providing revenue for said particular taxing district and to meet the current expenses of

said taxing district; and said properties securing said indebtedness are also listed as against the owner thereof, and taxes paid thereon in the various taxing districts of the said state and the various counties and other governmental subdivisions." He further avers that the moneys, credits, notes, and obligations so sought to be taxed by the respondents in the state of North Dakota are and have been taxed in the state of Minnesota, the residence and domicil of the petitioner.

The corporation relators are all Minnesota corporations, and they allege that a part of their business has been to loan money on promissory notes, secured by mortgages on real estate in North Dakota, and that each of them has heretofore loaned large sums of money on promissory notes secured by mortgages on farm lands in North Dakota, and are now the owners and holders of such notes and mortgages, some of which are secured on lands situated in the county of Cass. It is averred that "persons or corporations living in the state of North Dakota or engaged in the banking, loan, or real estate business there, having applications for loans made to them by owners of farm and other lands in the state of North Dakota, submit such applications to the Capital Trust & Savings Bank, the applications for such loans being in writing, and are sent by mail to the office of the Capital Trust & Savings Bank at St. Paul, Minnesota, for its consideration. In some cases, said petitioner accepts such applications, and in other cases the applications are rejected. If the petitioner decides to make the loan applied for, the notes and mortgages are executed by the borrower, who is generally a resident of the state of North Dakota. The loan broker in North Dakota, through whom such application is made, attends to the execution and recording of all papers, and when the notes, mortgages, and other papers are complete, they are sent by mail to the petitioner at St. Paul, Minnesota, for its examination and approval. The said petitioner examines the papers at St. Paul; the abstracts of title are examined for it at St. Paul, and, if the papers are approved, the money loaned is transmitted by said petitioner, at St. Paul, to the loan broker through whom the application is received, the funds being transmitted by draft or cashier's check drawn on funds in the state of Minnesota. The said petitioner has no agent acting for it in such matters in the state of North Dakota, and the business is transacted through loan brokers in the state of North Dakota, who have no authority to

act for said petitioner or accept loans for it or bind it in any way. The loan brokers in North Dakota through whom such applications are received receive their commissions or compensation from the borrower, and act as the borrower's agent. The mortgages and notes are usually signed within the state of North Dakota, but are passed on by the said petitioner at its office at the city of St. Paul. After the loan is made, the notes, mortgages, and other papers in connection with the loan are kept by said petitioner at its office in the city of St. Paul so long as it owns the same. The said petitioner does not and has not heretofore kept any funds within the state of North Dakota for investment. The notes secured by such mortgages are in all cases made payable at the office of said petitioner in the city of St. Paul. In some cases the said petitioner purchases mortgages from banks or persons engaged in the mortgage loan business in the state of North Dakota, and in all such cases the papers relating to such mortgage loan are sent to the said petitioner at its office at St. Paul for examination and approval; and if the petitioner determines to purchase such loan, the purchase price is transmitted from the city of St. Paul by draft or cashier's check or other like method, in the same manner as where the loan is made by the petitioner in the first instance." It is further averred that all the corporation relators pursued the methods just outlined in obtaining the securities sought to be taxed.

It is asserted by and on behalf of all of the relators that the state tax commission has requested and demanded that each relator file a return, listing for taxation as credits or as personal property the notes owned by them, secured as aforesaid by mortgages on lands in the state of North Dakota. And it is further asserted that the respondents and each of them, claiming authority to do so by virtue of chapter 229, Laws 1917, have threatened to, and will, unless enjoined by this court from so doing, assess and list for taxation within the respective counties in the state of North Dakota the notes and mortgages so owned by the several relators and held by them in the state of Minnesota.

These allegations are not denied. But the respondents assert that under the facts alleged the securities in question are assessable under the provisions of chapter 229 of the Laws of 1917. The bill for this enactment was entitled, "An Act to Amend and Re-enact § 2095, of the Compiled Laws of North Dakota for the Year 1913, Relating to Rev-

enue and Taxation, and Fixing the Situs of Personal Property for Tax Purposes."

The body of the law reads: "Except as otherwise provided in this chapter, personal property shall be listed and assessed in the county, town or district where the owner or agent resides; the capital stock and franchises of corporations and persons shall be listed in the county, town or district where the principal office or place of business of such corporation is located in this state; and if there be no principal office or place of business in this state where such corporation or person transact business, then personal property pertaining to the business of a merchant or manufacturer or corporation shall be listed in the town or district where his business is carried on. *The taxation and revenue laws of this state shall apply with equal force to any person or persons representing in this state business interests that may claim domicil elsewhere, the intent and purpose being that no nonresident, either by himself or through any agent shall transact business within the state without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from business done in this state are hereby declared assessable within this state, and at the business domicil of said nonresident, his agent, or representative; provided, however, no insurance company paying the state a percentage of its gross premiums received in the state shall be subject to the provisions of this act.*"

(In order to visualize the statute, we have italicized that portion thereof which was added by the amendment.)

The relators contend:

(1) That the notes and obligations which they have acquired in the manner above set forth do not arise from business done in the state of North Dakota, and consequently the respondents are acting without authority of law in attempting to assess the same for the purposes of taxation; and,

(2) That if the act under consideration is susceptible of being construed so as to apply to notes, secured by mortgages upon lands in the state of North Dakota, owned by citizens of the state of Minnesota, and held by them in that state, it deprives them of their property without due process of law and abridges their privileges and immunities as

citizens of the United States in violation of the 14th Amendment and § 11 of article 4 of the Constitution of the United States.

At the outset it is well to note that the avowed purpose of the statute under consideration is to fix the situs of personal property for purposes of taxation. The original section provided that personal property should be listed where the owner or agent resides, and that the capital stock and franchises of corporations and persons should be listed where the principal office or place of business of the corporation is located; and if there is no principal office or place of business in the state, that then personal property pertaining to the business of a merchant or manufacturer or corporation should be listed where the business is carried on. The amendment merely extended these provisions, and made the statute applicable to nonresidents transacting business in this state. The intent and purpose of the amendment as declared by the legislature was to require nonresidents transacting business within the state to pay a tax corresponding to that exacted from citizens of the state. And in that connection and to that end it provided that "all bills receivable, obligations or credits arising from business done in this state are (hereby declared) assessable within this state and at the business domicil of the said nonresident, his agent, or representative." Obviously, the legislature had no intention by the enactment of this statute to impose a privilege or occupation tax. The legislature was dealing with a tax on property only. The true purpose of the statute is merely to fix the situs of personal property, and to designate the particular place within the state where such property is to be taxed. In this country the power of taxation is exercised by the state "upon the assumption that an equivalent is rendered to the taxpayer in the protection of his personal property, in adding to the value of such property or in the creation and maintenance of public conveniences in which he shares; such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. . . . It is often said that protection and payment of taxes are correlative obligations." Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202, 50 L. ed. 150, 153, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

The power to tax is an incident of sovereignty and conferred upon the law-making branch of the government as a part of its general power.

But "while the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by the principle inhering in the very nature of constitutional government; namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government." Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396, 47 L. ed. 513, 518, 23 Sup. Ct. Rep. 463. Or, as was said by this court in a recent case (Martin v. Burleigh County, 38 N. D. 373, 165 N. W. 524): "Jurisdiction for taxing purposes must be dependent either upon a physical location of the property of such a character as to give to it a degree of permanency warranting the same treatment of the property as that accorded to all other property within the state, or it must be justified by the legal domicil of the owner being within the state." And it has been said by a high authority that while the legislative power extends over everything, whether it be person, property, possession, franchise, privilege, occupation or right, that "persons and property not within the territorial limits of a state cannot be taxed by it;" and that "a state can no more subject to its power a single person, or a single article of property, whose residence or legal situs is in another state, than it can subject all the citizens or all the property of such other state to its power." Cooley, Taxn. 2d ed. pp. 55, 159. See also Louisville & J. Ferry Co. v. Kentucky, supra. The limitations upon the state taxing power result from the distribution of power ordained by the Constitution. And "the application to the states of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution, and therefore it is impossible for one state to reach out and tax property in another without violating the Constitution; for where the power of one ends, the authority of the other begins." And "the limitations of the Constitution are barriers bordering the states and preventing them from transcending the limits of their authority and thus destroying the rights of other states, and at the same time saving their rights from destruction by the other states, in other words, maintaining and preserving the rights of all the states." United States v. Bennett, 232 U. S. 299, 306, 58 L. ed. 612, 616, 34 Sup. Ct. Rep. 433. Taxation without jurisdiction has been held to be a violation of the 14th amendment. This is so, whether it involves a property tax or a license tax. Provident Sav.

Life Assur. Soc. v. Kentucky, 239 U. S. 103, 60 L. ed. 167, L.R.A. 1916C, 572, 36 Sup. Ct. Rep. 34.

These rules apply to all taxes imposed by a state upon property. They apply to both tangible and intangible property. There is no great difficulty in understanding the rules; the difficulty arises in applying them. Obviously, it is more difficult to apply them in dealing with intangible than in dealing with tangible property. The actual physical situs of tangible property is readily ascertainable. This is not so with intangible property. Property of the latter class is usually held secretly, and, with the exception of shares of corporate stock and obligations secured by recorded instruments, such as mortgages or trust deeds, there is ordinarily no method by which the existence or ownership thereof may be ascertained. The statutory provision under consideration applies to intangible property. Its purpose was to fix the situs of such property for purposes of taxation.

It has been the tendency of the modern decisions in dealing with intangible property to apply thereto the maxim, *mobilia sequuntur personam* (movables follow the person), and to hold that such property has its situs and is taxable only at the domicil of the owner. This maxim, however, is only a presumption, or rather a fiction of the law, and must yield when contrary "to the logic and policy of the state," and the demonstrated "fact of actual control elsewhere." Blackstone v. Miller, 188 U. S. 189, 205, 47 L. ed. 439, 444, 23 Sup. Ct. Rep. 277; Liverpool Ins. Co. v. New Orleans, 221 U. S. 346, 354, 55 L. ed. 762, 767, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550. The Supreme Court of the United States has frequently been called upon to determine whether property sought to be so taxed had a situs within the state so as to confer jurisdiction to impose a tax. In considering these questions, it has repeatedly recognized a distinction between tangible and intangible property. Thus, it has held that a tax imposed by the state of the owner's domicil upon tangible personal property which has acquired a permanent situs in another state is taking property without due process of law (Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 195, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493); but that the state of the owner's domicil may legally impose taxes upon shares of stock owned by him in a

foreign corporation which holds all of its property and does all of its business in another state (Hawley v. Malden, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842). And that deposits in a bank in another state, where the depositor carries on a business from which the deposits are derived, and belonging to the depositor but not used by him in the business, are subject to a tax against him in the city of his residence, even though such deposits are subject to a tax in the state where the business is carried on (Fidelity & C. Trust Co. v. Louisville, 245 U. S. 45, 62 L. ed. 145, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40). No good purpose would be subserved by attempting to analyze or even to harmonize the different decisions of the United States Supreme Court on this subject. Regardless of any inconsistency or apparent conflict, the cases all recognize the correctness of the general rule that the power of a state to tax is limited to persons or subjects within its jurisdiction, or over which it can exercise some dominion. Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463. In other words, the state imposing a tax upon property, either tangible or intangible, must have some jurisdiction over the particular object or subject sought to be taxed. If there is no jurisdiction, no power of taxation exists. But if the jurisdictional conditions are present, the state has the power to impose taxes. And in dealing with intangible property, the state may, as against its residents, invoke the fiction, *mobilia sequuntur personam,* even though the actual control of the intangible property be elsewhere. Kidd v. Alabama, 188 U. S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401; Fidelity & C. Trust Co. v. Louisville, 245 U. S. 45, 62 L. ed. 145, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40; Hawley v. Malden, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, Ann. Cas.1916C, 842. On the other hand, the state may refuse to recognize the maxim and impose taxes upon intangible property which in fact has a situs within the state and enjoys the protection of its laws, even though such property is owned by a nonresident. In such cases "the legal fiction expressed in the maxim, *mobilia sequuntur personam,* yields to the fact of actual control elsewhere. And in the case of credits, though intangible, . . . the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicil. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor

and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicil is control of the ordinary means of enforcement." Liverpool & L. & G. Ins. Co. v. New Orleans, 221 U. S. 346, 354, 55 L. ed. 762, 767, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550. See also Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297.

It is contended by the attorney for the respondents that the legislature intended to impose a liability for taxes, and render all negotiable instruments, obligations, and credits arising from business done in this state subject to taxation here. And it is contended that loans made by nonresidents upon applications submitted to and approved by them in another state, or loans purchased by them from banks or persons engaged in the mortgage loan business in North Dakota, are subject to taxation in this state. Leaving constitutional consideration on one side, and expressing no opinion as to whether the legislature could, without violating the constitutional provisions relating to freedom of contract and interstate commerce, impose such liabilities upon commercial transactions between residents of this state and residents of other states, it is plain that the legislature has manifested no intent to do so. The purpose of the statute under consideration was to fix the situs of personal property for the purposes of taxation. The purpose of the amendment was to fix the situs of property which had formerly escaped taxation, to the end that the burden of taxation might be laid equally upon all those who have acquired and own property in this state. And to that end, the legislature provided that nonresidents who are engaged in business in the state shall pay a tax corresponding to that which is exacted from one of its own citizens. And that negotable instruments, credits, and obligations arising from business done by such nonresidents shall be assessable *"at the business domicil of the said nonresident, his agent, or representative."* Manifestly, it was not the purpose of the legislature to impose taxes upon every obligation or debt owed by citizens of North Dakota to residents of other states, but to impose such taxes only upon such credits and obligations as have arisen and have been derived by one who is conducting a business in this state. In other words, the legislature sought to fix the situs of intangible property, arising from business regularly conducted

in this state by a nonresident, at the business domicil of the owner, or the domicil of his agent or representative in the state.

With respect to what obligations or credits the legislature had in mind as having arisen from business done in this state, the very language of the statute indicates that the legislature did not intend to invent or adopt any new definition, or put into force any new idea as to what constitutes "doing business." The direction of the statute is that the obligations and credits to be taxed shall have arisen in the course of the business transacted by one who has a business domicil in the state, or some authorized resident agent or representative therein.

The term, "doing business," has been the subject of numerous judicial decisions; and while the decisions are by no means harmonious, the term has, nevertheless, acquired a more or less well-settled meaning. No good purpose would be subserved by entering into an extended discussion of the many authorities dealing with the question of what constitutes "doing business." Ordinarily, "the term 'business' . . . means an established business, either in connection with or apart from some business that had its domicil in another state. 'Doing business' . . . is maintaining an office and having capital invested and carrying on a regular business; that is, maintaining an office and having a capital invested and carrying on a regular business in the state." 5 Thomp. Corp. 2d ed. § 6670. The Supreme Court of the United States has held that where a resident of one state sends a note into another state where it is discounted, such transaction does not constitute "doing business" within the state from which the note was sent. Bamberger v. Schoolfield, 160 U. S. 190, 40 L. ed. 374, 16 Sup. Ct. Rep. 225. It has also held that the mere continuance by a foreign insurance company of the obligation of existing policies held by residents of a state, together with the receipt of renewal premiums thereon at the company's home office in another state, does not constitute transaction of business, so as to authorize the state where the policy holder resides to impose a privilege or license tax upon the company. Provident Sav. Life Assur. Soc. v. Kentucky, 239 U. S. 103, 60 L. ed. 167, L.R.A.1916C, 572, 36 Sup. Ct. Rep. 34. The authorities seem agreed that where a corporation domiciled in one state purchases securities or receives applications and makes loans through a broker resident in another state, such transactions do not constitute doing business in the state of the broker's

residence, where the securities purchased are delivered, and the loans are made payable, to the corporation at its domicil. See 5 Thomp. Corp. 2d ed. § 6670. It is the duty of this court to ascertain and give effect to the intention of the legislature as expressed in the law. In ascertaining such intention, "words and phrases are construed according to the context and approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, . . . are to be construed according to such peculiar and appropriate meaning or definition." Comp. Laws 1913, § 7325. And in the absence of anything from which a contrary intent may be gathered, we must assume that when the legislature uses the term, "doing business" or "business done," it uses it in the sense in which it is used by the courts and legislatures of the country.

It is strenuously asserted by counsel for the relators that the power to impose a tax upon obligations evidenced by promissory notes and other written instruments exists only in cases where the owners reside, or the instruments themselves are, within the borders of the taxing power. Although there is certain language used in some of the authorities justifying the contention made, it is difficult to see any logical reason on which the contention can rest. It is true that, "by a tradition which comes down from more archaic conditions," the debt is deemed inseparable from the paper which declares and constitutes it. Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277. This, however, is only a legal theory and one which the legislature may modify or abrogate when it deems necessary or desirable. And, as has been stated, a legal fiction or theory cannot deprive a state of jurisdiction to tax where a sufficient jurisdictional basis does, in fact, exist. While promissory notes are deemed property in the sense that they are subject to purchase and sale, the instruments themselves are, as between creditor and debtor at least, in fact merely evidence of the debt. A promissory note and the mortgage securing it may be destroyed, but the obligation evidenced by the instruments still remains until discharged. If all promissory notes and mortgages now existent, formerly executed by citizens of this state, were destroyed, the obligations on the part of the makers, and the rights of the owners and holders to enforce such obligations, would not be altered in the least. The evidence of the obligations would be nonexistent, but the obligations

themselves would remain and could be enforced as before. In other words, the debt or obligation itself is the primary thing, and remains, even though the evidence of its existence is destroyed. The credit is one thing, the evidence of it is another thing. "What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. . . . So, again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place." Ibid. The thing of value, the enforceable obligation, is here, regardless of where the evidence of the obligation may be found. We are therefore of the opinion that this state has the power which it has sought to exercise by the statute under consideration, to wit, to impose taxes upon credits and obligations owned by a nonresident who is conducting a business in this state, and which credits and obligations are owing to him by residents of this state, and have arisen from the business which is being conducted by such nonresident in this state. Manifestly, such obligations and credits are subjects of value to the owner. In many instances they constitute property of the very highest value. Under the statute, obligations and credits to be taxed must have arisen in this state from business transacted here under the protection of our laws, and payable by persons domiciled within this state. The rights of the creditor must be enforced here. The laws of this state protect the obligation and enable the creditor to enforce it against the debtor, thereby making it valuable. And as tangible property is taxable where it has a permanent situs, because the sovereign state where it is located can exercise control over it and thus afford it the protection for which the tax is exacted, it seems that in cases like those which fall within the provisions of the statute before us, the state of North Dakota, which is the domicil of the debtor and has control over him, also has control over the obligations sought to be taxed. Nor do we deem the physical presence of the instruments of indebtedness within this state a jurisdictional prerequisite. We do not believe that a nonresident who is engaged in business in this state and acquires and owns valuable obligations, credits, and securities which have arisen from such business, can escape taxation merely by removing the evidence of such debts from this state. "Persons are not permitted to avail themselves for their own benefit of the laws of a state in the conduct of

business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design." Bristol v. Washington County, 177 U. S. 133, 139, 44 L. ed. 701, 704, 20 Sup. Ct. Rep. 585.

But inasmuch as it appears that the corporation relators had their business domicil in the state of Minnesota; that they had no established agencies in this state; that all applications for loans were received by them and passed upon at their home offices in Minnesota; that such loans were made payable in the state of Minnesota; that the relators kept no funds within the state of North Dakota for investment, but that the amount of each loan was transmitted to the borrower by draft or cashier's check drawn upon a Minnesota bank,—we are entirely satisfied that such transactions do not constitute "business done" in North Dakota within the terms of the statute under consideration.

It therefore follows that the securities held by the different corporation relators are not subject to taxation under the statute. The respondents are, therefore, acting in excess of and without authority of the law in attempting to impose taxes thereon.

It also follows that some of the securities held and owned by the relator Wheeler fall within the rule just stated. But it is not entirely clear from the facts alleged by the relator and admitted by the respondents that all of his securities fall within the rule. It may be that some of his securities arose in a loan business regularly conducted by him through an agent residing in this state, and come within the purview of the statute. If this is so, the mere fact that he has removed the securities to his home in Minnesota will not deprive the respondents of the right to impose taxes thereon. But, as already stated, we are unable to determine what the fact is with regard thereto, and whether any of Wheeler's securities are subject to taxation in this state.

A writ will issue in harmony with the views expressed in this opinion.

ROBINSON, J. (specially concurring and in part dissenting). This suit challenges the validity of chapters 229 and 230, Laws of 1917. Chapter 229 is to the effect that no nonresident, either by himself or agent, shall do business within the state without paying a tax the same as citizens of the state, and that all bills receivable, obligations, and credits arising from business done in this state are assessable within

the state and at the business domicil of the nonresident or his agent. The term "credits" means and includes every claim or demand for money due or to become due, and all demands secured by deeds or mortgages due or to become due. Comp. Laws, § 2074.

Chapter 230 provides that all moneys and credits must be listed for taxation, and that, in lieu of all other taxes, the same shall be subject to an annual tax of 3 mills on each dollar of the fair cash value. That the taxes paid under such levy shall be apportioned one sixth to the state; one sixth to the county; one third to the general fund of the city, village, or township; and one third to the school district.

These two chapters may be considered as twins. They were enacted at the same time and for the same purpose. They stand or fall together. The real purpose of each chapter was to levy a 3-mill tax on the credits of nonresidents. What a person does by another he does by himself. Hence, when a resident agent does represent a nonresident in carrying on a farm, a loan agency, or any business, the property, credits, notes, and mortgages obtained, held, and used by him have a local situs and domicil and are subject to taxation. Such has always been the law of this state.

Before the passage of the two acts, nonresident property of every kind, including money and credits having a situs or domicil in the state, was, and it still is, subject to assessment and taxation the same as the property of residents. Hence, it must be that the real purpose of those acts was to levy a 3-mill tax on the credits of all nonresidents when secured on lands in this state.

The relators show that they do not reside in this state and they carry on no business within the state, but they do purchase notes and mortgages secured on lands in the state, and defendants show a purpose to assess such notes and mortgages and to levy thereon a tax of 3 mills on the dollar. Now, as held by the United States Supreme Court, all property in debts belong to the creditors to whom they are payable, and follow their domicil wherever they may be. Debts can have no locality aside from the parties to whom they are due. This principle might be stated in many different ways and supported by citations from numerous adjudications; but no number of authorities, and no form of expression, could add anything to its obvious truth.

So far as debts are held by nonresidents of the state, they are prop-

erty beyond the jurisdiction of the state. State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179. No state has jurisdiction to levy taxes on property, money, or credits which are held and used in another state.

In regard to the levying of taxes the Constitution provides thus: The legislative assembly shall provide for raising revenue sufficient to defray the expenses of the state for each year, not to exceed in any one year 4 mills on the dollar of the assessed valuation of all taxable property in the state, and a sufficient sum to pay interest on the state debt. § 174.

No state tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied. § 175.

The debt of any county, township, city, town, or school district shall not exceed 5 per cent of the assessed valuation of the taxable property therein. § 183.

Under the Constitution each political subdivision must levy its own taxes and impose and bear its own burdens. It is for the state to levy its own tax, to make each levy for a specified public purpose, and to limit the levies to 4 mills on the dollar and the interest on the public debt. Obviously, there is nothing in the act to show the object of the 3-mill levy. The act does not state the object of the 3-mill levy or show that it is for a public purpose. For the several reasons the levy is clearly void. The sum total of all levies for the necessary expenses of the state must not exceed 4 mills on the dollar in any one year. This limitation it would be quite impossible to fix and determine if the state might levy on all the different classes of property 3 mills or 3 cents on the dollar, and if the state may discriminate and levy 3 mills on credits, why not 3 cents on other classes of property?

It seems we are having altogether too much tinkering with tax legislation, and it is done for the purpose of raising excessive revenues. The only safe course is to assess and tax all property by uniform rule according to its value in money, and in every law or resolution imposing a tax to state distinctly the object of the same.

The conclusion is that said chapters 229 and 230 are void in so far as they provide for the levy of a 3-mill tax on money and credits, and in so far as they provide for the assessment of money or credits not

owned or held or used in this state. Hence, it is ordered that in the making of assessments and tax levies under said chapters, the defendants and all persons acting under them shall conform to this decision, and that the relators shall not be required to list for assessment and taxation any property, money, or credits of nonresidents, only such as may be held and used in this state regardless of the fact that the same may be secured on property within the state.

GRACE, J. (concurring in part, dissenting in part). We concur in the opinion of the majority in so far as it holds that moneys and credits of the citizens of the state of North Dakota are taxable according to the provisions of chapter 229 of the 1917 Session Laws.

We dissent from the majority opinion wherein it holds that the relators and those similarly situated who are nonresidents and who are the owners and holders of mortgages, obligations, accounts, and contracts, etc., which are obligations owing by the citizens or residents of this state to the residents and citizens or corporations of other states, are not taxable by the proper tax officials of this state, in the same manner and to the same effect as moneys, obligations, and credits, etc., of the citizens and residents of this state are subject to the tax provided by chapter 229 of the 1917 Session Laws.

As it appears to the writer, the result arrived at by the majority with reference to intangible property of nonresidents is clearly contrary to the major portion of the reasoning of the majority of the court. The greater part of the reasoning of the majority, as expressed in their opinion, would be logical if the result as to nonresidents were just the reverse of that at which the majority opinion arrives.

The first main question to be considered, stated in simple manner, is: "Are the plaintiffs transacting business within the state of North Dakota?" The revenue statute under consideration is part of chapter 229 of the 1917 Session Laws. The same reads as follows: "Except as otherwise provided in this chapter, personal property shall be listed and assessed in the county, town or district where the owner or agent resides; the capital stock and franchises of corporations and persons shall be listed in the county, town or district where the principal office or place of business of such corporation or person is located in this state; and if there be no principal office or place of business in

this state where such corporation or person transacts business, then personal property pertaining to the business of a merchant or manufacturer or corporation shall be listed in the town or district where his business is carried on. The taxation and revenue laws of this state shall apply with equal force to any person or persons representing in this state business interest that may claim domicil elsewehere, the intent and purpose being that *no nonresident, either by himself or through any agent* shall transact business within the state without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from business done in this state are hereby declared assessable within this state, and at the business domicil of said nonresident, his agent, or representative; provided, however, no insurance company paying the state a percentage of its gross premiums received in the state shall be subject to the provisions of this act."

It is not difficult to ascertain the intent of the legislature in passing the above law. In fact the legislature has declared its intent which is contained in the body of the law. The legislature evidently did this in order to save the court the trouble of trying to ascertain what the intent of the legislature was, in the passage of such law, and for the further purpose of guiding the court in ascertaining the intention of the legislature. Many laws are passed by legislatures in which no reference is made as to what the intent of the law really is, it being left to the court of final resort to finally determine the intent of the law from the language used therein; but the legislature has clearly expressed the intent of the law under consideration.

The law under consideration, as passed by the legislature, has not its parts grammatically and logically arranged, but this is a fault common to many legislative enactments; but notwithstanding the poor grammatical arrangement of the law under consideration, when the whole law is read, the intent thereof is exceedingly clear, and would be so even though the legislature had not declared the intent.

The majority opinion clearly declares the intent of the law, and then arrived at a result which appears to us directly contrary to the intent of the law. The majority opinion uses the following language with reference to the intent of the amendment:

"The intent and purpose of the amendment, as declared by the legis-

lature, was to require nonresidents transacting business within the state to pay a tax corresponding to that exacted from citizens of the state."

We quote further from the majority opinion to support such intent of the legislature in enacting said law:

"At the outset, it is well to note that the avowed purpose of this statute under consideration *is to fix the situs of personal property for the purpose of taxation.*

"The original section provides that personal property should be listed where the owner or agent resides, and that the capital stock and franchise of corporations and persons should be listed where the principal office or place of business of the corporation is located; and if there is no principal office or place of business in the state that then personal property pertaining to the business of a merchant or manufacturer or corporation should be listed where the business is carried on. The amendment merely extended *these provisions and made the statute applicable to nonresidents transacting business in the state. The intent and purpose of the amendment as declared by the legislature was to require nonresidents transacting business within the state to pay a tax corresponding to that exacted from citizens of the state. And in that connection and to that end it provided that 'all bills receivable, obligations or credits arising from business done in this state are (hereby declared) assessable within the state and at the business domicil of the said nonresident, his agent or representative.'* Obviously, the legislature had no intention, by the enactment of this statute, to impose a privilege or occupation tax. The legislature was dealing with a tax upon property only. The true purpose of the statute is merely to fix the situs of personal property and to designate the particular place within the state where such property is to be taxed. . . .

"It is strenuously asserted by counsel for the relators that the power to impose a tax upon obligations evidenced by promissory notes and other written instruments exists only in cases where the owners reside or the instruments themselves are within the borders of the taxing power. Although there is certain language used in some of the authorities justifying the contention made, it is difficult to see any logical reason on which the contention can rest. It is true that 'by a tradition which comes down from more archaic conditions' the debt is deemed

inseparable from the paper which declares and constitutes it. Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277. This, however, is only a legal theory and one which the legislature may modify or abrogate when it deems necessary or desirable. *And, as has been stated, a legal fiction or theory cannot deprive a state of jurisdiction to tax where a sufficient jurisdictional basis does, in fact, exist.* While promissory notes are deemed property in the sense that they are subject to purchase and sale, the instruments themselves are, as between the creditor and debtor at least, *in fact merely evidence of the debt.* A promissory note and the mortgage securing it may be destroyed, *but the obligation evidenced by the instruments still remains until discharged.* If all promissory notes and mortgages now existent formerly executed by citizens of this state were destroyed, *the obligations on the part of the makers and the rights of the owners and holders to enforce such obligations would not be altered in the least.* The evidence of the obligation would be nonexistent, but the obligations themselves would remain and could be enforced as before. In other words, the debt or obligation itself is the primary thing, and remains even though the evidence of its existence is destroyed. The credit is one thing, the evidence of it is another thing. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. . . . So, again, what enables any other than the very creditor and proper person to collect the debt? The law of the same place. Ibid. *The thing of value, the enforceable obligation, is here regardless of where the evidence of the obligation may be found.* We are therefore of the opinion that this state has the power which it has sought to exercise by the statute under consideration, to wit, to impose taxes upon credits and obligations owned by a nonresident who is conducting a business in this state, and which credits and obligations are owing to him by residents of this state, and have arisen from the business which is being conducted by such nonresident in this state. Manifestly such obligations and credits are subjects of value to the owner. In many instances they constitute property of the very highest value. Under the statute, obligations and credits to be taxed must have arisen in this state from business transacted here under the protection of our laws and payable by persons domiciled within this state.

The rights of the creditor must be enforced here. The laws of this state protect the obligation and enable the creditor to enforce it against the debtor, thereby making it valuable. And as tangible property is taxable where it has the permanent situs, because the sovereign state where it is located can exercise control over it, and thus afford it the protection for which the tax is exacted, it seems that in cases not like those which fall within the provisions of the statute before us the state of North Dakota, *which is the domicil of the debtor and has control over him, also has control over the obligations sought to be taxed.* Nor do we deem the physical presence of the instrument of indebtedness within this state a jurisdictional prerequisite. *We do not believe that a nonresident who is engaged in business in this state and acquires and owns valuable obligations, credits and securities which have arisen from such business, can escape taxation merely by removing the evidence of such debts from this state."*

The writer has quoted most extensively from the opinion of the majority, and, after reading and considering the language thus expressed in the majority opinion, cannot escape the conviction that the majority opinion conceives it was the intention to require nonresidents transacting business in this state to pay a tax corresponding to that exacted from citizens of the state; that such tax may be upon intangible property; that such intangible property may consist of notes and mortgages on land within this state and owned and held by persons without the state, and that the situs of such intangible property for the purpose of taxation is, in fact, the place where the debtor resides though the evidence of the debt is held without the state; that the situs of such intangible property for the purpose of taxation is in the state that has control over both the debtor and its obligation and the laws of such state, which protect the obligations and enable the creditor to enforce it against the debtor.

All these concessions are really, in fact, made by the majority opinion, and such concessions must necessarily be made because they are true, and we see that when such concessions are made the result arrived at by the majority opinion, as to nonresidents, cannot logically be reached.

There is no question arising in this case concerning whether or not the relators do business in this state. They, in their petitions and

affidavits, admit they are doing business in this state, and they, in effect, admit they are doing a regular business in this state; and this being true, the notes, obligations, or mortgages arising in this state owing from debtors in this state to them, even under the reasoning of the majority, are taxable in North Dakota.

The majority opinion seems to rest upon the theory that the relators in question were not doing business within this state. We see no other way the majority can avoid the logical result of their own reasoning except to base the reason for the result they reached upon the theory or claim that the relators are not doing business in the state of North Dakota or are not conducting a regular business. This theory or this claim is entirely overcome and dissipated by the express admission of the relators. E. J. Wheeler, in his affidavit, states as follows: "Affiant further says that he is engaged in the *real estate and loaning business,* and in the purchase and sale of mortgages, bonds, credits, and other securities held and owned by him until collection thereof; *that at times in the furtherance of his lawful occupation and business* he advances and loans to citizens of the state of North Dakota moneys and checks therefor, notes, bonds, obligations, and other evidence of debt secured by mortgages upon real and personal property, and at times purchases the same, and for that purpose at times employs an agent in the state of North Dakota to take applications for loans, cause to be executed notes and mortgages, and forwards the same to petitioner, who forwards to the agent the moneys for said loans, which is by said agent delivered to the borrower within the state of North Dakota, which said promissory notes, mortgages, and credits, however, are not held in the state of North Dakota, but in the actual possession of the petitioner in the state of Minnesota."

It is not necessary to quote the affidavit of Wheeler further, as it clearly shows that he is engaged in transacting a regular business in the state of North Dakota, where this conclusion necessarily follows from his admission. He also shows, further, that the bonds, notes, negotiable instruments, and mortgages are in different and various counties of the state of North Dakota; that the property securing such evidence of debt is located in various taxing districts of the state of North Dakota and subject to the particular jurisdiction where levies are and have been made for the purpose of providing revenue for said

particular taxing district, and to meet the current expenses of said taxing district. We see, therefore, that the affiant, who is one of the petitioners and relators, concedes that the property which secures these obligations is located in various taxing districts which have jurisdiction over such property. If it should be found that the obligations which said property secures are assessable as intangible property, *it will necessarily have to be conceded that the taxing districts where the property is located which secures such obligations will have jurisdiction to assess such intangible property.*

The other petitioners and relators in this proceeding are, the Capital Trust & Savings Bank, Merchants Trust & Savings Bank, Northwestern Trust Company, Minneapolis Trust Company, Minnesota Loan & Trust Company, Wells-Dickey Company, Hennepin Mortgage Company, Gould-Stabeck Company, and Drake-Ballard Company. These are all Minnesota corporations, and each have a business office or place either in St. Paul or Minneapolis, Minnesota.

In the brief of intervening relator is substantially the following statement of facts: "The business of each of them (referring to the above corporations) consists among other things in loaning money on promissory notes secured by mortgages on farm lands in Minnesota, North Dakota, and other states in the Northwest. *They each hold a large amount of such notes secured by mortgages on farm lands in various counties of the state of North Dakota.* The method of making such loans is illustrated by a practice of the intervener, Capital Trust & Savings Bank, and is as follows: Persons or corporations living in the state of North Dakota and engaged in the banking, loan, or real estate business and having applications for loans made to them by owners of farm lands in the state, submit such application to the intervener. The applications are in writing and are sent by mail to the intervener's office in St. Paul for its consideration. In some cases the intervener accepts the applications and in other cases they are rejected. If it desires to make the loan applied for, the notes and mortgages are executed by the borrower, who is usually a resident of North Dakota. The loan broker in North Dakota through whom the application is made attends to the execution and recording of the papers, and when they are complete they are sent by mail to the intervener at his office in St. Paul for its examination and approval. The papers are examined in St. Paul; the abstracts of

titles are passed on at St. Paul and the loan is accepted or rejected in St. Paul. If the papers are approved the money loaned is transmitted by the intervener at St. Paul to the loan broker through whom the application is received, the funds being transmitted by draft or cashier's check drawn on funds in the state of Minnesota. The intervener has no agent acting for it in such matters in North Dakota, and the loan brokers have no authority to represent the intervener and receive their commission and compensation from the borrower and act as the borrower's agent. After the loan is made, the notes, mortgages, and other papers are kept by the intervener at his office in St. Paul so long as he owns the same. The notes are, in all cases, made payable at the office of the intervener in the city of St. Paul. Occasionally, if the intervener purchases mortgages from banks or persons engaged in the mortgage loan business in North Dakota, and in such cases the papers relating to the mortgage loan are sent to the intervener at his office in St. Paul for examination and approval, and if accepted, the purchase price is transmitted from St. Paul to North Dakota in the same manner as where the loan is made by the intervener in the first instance. The intervener does not maintain any agent or place of business in the state, and the mortgage notes do not arise out of any business transacted in the state of North Dakota, unless making loans in the manner set forth constitutes doing business in that state. The methods followed by all the interveners are substantially the same. The interveners, other than the Capital Trust & Savings Bank, have heretofore complied with the Foreign Corporation Act of the state of North Dakota; but notwithstanding they have received licenses to do business in that state, they have not, in fact, transacted any business in the state unless the making of mortgage loans stated constitutes doing business in the state."

This statement of facts, without need of further analysis, clearly shows and demonstrates that each of the interveners is engaged in business in the state of North Dakota. In the statement of facts, it is admitted that *"they each hold a large amount of such notes secured by mortgages on farm lands in various counties of the state of North Dakota."* This statement, in effect, is equivalent to stating that they each do a large business in the state of North Dakota by loaning money to the residents of North Dakota and taking mortgages on their farms. They have, with one exception, complied with the Foreign Corporation

Act of this state and received their licenses to do business,—all of which indicates the transaction of a regular business in the state of North Dakota. The statement of facts also shows that a large part of the business is done in North Dakota. The statement of facts referred to this matter and to the making of a loan, and states as follows: "If it desires to make the loan applied for, the notes and mortgages are executed by the borrower, *who is usually a resident of North Dakota,* and it is stated that the method of making such loan is illustrated by the practice of the Capital Trust & Savings Bank."

The quotation last made is with reference to the Capital Trust & Savings Bank, so that it would appear that a large part of the business of the corporation is that of making farm loans in the state of North Dakota. In fact, it must, we think, be conceded that all of the corporations above referred to, from their own statement of facts, do a large farm loaning business in the state of North Dakota. Assuming that it appears that such corporations do a large business in the state of North Dakota, the result arrived at by the majority opinion has no logical support, and the result arrived at does not follow from the major part of the reasoning of the majority opinion. The result arrived at by the majority, as it appears to us, is in direct conflict with their reasoning as we have set it forth in this opinion, and cannot rest upon the proposition that the intervening relators are not doing business in the state of North Dakota, because their statement of facts, we believe, shows that they are doing business in the state of North Dakota. It being, as we believe, shown that the relators are doing business in the state of North Dakota, as the words, "doing business," are usually understood, and applying to such words the ordinary and common signification, and it being further conceded that the obligation is, in fact, the thing of value, and the notes and mortgages but the evidence of the value, and that the power exists in this state to enforce such obligations to which power the creditor may resort whenever he is entitled to a remedy, it must be apparent and it ought to be held that such obligation is taxable as intangible property by virtue of the statute under consideration. Such, we believe, was the intent of the legislature, and such intent, when ascertained and especially when expressly declared, should govern this court. The plain intent of the legislature should be carried into effect.

There can be no question but what the state has jurisdiction to impose a tax under consideration upon the intangible property, in this proceeding. The intangible property is located within this state. That is, the obligation, the thing of value, is within this state. The debtor resides within this state. The power to enforce the obligations under consideration is within this state. The intangible property, the obligation, is within this state. Though the evidence of such obligation may be without the state, the obligation, the thing of value, the credit being within this state, the state has jurisdiction to apply taxing laws to such obligation and credits in the same manner as it applies the taxing laws to similar obligations and credits of its own citizens. There can be no question about the state having jurisdiction over the intangible property under consideration and all similar intangible property.

The legislature has clearly declared the intent of the act in these words: *"The intent and purpose being that no nonresident, either by himself or through any agent shall transact business within the state without paying to the state a corresponding tax with that exacted of its own citizens."* [Laws 1917, chap. 229.]

It is clear from the above language that it is not necessary to have an agent in this state, for the law applies whether the business is done by the principal or through an agent; and the intent as expressed above clearly shows that if the business is done within this state so that an obligation exists in the state, then the power to tax such obligation exists in the state, to the same extent that a similar obligation is taxed as against a citizen of this state.

It may be well to examine upon what intangible property or credits are the citizens of the state of North Dakota subject to tax. When that is ascertained, then the nonresident must pay a corresponding tax upon similar intangible property. It must be conceded that the citizens of the state of North Dakota must pay the tax under consideration, upon every credit and upon all intangible property such as notes, mortgages, accounts, contracts, etc., which he owns. Any citizen who has any of such intangible property is subject to the tax under consideration, whether he is an individual, a corporation, or whether he does such business himself or through an agent. If this is true, then the nonresident who has similar property in this state, according to the expressed intent of such law, should pay a corresponding tax.

The question then is: Are notes and mortgages executed by citizens of this state to nonresidents, upon intangible property within this state, subject to the tax under consideration? It being conceded that such notes and mortgages are but the evidences of the obligation, and that the obligation is the thing of value; that the obligation exists within this state, the debtor resides within this state; the obligation to pay existing within this state; the power to enforce such obligation being within this state; it must follow that the intangible property under consideration and similarly situated must be within this state, and is therefore taxable within this state in the manner corresponding to that of similar intangible property taxed against the residents and citizens of this state. In other words, whatever intangible property a nonresident has within this state is taxable in the same measure as and correspondingly with similar property of a resident or citizen of the state.

This is the true measure of authority and power of the state to tax this kind of property. If the citizens of the state pay this tax upon a mortgage, note, or obligation which they own, then a similar tax must be paid upon a similar note, mortgage, or obligation which is owned by a nonresident.

It does not seem to us that there is any great difficulty in understanding this law, especially where the clear intent of the legislature is expressed, as we have before set forth. The measure of the liability of a nonresident who owns intangible property within this state to pay tax thereon is measured by the liability of a citizen or resident within this state in paying a tax upon similar intangible property.

As the majority opinion has not entered into a discussion of constitutional questions, we will not do so.

O. T. BENSON, Respondent, v. JAMES E. GRESSEL, Appellant.

(168 N. W. 649.)

Justice of the peace — jurisdiction of — objection to — summons — given name of defendant in title — different name in body — motion by defendant for change of venue — waives such objection — general appearance.

1. Where an objection is made to the jurisdiction of the justice court on

the ground that the summons issued therefrom gives the proper first or given name of the defendant in the caption of the summons and a wrong given or first name in the body of the summons, the objection to the jurisdiction is waived where the defendant subsequently makes a motion for a change of venue supported by an affidavit signed by the defendant, the motion for a change of venue and the affidavit supporting it constituting a general appearance of the defendant in the case.

Justice court — action in — party moving for change of venue — usual affidavit made — change must be made — jurisdiction.

2. Where a party to an action in the justice court makes a motion for a change of venue and supports such motion by an affidavit signed by the party, such change of venue must be granted. After the making of such motion and the filing of such affidavit, the justice court has no further jurisdiction.

Justice court — appeal from — to district court — on questions of law only — powers of district court — may order case reopened — trial on merits.

3. Upon an appeal from the justice court to the district court on questions of law only and from a reversal of the judgment of the justice court, the district court may, under § 9164, Compiled Laws 1913, direct the case to be reopened and placed upon its calendar for trial on issues of fact, by so providing in its order, reopening the case.

Opinion filed July 25, 1918.

Appeal from the District Court of Oliver County, North Dakota, Honorable, *J. M. Hanley,* Judge.

Affirmed.

Oliver Leverson, for appellant.

The appeal being on questions of law alone, the district court had no authority to order the case reopened and to stand upon the calendar for trial on the merits. The justice court having no jurisdiction, and appeal being on questions of law only, the district court had only jurisdiction to order a reversal of judgment of the justice. Comp. Laws 1913, § 9164.

John J. Garrity, for respondent.

On appeal to district court from the judgment of a justice court on questions of law only, the district court may order the case reopened and direct that it be retained and placed on the calendar for trial. Comp. Laws 1913, § 9164.

The necessary effect of a reversal of the judgment of the justice is to

reopen the case for trial upon its merits in the district court. The case should not be remanded to the justice court. Olson v. Shirley, 12 N. D. 106, 96 N. W. 297; Grovenor v. Signor, 10 N. D. 503, 88 N. W. 278.

GRACE, J. This action is one originally commenced in the justice court before Arthur A. Smith, justice of the peace of Oliver county, North Dakota. The action was to recover the sum of $30 for professional services claimed to be rendered by the plaintiff and rendering professional services as physician to the wife of the defendant.

The summons was issued out of the justice court, and in the summons were stated the facts constituting plaintiff's cause of action. The right name of the defendant is James E. Gressel. In the caption of the summons the name was given as James E. Grossel, in the body of the summons the name of John E. Gressel was inserted. The appellant, in effect, claims that the insertion of the wrong first or given name in the body of the summons operated to defeat the justice court of any jurisdiction. There might be some merit to this claim were it not for the further fact that subsequent to the issue and service of the summons on James E. Gressel, in the body of which summons was inserted John E. Gressel, the defendant James E. Gressel, on the 6th day of August, 1915, made a motion and affidavit in support thereof in an application for a change of venue from said justice of the peace. On the 12th day of August, at which time the summons was made returnable, Mr. Graf, acting in place of Attorney Leverson for the defendant, moved to dismiss the action on the ground that the summons was addressed to John E. Gressel, and services not made on John E. Gressel. Motion to dismiss was opposed by the counsel for the plaintiff on the ground that the right name, James E. Gressel, was in the caption of the summons, and that the return of the service shows the summons was served upon James E. Gressel.

We are of the opinion that the defendant, under the above showing, submitted himself to the jurisdiction of the court and thus waived the irregularities in the summons of which he complains. In other words, he made a general appearance in court, and thus conferred jurisdiction upon the court even if the court had no jurisdiction theretofore.

If the defendant upon his special appearance had made a motion to

dismiss the case upon the ground that the court had no jurisdiction by reason of the insertion of the wrong name in the body of the summons, and did nothing more, that is, if he had not subsequently made his motion in application for a change of venue, he would have been in a position to raise the question of jurisdiction by his special appearance; but having made his motion and filed his affidavit for a change of venue, that constituted a waiver of any irregularity in the summons, and was a submission by the defendant to the jurisdiction of the court, and constituted a general appearance in court for all purposes. The defendant having made a motion and filed an affidavit for a change of venue, the affidavit being signed by the defendant, he had an absolute right to a change of venue, and it was the plain duty of the justice court to grant such change of venue. After the making of the motion and the filing of the affidavit for a change of venue, the justice court thereafter had no jurisdiction to render judgment against the defendant.

The defendant appealed to the district court on questions of law alone. The district court properly set aside the judgment of the justice court on the ground that the justice court had no jurisdiction to enter judgment, and ordered that the case be reopened and stand for trial on issues of fact raised by the summons and such answer as the defendant may serve and file within twenty days after the service of the order of the district court upon defendant's attorney. Under § 9164, Compiled Laws 1913, the district court, in directing the case to be reopened and placed upon its calender for trial on issues of fact in the manner in which its order provided, proceeded legally, and its order so made was in harmony with the section of our Code above pointed out. The following cases heretofore decided by this court are in point: Olson v. Shirley, 12 N. D. 106, 96 N. W. 297; Grovenor v. Signor, 10 N. D. 503, 88 N. W. 278.

The judgment appealed from is affirmed, with costs.

JOHN McCARTY, Plaintiff and Respondent, v. CHARLES W. GOODSMAN, Amanda Goodsman, and Asa J. Styles, Defendants, ASA J. STYLES, Appellant.

(168 N. W. 721.)

Mortgage foreclosure — by advertisement — enjoining of — right of foreclosure — established in subsequent trial — power of sale — under — no legal counterclaim — no valid defense — proceeding enjoined — costs incurred in — may recover.

1. Where the foreclosure of a mortgage by advertisement is enjoined under § 8074, Compiled Laws 1913, and it is established in the subsequent foreclosure action that the plaintiff had a right to foreclose the mortgage under the power of sale, and that there was, in fact, no legal counterclaim or valid defense against the whole or any part of the amount claimed to be due in the notice of sale, the plaintiff is entitled to recover in such foreclosure action the costs and disbursements which he has actually and necessarily incurred in the foreclosure proceeding, which was enjoined.

Statutory attorney's fee — but one recoverable.

2. The plaintiff in such foreclosure action, however, is entitled to recover only one statutory attorney's fee.

Opinion filed July 25, 1918.

From a judgment of the District Court of Pierce County, *Burr,* J., defendant appeals.

Modified and affirmed.

Asa J. Styles, for appellant.

In mortgage foreclosure proceedings by advertisement, before an attorney's fee can be included as an item of costs, the attorney must file his affidavit in full compliance with the statute. He must also be a resident attorney. Comp. Laws 1913, § 7792; 11 Cyc. 105; Fletcher v. Kelly, 88 Iowa, 475, 55 N. W. 474, 21 L.R.A. 347; Wilkins v. Troutner, 66 Iowa, 557, 24 N. W. 37.

Costs cannot be taxed in the absence of statutory authority. Angholm v. Ekrem, 18 N. D. 185.

"In a suit in equity the costs of a previous action at law between the same parties and in reference to the same subject-matter are not allowable." 5 Enc. Pl. & Pr. 238.

"Where the service of process or papers is one which is not required by law, compensation therefore cannot be taxed as costs." 11 Cyc. 100, and cases note 19.

Harold B. Nelson, for respondent.

"Whenever any real property shall be sold by virtue of a power of sale contained in any mortgage, the officer making the sale shall immediately give the purchaser a certificate of sale." Comp. Laws 1913, § 8084.

"Such certificate must be executed and acknowledged and may be recorded, as provided in case of a certificate of sale of real property upon execution, and shall have the same validity and effect." Johnson v. Day, 2 N. D. 295.

These provisions are mandatory. Ibid.; Martin v. Hawthorne, 5 N. D. 66.

A sale without a certificate does not pass title. Smith v. Buse, 28 N. W. 220.

A sale had in violation of an order restraining it is void, and by analogy the issuance of a certificate after an order forbidding it is also void. Lash v. McCormick, 14 Minn. 482.

"One who obtained an injunction restraining the sale, but allowing the continuation of the publication of notice, cannot on taxation of costs object to the allowance of the whole expense of publication, although it exceeded twenty-four weeks." Collins v. Standish, 6 How. Pr. 493; Cree v. Lord, 25 Vt. 498.

In foreclosure the attorney's fee, like other costs, is a statutory item. Comp. Laws 1913, § 7792.

"In a proceeding to foreclose a mortgage, where the answer admits the execution of the note and mortgage, and does not deny that the amount claimed in the petition is due, there is nothing for the plaintiff to prove." Cooley v. Hobart, 8 Iowa, 358.

"Where defendant sets up an unfounded defense and delays the proceedings it is proper to charge him personally with the costs, instead of taking them out of the property." 2 Barb. Ch. 440; Boudinot v. Winter, 60 N. E. 553; O'Neal v. Hart, 47 Pac. 926.

CHRISTIANSON, J. The defendant Styles is the owner of the premises involved in this controversy. The plaintiff had acquired and owned

a $500 mortgage upon such premises, executed by Charles W. Goodsman and Amanda Goodsman, his wife, the former owners thereof. In January, 1916, the plaintiff instituted proceedings by advertisement for the foreclosure of such mortgage. The defendant Styles thereupon applied to the district court for, and received, an order under the provisions of § 8074, Comp. Laws 1913, enjoining the foreclosure by advertisement, and directing that all further proceedings for foreclosure be had in the district court of Pierce county. The restraining order was issued upon the affidavit of the defendant Styles, averring that the mortgage sought to be foreclosed was barred by the Statute of Limitations.

The foreclosure sale was advertised to be held on February 21, 1916. The restraining order was issued February 17, and served February 18, 1916. Immediately after the service of the restraining order, plaintiff applied for an order to vacate it; and the court, being somewhat in doubt as to its powers and duties in the matter, issued an order to show cause, returnable March 7, 1916. The order to show cause did not vacate the restraining order, but merely suspended it to the extent of permitting the sale to be made, and directed that no certificate of sale be issued until the further order of the court. The order in effect held the matter in abeyance pending the hearing on the order to show cause. The plaintiff was the purchaser at the sale held pending the hearing.

The motion to vacate thereafter came on for hearing, pursuant to the order to show cause. Upon the hearing, the defendant Styles appeared in opposition to the motion to vacate, and after due consideration the court denied the motion to vacate the restraining order. The restraining order, therefore, remained in full force and effect, and the plaintiff, in accordance with its directions, instituted the present action to foreclose the mortgage. The defendant Styles appeared and in his answer asserted:

1. That the mortgage described in the complaint had been extinguished by virtue of the sale made pending the hearing on the order to show cause; and,

2. That the cause of action set forth in the complaint was barred by the Statute of Limitations for the reason that the mortgage sought to be foreclosed contained a covenant on the part of Goodsman and wife

to pay all taxes on the land and keep the buildings thereon in repair; that they had failed to pay taxes, and had permitted the buildings to be removed from the land; and that such acts constituting defaults in the conditions of the mortgage had occurred more than ten years prior to the commencement of this action.

Upon the trial, the defendant Styles filed a supplemental answer, wherein he pleaded as an affirmative defense that the land in controversy had been sold at mortgage foreclosure sale on February 21, 1916, to the plaintiff, John McCarty, for the sum of $613.53, pursuant to the printed notice of foreclosure sale, and that on the 20th day of February, 1917, the defendant Styles had made redemption from such sale by paying to the sheriff the sum of $669.75. He thereupon withdrew the defense of the Statute of Limitations, and so informed the court and adverse party.

The trial court made findings, and ordered judgment, in favor of the plaintiff. The defendant appeals and demands a trial anew in this court.

On his appeal the defendant asserts:

1. That the mortgage was extinguished by the foreclosure and the subsequent redemption made by the defendant therefrom.

2. That in any event the court erred in allowing certain costs to be taxed.

We will consider these propositions in the order stated.

(1) With respect to the first contention, it should be stated that the evidence shows that the plaintiff refused to accept the moneys paid by the defendant Styles to the Sheriff of Pierce county for the alleged purpose of making redemption. And it is indeed difficult to understand on what possible theory Styles can now contend that the foreclosure sale which he caused the court to enjoin was of any effect. As was said by the trial court in memorandum decision in this case: "Here is the defendant getting from the court an order enjoining the very proceedings which he said were a foreclosure, and compelling the plaintiff to treat the foreclosure proceedings as a nullity, and compelling the plaintiff to bring an action to foreclose and drop the foreclosure proceedings by advertisement, and now coming before the court and claiming that the proceedings enjoined on his application were of such a character as could be redeemed from. It will be further noted

that this attempted redemption by the defendant is long after he had answered in this case. The defendant himself never considered that there was a foreclosure by advertisement. He knew that he had had it enjoined, that the plaintiff commenced this action treating the proceedings as a nullity, and that defendant himself had treated it as a nullity in answering. How he can come in now and claim to redeem passes the comprehension of this court. He cannot be permitted to play fast and loose with the process of this court. . . . The defendant does not seriously contend that the mortgage is not a lien on the land, and he withdraws the very defense of Statute of Limitations that he set up in his affidavit to have the foreclosure proceedings by advertisement enjoined. On page 22 of the transcript, lines 3 and 4, the defendant Styles withdraws the defense of the Statute of Limitations, and on page 21 of the same transcript, lines 19 to 24, defendant limits his defense in this case to that of a redemption."

The reasoning adopted by the trial court meets with our entire approval.

(2) With respect to the taxation of costs, it appears that the court taxed, and entered judgment against the defendant Styles personally for, the costs of the action, such as the fees of the clerk of the district court, sheriff's fees for serving the summons and complaint, and the statutory costs. The court also permitted to be taxed as costs, not against the defendant Styles personally, but "to be taxed in the judgment as a part of the indebtedness secured by the note and mortgage upon the premises involved in the action, and to be satisfied only out of the proceeds derived from such sale," the following items of costs incurred and expended by the plaintiff in the foreclosure proceedings by advertisement; attorney's fees, $50; publishing notice of sale, $11.88; sheriff's fees, $10.60; register of deeds, $4.25.

It is contended that the statutory attorney's fees for the foreclosure of the mortgage should not have been allowed for the reason that Mr. Coger, the attorney to whom plaintiff had executed a power of attorney to foreclose the mortgage, was no longer a resident of the state. The record shows, and it is pointed out by the trial court in its memorandum decision, that the question of the change of residence of Mr. Coger was not mentioned at any time during the trial of the case. The summons and complaint in the action were signed by Albert E. Coger and Harold

B. Nelson as attorneys for the plaintiff. The residence and postoffice address of such attorneys, as indorsed upon the summons and complaint, is given as Rugby, Pierce county, North Dakota. Mr. Coger is the attorney who appeared and conducted the foreclosure proceedings by advertisement, and the complaint alleges the execution and delivery by the plaintiff of a power of attorney, authorizing Coger to foreclose the mortgage. No objection was made upon the trial, nor was it even intimated that Coger was no longer a resident of the state. Nor was any such objection made at the time the costs were retaxed by the clerk of the district court. The written objections filed before the clerk by the defendant Styles contain no such ground of objection. This objection was apparently an afterthought. It was first raised upon the application made before the court to review the retaxation of costs. Our statute contemplates that objections to items of costs shall be made in the first instance before the taxing officer. Comp. Laws 1913, § 7802. See also 15 C. J. p. 190, § 455. Upon the hearing before the district court, the defendant Styles submitted an affidavit wherein he stated on information and belief that Coger is no longer a resident of the state, and also submitted what purports to be a letter received from the deputy clerk of the supreme court of Minnesota to the effect that Coger was admitted to practise law in that state on February 21, 1917. The defendant does not deny that the foreclosure action was conducted and tried by an attorney regularly admitted to practise in, and a bona fide resident of, this state. On the contrary, the record shows this to be the fact. We are entirely satisfied that the trial court was justified in disregarding the objection sought to be made by the defendant to the taxation of the statutory attorney's fee for the foreclosure of the mortgage.

We are also satisfied that the trial court was entirely correct in taxing the costs in the action against the defendant Styles, and directing personal judgment to be entered against him therefor. The costs in the action were occasioned solely by his acts. He made it necessary to maintain the action in the first place, and he alone appeared and answered. We have no doubt that he became chargeable with the costs incurred, and properly taxable, in the action.

With respect to the items of cost incurred in the foreclosure proceedings which were enjoined by the defendant, a somewhat different

question arises. In the case at bar the plaintiff in his complaint alleged the facts with respect to the attempted foreclosure by advertisement and the enjoining thereof upon the application of Styles. Upon the trial, the plaintiff testified fully and without objection to the different items expended by him upon the foreclosure proceedings which were enjoined, and these different items were also further proven by the defendant Styles,—by the testimony of a deputy sheriff of Pierce county,—in attempting to establish the alleged redemption. In its findings of fact, the court finds the different items and amounts expended by the plaintiff, McCarty, in such foreclosure proceeding and awarded judgment to the plaintiff therefor.

In our opinion, the trial court was correct in allowing such recovery. Under the facts in the instant case, it is immaterial whether such items be considered as items of costs or as elements of damages. For while ordinarily damages arising from an injunction are not recoverable where no undertaking has been required, it is generally recognized that the court has power to make the decree in reference to the costs of the suit as it may deem equitable and just. Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060. And the better rule is that, even where a bond has been required, the party enjoined is not limited to an action on the bond alone in cases where the injunction was sued out without probable cause, but that in such cases the party enjoined, in addition to his remedy on the bond, may also maintain an action at law for the wrongful suing out of the injunction. 14 R. C. L. p. 481, § 183. In injunctional actions, the dissolution of an injunction is, until reversed, conclusive that the injunction was wrongfully obtained. High, Inj. 4th ed. § 1665. In the case at bar, not only did the trial court render judgment favorable to the plaintiff, but the defendant expressly withdrew the defense of the Statute of Limitations which was the defense asserted and upon the strength of which the restraining order was issued. The only deduction which any reasonable man can draw from the record in this case is that the restraining order was obtained without any probable cause therefor.

A proceeding to enjoin the foreclosure of a mortgage by advertisement is neither an action nor a special proceeding, within the meaning of those terms as used in our statute. Tracy v. Scott, 13 N. D. 577, 101 N. W. 905. The order is granted *ex parte*. Counter affidavits

are not allowed. Commercial Nat. Bank v. Smith, 1 S. D. 28, 44 N. W. 1024. The sole purpose of the order is to prevent the sale and require the foreclosure proceedings to be conducted in the district court, in order that a "valid defense" or "legal counterclaim" may be interposed. The order is not *res judicata,* upon the right to foreclose or the validity of an asserted defense, or counterclaim, in the subsequent litigation between the parties. According to its terms, the statute is intended to give the mortgagor and those in privity with and claiming under him an opportunity to interpose any existing "legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due" on the mortgage which is being foreclosed. And in order to enable the party or parties to interpose the asserted defense or counterclaim, the court not only enjoins the pending foreclosure, but directs "that all further proceedings for the foreclosure be had in the district court properly having jurisdiction of the subject-matter." Comp. Laws 1913, § 8074. But while the enjoining of a foreclosure by advertisement is a statutory proceeding, manifestly it was not intended that the statute should be made an instrument of oppression, and that the party who so utilizes it shall escape payment of the costs which he has occasioned. In a certain sense, the foreclosure action is a continuation of the proceeding instituted by the advertisement. And it has been held that, where a foreclosure by advertisement is enjoined, the costs and expenses incurred therein are properly taxable as items of costs in the foreclosure action where the party prosecuting the foreclosure prevails in the action. J. I. Case Threshing Mach. Co. v. Mitchell, 74 Mich. 679, 42 N. W. 151. And as a general rule, a mortgagee who has been wrongfully enjoined from proceeding to sell mortgaged premises by advertisement is entitled to be reimbursed for the expenses occasioned by the injunctional order. See Wiltsie, Mortg. Foreclosure, 3d ed. § 946.

It is clear that the restraining order was issued without probable cause, and that by reason of its wrongful issuance the plaintiff was compelled to expend certain costs, and that in right and justice he is entitled to recover the items reasonably and properly expended, from the party who occasioned the expenditure. And there is no good reason why such recovery should not be had in the foreclosure action. Cer-

tainly plaintiff should not be required to institute another action in order to obtain them.

In our opinion, however, only one statutory attorney's fee is allowable. Even in injunctional actions, counsel fees are not always allowed as damages upon the dissolution of the injunction. "The true test with regard to the allowance of counsel fees as damages would seem to be that if they are necessarily incurred in procuring the dissolution of the injunction, when that is the sole relief sought by the action, they may be recovered; but if the injunction is only ancillary to the principal object of the action, and the liability for counsel fees is incurred in defending the action generally, the dissolution of the injunction being only incidental to that result, then such fees cannot be recovered." High, Inj. 4th ed. § 1686.

As we have already stated, the foreclosure action is in a sense a continuation of the proceeding commenced by the advertisement. There is only one foreclosure of the mortgage. Our statute relating to attorney's fees clearly contemplates that only one fee shall be allowed for the foreclosure of a mortgage. And we do not believe that when a foreclosure by advertisement is enjoined that this will warrant the taxation of two statutory attorney's fees on foreclosure, or that the party who sues out the restraining order can be said to have occasioned the expenditure of an additional statutory attorney's fee in foreclosure by causing the sale to be enjoined. But we do believe that where it is established in the foreclosure suit that there was, and is, in fact, no "legal counterclaim or valid defense against the whole or any part of the amount claimed to be due" in the notice of sale, the party foreclosing is entitled to recover, and the party who has procured the injunction is properly chargeable with, the costs and disbursements actually and necessarily incurred in conducting the proceeding by advertisement, such as the fees for publishing the notice of sale and matters of that kind. These expenditures go for naught. They are occasioned by the injunction, and recovery therefor may be awarded in the foreclosure action.

Inasmuch as in this case the court allowed two statutory attorney's fees,—one upon the foreclosure by advertisement and the other upon the foreclosure by action,—the judgment should be modified to the extent of disallowing one of these items. The judgment appealed from

is therefore modified to that extent, and as so modified, it is affirmed. Neither party will recover costs on this appeal.

ROBINSON, J. (concurring). This case is really much ado about nothing. It presents for review only a few trifling errors regarding the taxation of costs and a personal judgment against the appellant Styles for $54 and on the personal judgment he has been allowed a credit of $10. The suit is to foreclose a mortgage which was not made by Styles. It was made by Charles Goodsman and wife, dated November 10, 1903, to secure $500 in ten years, with interest at 7 per cent. Defendant Styles is made a party as a purchaser of the mortgaged premises. As the court found the amount due and unpaid on the mortgage is $500 and interest at 7 per cent from February 1, 1915.

The original judgment was that plaintiff recover from the mortgagors said $500 and interest, with costs amounting to $131.53, and that he recover from Styles a part of the costs amounting to $131.53.

On October 20th, 1917, on motion to retax the costs, an amended judgment was entered that plaintiff recover from the mortgagors $500, with interest at 7 per cent from February 1, 1915, and also the following costs in a void foreclosure advertisement:

Attorney's fees	$30.00
Public notice of sale	11.88
Sheriff's fees	10.60
Register of Deeds	4.25
Amount	$56.73

Also that plaintiff recover from Asa Styles on costs of the suit $54.80. As Styles was the only party who appeared and defended, there was nothing wrong in taxing against him the costs of the suit, but in regard to the costs of the void foreclosure by advertisement amounting to $56.73, there is no law for taxing the same against anyone. It cannot be that a party may tax against anyone the costs of repeated and void attempts to foreclose a mortgage. It is quite sufficient that the mortgagors should be taxed with the actual costs of a valid foreclosure.

By commencing this action the plaintiff concedes that his first attempted foreclosure was abortive and void, and it is quite enough for a party to bear the costs of a valid foreclosure proceeding against him or his property without paying the costs of a void suit. The costs and

disbursements of the action must be taxed in accordance with the statute.

Hence, the judgment should be modified by striking it from the costs of the attempted foreclosure by advertisement, and as thus modified it is affirmed without costs to either party. No cost is allowed the appellant, because he has persisted in raising and presenting false and needless issues in regard to the void foreclosure proceeding and an attempted redemption under it.

ANNA BOCKWOLD LARSON, Appellant, v. FRANK DUTTON and Mrs. Frank Dutton, Respondents.

(168 N. W. 625.)

Habeas corpus — writ of — quashing — judgment — minor child — awarding possession of — to one of contending parties — is a final order or judgment — affecting substantial rights — is appealable.

A judgment or order quashing a writ of habeas corpus and awarding the possession and custody of a minor child to one of the contending parties is a final order or judgment affecting substantial rights, which is made in a special proceeding and is appealable under the provisions of § 7841 of the Compiled Laws of 1913.

Opinion filed July 25, 1918.

Motion by respondents to dismiss an appeal from a judgment quashing a writ of habeas corpus and awarding the custody of a minor child to the possession of the defendants.

Motion denied.

Wade A. Beardsley and *E. T. Burke,* for appellant.

Newton, Dullam, & Young, for respondents.

BRUCE, Ch. J. This is a motion to dismiss an appeal taken from a judgment of the district court, quashing a writ of habeas corpus and

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NOTE.—For a discussion of the question of habeas corpus decree as to the custody of infant as *res judicata*, see notes in 67 L.R.A. 783, and 49 L.R.A.(N.S.) 83.

awarding to the defendants the custody and possession of a minor child. The motion to dismiss is made on the theory that the judgment or order is not appealable.

The Statutes of North Dakota in relation to appeals are as follows:

Section 7818: "A judgment or order in a civil action or in a special proceeding in any of the district courts may be removed to the supreme court by appeal as provided in this chapter, and not otherwise."

Section 7841: "The following orders when made by the court may be carried to the supreme court:

"1. An order affecting a substantial right made in any action when such order in effect determines the action and prevents a judgment from which an appeal might be taken.

"2. A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment.

"3. When an order grants, refuses, continues or modifies a provisional remedy, or grants, refuses, modifies or dissolves an injunction or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of § 8074 of this Code; when it sets aside or dismisses a writ of attachment for irregularity; when it grants or refuses a new trial or when it sustains or overrules a demurrer.

"4. When it involves the merits of an action or some part thereof; when it orders judgment on application therefor on account of the frivolousness of a demurrer, answer or reply on account of the frivolousness thereof.

"5. Orders made by the district court or judge thereof without notice are not appealable; but orders made by the district court after a hearing is had upon notice which vacate or refuse to set aside orders previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice."

Section 7846: "In all actions tried by the district court without a jury, in which an issue of fact has been joined, excepting as hereinafter provided, all the evidence offered on the trial shall be received. Either party may have his objections to evidence noted as it is offered;

but no new trial shall be granted by the district court on the ground that incompetent or irrelevant evidence has been received, or on the ground of the insufficiency of the evidence. A party desiring to appeal from a judgment in any such action shall cause a statement of the case to be settled within the time and in the manner prescribed by article 8 of chapter 11 of this Code, and shall specify therein the questions of fact that he desires the supreme court to review and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court. Only such evidence as relates to the questions of fact to be reviewed shall be embodied in this statement. But if the appellant shall specify in the statement that he desires to review the entire case, all the evidence and proceedings shall be embodied in the statement. All incompetent and irrelevant evidence, properly objected to in the trial court, shall be disregarded by the supreme court, but no objection to evidence can be made for the first time in the supreme court. The supreme court shall try anew the question of fact specified in the statement or in the entire case, if the appellant demands a retrial of the entire case, and shall finally dispose of the same whenever justice can be done without a new trial and either affirm or modify the judgment or direct a new judgment to be entered in the district court; the supreme court may, however, if it deem such course necessary to the accomplishment of justice, order a new trial of the action. In actions tried under the provisions of this section, failure of the court to make findings upon all the issues in the case shall not constitute a ground for granting a new trial or reversing the judgment; provided, that the provisions of this section shall not apply to actions or proceedings properly triable with a jury."

We have no doubt that the judgment was appealable. We are, however, also of the opinion that, though the order or judgment was as to the particular facts in controversy a final order and appealable, in all of such cases the welfare of the child is the primary consideration, and "the order in such a case is not an unalterable final judgment, but will last only as long as no material change of circumstances require a change of custody." Knapp v. Tolan, 26 N. D. 23, 49 L.R.A.(N.S.) 83, 142 N. W. 915.

That the order or judgment is appealable is to us the inevitable result of our prior decision in Knapp v. Tolan, supra. In the case of

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

"It follows as a result of such a rule that since the judgment rendered upon the facts existing at the time of the trial is binding and conclusive and bars a subsequent proceeding by the parties thereto upon the same facts, the order made thereon is a final order, so far as the facts existing at the time of the institution of the case and trial are involved; and that such an order is final within the meaning of the statutes for the purpose of review." Jamison v. Gilbert, 38 Okla. 751, 47 L.R.A.(N.S.) 1133, 135 Pac. 342; Carmack v. Marshall, 211 Ill. 519, 67 L.R.A. 787, 71 N. E. 1077, 1 Ann. Cas. 256; Bleakley v. Smart, 74 Kan. 476, 87 Pac. 76, 11 Ann. Cas. 125; Hall v. Whipple, — Tex. Civ. App. —, 145 S. W. 308, 12 R. C. L. 1258.

Even though the trial court, upon proper motion and upon a new showing of facts, may make other orders regarding the custody of the child, and even though the judgment of this court will not preclude any such motion or proceeding, if the welfare of the child demands it, such a possibility ought not and will not deprive the appellant of his right to have the action of the trial court reviewed. Hall v. Whipple, — Tex. Civ. App. —, 145 S. W. 308.

The motion to dismiss the appeal is denied, with $15 costs to the appellant.

GRACE, J. I concur in the result.

CHRISTIANSON, J. (concurring specially). Under the laws of this state, "every person imprisoned or restrained of his liberty under any pretense whatever may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint, and thereby (except in the cases specified in the next section) obtain relief from such imprison-

ment or restraint if it is unlawful." Comp. Laws 1913, § 11,359. And "the writ of habeas corpus must be granted, issued and made returnable as hereinafter stated:

"1. The writ must be granted by the supreme court or any judge thereof upon petition by or on behalf of any person restrained of his liberty within this state. When granted by the court it shall in all cases be issued out of and under the seal of the supreme court, and may be made returnable, either before the supreme court, or before the district court or any judge of the district court.

"2. The writ may be granted, issued and determined by the district courts and the judges thereof upon petition by or on behalf of any person restrained of his liberty in their respective districts.

"When application is made to the supreme court, or to a judge thereof, proof by the oath of the person applying or other sufficient evidence shall be required that the judge of the district court having jurisdiction by the provisions of subdivision 2 of this section is absent from his district or has refused to grant such writ, or for some cause to be specially set forth is incapable of acting, and if such proof is not produced, the application shall be denied." Comp. Laws 1913, § 11,362.

It has been said that this latter section is an innovation, and intended as an innovation, upon the old practice. "It strikes at once at the matter of repeated applications to courts of equal authority. A district court, or the judge thereof, can only grant, issue and determine the writ upon the petition of a party confined in that particular district. No other district court or judge has any jurisdiction." Carruth v. Taylor, 8 N. D. 180, 77 N. W. 617. Neither can a party come to the supreme court in the first instance as a matter of course. "Certain facts must be shown. The judge of the district court of the district where the petitioner is confined must be absent, or must refuse to act, or for some cause to be specially set forth must be incapable of acting." Ibid.

The question presented in this case is whether the decision of the district court denying a writ of habeas corpus is appealable.

The right of appeal is not specifically granted in any case by the Constitution of this state. Hence, under the prevailing modern rule, the appellate procedure is a matter for legislative regulation. In other words, in this state the right of appeal is a statutory right to be defined,

limited, and regulated by the legislature. 2 Enc. Pl. & Pr. 12–21. This rule applies with full force in habeas corpus cases. Carruth v. Taylor, 8 N. D. 166, 168, 77 N. W. 617; 10 Standard Proc. 953.

Whether a decision in a habeas corpus case is a final order affecting a substantial right made in a special proceeding, or a final judgment within the purview of the statutes permitting appeals and writs of error, is a question upon which the courts have differed. 9 Enc. Pl. & Pr. 1072; 12 R. C. L. pp. 1256 et seq. It is also a question upon which the members of this court have differed. See Carruth v. Taylor, 8 N. D. 166, 77 N. W. 617. In Carruth v. Taylor this court held that a final order entered by a district court in a habeas corpus case is not appealable. This ruling was approved in State ex rel. Styles v. Beaverstad, 12 N. D. 527, 97 N. W. 548, wherein this court said: "A majority of the court, as now constituted, adhere to the ruling that an order discharging the writ and remanding the petitioner, when made by a district judge, is not an appealable order; and all members of the court are agreed that the order of remand was not *res judicata;* but that relator is entitled to have his petition for a second writ upon the same facts considered by this court, notwithstanding such order of the district judge." 12 N. D. 530. But in the subsequent case of Knapp v. Tolan, 26 N. D. 23, 49 L.R.A.(N.S.) 83, 142 N. W. 915, this court held that where the object of the writ of habeas corpus is to determine who is entitled to the custody of an infant, the decision becomes *res judicata* and precludes the issuance of a second writ upon the same state of facts. Under the holding in the latter case, therefore, the decision of a district court in a habeas corpus case involving the custody of an infant necessarily becomes final upon the facts existing and presented for determination in that case. As such decision becomes final as to the contending parties upon the right of guardianship and the permanent custody of such infant, it would seem to follow that an appeal will lie under the provisions of our statutes relative to appeals in civil actions or proceedings. State, Baird, Prosecutor, v. Baird, 19 N. J. Eq. 481; 12 R. C. L. pp. 1257 et seq.

The former decisions of this court are all supported by many decisions. The distinction (pointed out in Knapp v. Tolan, supra) between a case wherein the writ of habeas corpus is used strictly for the purpose of obtaining the release of one who claims to be illegally restrained of

his liberty and one where the object of the writ is to determine the custody of an infant is recognized by the authorities generally. While this is true, I am by no means satisfied that this distinction was justified under our statute and the former decisions of this court. Under our statute the writ of habeas corpus is authorized only when certain conditions are shown to exist. When a condition justifying the issuance of the writ is shown to exist, the writ should be granted. If the condition does not exist, it should be denied. The statute makes no distinction between the procedure or effect of the writ in different classes of cases. However, as already stated, this court has drawn a distinction, and while I entertain considerable doubt as to the correctness of the rule announced in Knapp v. Tolan,—in view of the language of our habeas corpus act and the former decisions of this court relative to the finality and appealability of decisions in habeas corpus cases,—I am not prepared to say that the former decision should be overruled. It is desirable that rules of procedure be certain. This is especially so in cases involving questions as important as those which arise under the habeas corpus act, and the rules of procedure as established by former decisions ought not to be departed from, but rather harmonized, if it is possible to do so. And if the rule announced in Knapp v. Tolan, supra, is to stand, then manifestly the decision of a district court in a habeas corpus case involving the custody and right of guardianship of an infant is final, and concludes substantial rights of the contending parties, and is subject to review in this court by appeal or writ of error. To deny such review would be contrary to the spirit of our laws. It seems to me, however, that there is some danger that confusion may arise with respect to the procedure in habeas corpus cases in view of the different decisions of this court and the provisions of our statute, and it may be desirable to clarify the situation which has arisen by legislative enactment.

Our statute on appeals provides for appeals to the supreme court only from judgments and orders of district courts and of county courts having increased jurisdiction. But a writ of habeas corpus may be issued and a hearing in such proceeding had before one of the judges of the supreme court. In such a case there is no appeal, nor is any other mode of review provided by the statute. The question naturally presents itself, What will be the effect of an order entered by a judge of

the supreme court in a habeas corpus proceeding which involves the custody of a child? Manifestly, such order would not be a determination of a district court, nor would it be a determination of the supreme court. Would the order be *res judicata* under the ruling in Knapp v. Tolan, supra, or might another writ be issued either by the district court or the supreme court, and the same facts reinvestigated? In either case an unusual situation is presented. If the determination of a judge of the supreme court in such case is *res judicata,* then there is no way to review the correctness of such decision insofar as it is based upon the facts involved in the particular case. If it is not *res judicata,* then the situation is presented whereby the determination of a district judge upon a certain state of facts is final and conclusive, whereas the determination by a judge of the supreme court upon the same facts has no binding effect whatever. This is merely illustrative of the perplexing questions which may arise in the future under our statute and the rules announced in the former decisions of this court.

As I understand the matter, there is no intention on the part of the majority members to overrule Carruth v. Taylor and State ex rel. Styles v. Beaverstad, supra. But the intention is merely to limit the rule announced in those decisions to cases wherein the writ of habeas corpus is used strictly for the purpose of obtaining the release of one who claims to be illegally restrained of his liberty. The law in this state, as established by the different decisions, therefore, is:

(1) In cases, arising in a district court, where the writ of habeas corpus is used as a writ of liberty—that is, when it is used strictly for the purpose of obtaining the release of one who claims to be illegally restrained of his liberty,—the decision is not final. It does not become *res judicata,* nor is it subject to review by appeal or writ of error.

(2) But in cases (arising in the district court) where the writ of habeas corpus is used for the purpose of determining the right of guardianship and custody of an infant, the decision is final and concludes the contending parties upon the facts then existing. Such decision is *res judicata,* and an appeal will lie therefrom.

It should follow, also, as a matter of orderly procedure, that a judge of this court ought not to hear and determine habeas corpus cases of the latter kind. And also that cases of the latter kind ought, in the first

instance, to be heard in the district court and brought here in the regular way by appeal.

BIRDZELL, J. (dissenting). I dissent from the views entertained by the majority of the court in this case, and, though the question is but a narrow one of procedure, I feel that I should briefly state the reasons for my dissent. I have arrived at a conclusion in this case only after considerable reluctance, due to the fact that the result arrived at by the majority provides an apparently simple procedure for securing a review and determination of the issues involved in habeas corpus proceedings before district courts. But, upon mature reflection, it seems to me that the simplicity of the procedure is apparent rather than real, and that it gives rise to difficulties and complications that would be altogether eliminated if the statute (§ 11,362, Compiled Laws of 1913) were strictly adhered to and no distinction attempted to be read into it, based upon the use of the writ to determine the legal custodianship of a minor as distinguished from its use to determine the legality of an imprisonment. Whatever warrant there may be for such a distinction in the ultimate determination of the rights of the parties after the writ has been issued, I am satisfied that, under our statutes, there is no occasion for carrying the distinction into the realm of procedure.

When an application is made and is supported by the facts which the statute requires to be stated, the statute provides that the writ "must be granted" by the supreme court or by any judge thereof. The language is mandatory, and it is sufficiently broad to bring before this court or before any judge thereof the merits of any controversy which might be properly disposed of in a habeas corpus proceeding. The attempt to clarify the procedure by entertaining appeals from orders of district courts only tends to greater confusion. Such a state of confusion will only be partially avoided by following out the suggestion contained in the concurring opinion of Judge Christianson, to the effect that a judge of this court ought not to hear and determine proceedings in habeas corpus where the custody of an infant is involved. In my judgment, this power should not be relinquished. Under the statute the duty is mandatory and is one that has previously been exercised. Re Sidle, 31 N. D. 405, 154 N. W. 277. It would be equally

the duty of a judge of this court to issue the writ in similar circumstances. Comp. Laws 1913, § 11,362.

Traditionally, and of necessity, habeas corpus is a speedy remedy for the determination of the legality of a restraint of personal liberty or the legal custodianship of a minor; and the writ may be issued by a district judge, where a person is restrained of his liberty in his district, or by a judge of this court or by the court in term time or vacation. When the writ is issued the judgment should, in all cases, determine the cause upon the merits presented in the application, the answer, and the evidence. Under the rule adhered to by the majority, this court will be driven to the review of the records for the purpose of determining the correctness of judgments entered by district courts in habeas corpus proceedings, while the statute contemplates that the court itself should determine the matter as an original proposition or, in its discretion, direct that it be determined before a designated district court or judge. It is inconceivable that any cause can arise wherein the writ may be appropriately employed where the merits cannot be brought to this court by an original application. If facts are stated in the application which would seem to warrant a final adjudication in this court, it can, of course, be determined here, rather than before a district judge. Ibid. Hence, there is no occasion for an appeal in such matters. If an appeal had been contemplated, it is difficult to see why a judge of this court, as distinguished from the court itself, would have been authorized by statute to issue the writ and determine the cause. Clearly there would be no appeal in such a case, but yet on a subsequent original application the court itself might determine the whole controversy anew. As further indicating the confusion which results from the holding of a majority, a party adversely affected by the determination of the issues in a habeas corpus proceeding by a district judge might renew his application before the time had expired for an appeal. If his application be denied, he might then apply to this court or to a judge thereof, and it would become the duty of the court or of the judge to issue the writ. The statute does not contemplate that the legality of a restraint or the custodianship of a minor shall ever be placed beyond the realm of inquiry in an appropriate original habeas corpus proceeding. This is the virtue of the writ.

The doctrine of *res judicata* in such cases is employed largely at the

discretion of the courts before whom a hearing is had for the purpose of preventing the repeated litigation of questions of fact, and its application may safely be left to the sound discretion of the judge before whom the application is made or hearing had. The statute does not give to a person who claims that his liberty is restrained the right to appear before various district judges, but, on the contrary, it localizes the jurisdiction to the district within which the party is restrained. This takes care of the inconvenience that would result if a party were free to make successive applications to different district judges.

As I view the question, it is fully covered by the statute, and there is no occasion for making the distinction that is made by the majority in order to secure a review of the action of the district court. Whatever the necessities may be in those jurisdictions where statutes similar to ours do not exist, and where ample statutory provision might not be made for a review of the proceedings had in habeas corpus matters before courts of original jurisdiction, it is clear that these necessities are not present in this state under our statutes. Even if there were a necessity for a review in this court, in my judgment it would be preferable to provide for such review by writ of error under the authority of chapter 225 of the Session Laws of 1917.

PETER MATHIAS, Respondent, v. STATE FARMERS' MUTUAL HAIL INSURANCE COMPANY, a Corporation, Appellant.

(168 N. W. 664.)

Hail insurance contract — loss under — adjustment of loss — failure to pay — action to recover — oral agreement on adjustment — amount of loss so fixed — receipt given for less — signed by mistake.

1. This action is based on an adjustment of loss under a hail insurance contract. The plaintiff alleged and proved to the satisfaction of the jury that by oral agreement his loss was adjusted at $335; that, being unable to read English, he signed a paper fixing the loss at $250.

Signing of paper — does not make a contract — consent of parties — must be free and mutual — fraud — undue influence — mistake.

2. The signing of a paper does not make a contract. Under the plain words of the statute there can be no contract where the consent of the parties to the

terms of the same is not free and mutual; and consent is not free when it is obtained by fraud, undue influence, or mistake. In this case the jury found and had a right to find that the document claimed to be a written contract was not a contract.

Opinion filed February 7, 1918. Rehearing denied July 30, 1918.

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

Defendant appeals.

Affirmed.

Jacobsen & Murray and *Moonan & Moonan,* for appellant.

Plaintiff's cause of action is based wholly upon a contract of adjustment of the loss.

"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." Civ. Code, § 5889; Alsterberb v. Bennet, 14 N. D. 596, 106 N. W. 49.

Evidence of prior parol agreements is not permissible. 17 Cyc. 669.

In order to permit parol evidence of fraud, it should be pleaded. Conn v. Rossarond, 161 S. W. 73; Baur v. Raylorr, 96 N. W. 268.

It was plaintiff's own fault if he did not understand the settlement; he had full opportunity to acquaint himself with all the facts.

"If the creditor fails to read the condition as stated in a letter from the debtor, or in a receipt given him to sign, or even that he could not read or write, and did not know of the condition indorsed on a check tendered in full payment, these facts do not affect the operation of the rule to the effect that his acceptance will discharge the claim in full." 1 C. J. 564.

Where fraud is not pleaded, such written acceptance is conclusive. The evidence did not justify the finding of fraud, and from plaintiff's own testimony it conclusively appears that there was no fraud, and no facts shown, upon which the written instrument could be set aside. Raymond v. Edelbrock, 15 N. D. 231, 107 N. W. 194; Standard Mfg. Co. v. Hudson, 88 S. W. 137.

V. H. Crane, for respondent.

No reply is necessary in framing the issues unless a counterclaim is

pleaded in the answer, or unless upon motion the court requires a reply. Comp. Laws 1913, § 7452.

"Where an instrument is pleaded in defense or read in evidence on the trial under a general denial, in support of a defense in an action at law, plaintiff has the same right to show that it was obtained from him by fraud as he would have if it were the subject of a formal issue." Chambovet v. Cagney, 35 N. Y. Super. Ct. 474; Abbott's Trial Brief, 1496, ¶ 275.

Under such circumstances plaintiff is at liberty to show that his signature to the written instrument was obtained by fraud, or by mistake, and evidence upon such subject, and instructions thereon, are proper. Leslie v. Keepers, 31 N. W. 486.

Mistake or fraud may be proved in rebuttal of an accord and satisfaction alleged by defendant. 1 C. J. 582.

In all such cases the rule that prior negotiations are merged in the written agreement has no application. Jones, Ev. p. 546, ¶ 435.

There must be an acceptance of the writing with a full understanding as to the facts. The mere signing of a document does not amount to a contract. Wigmore, Ev. p. 3396, ¶ 2416.

Fraud in the procurement of a contract may be shown by parol, though the claimed contract is in writing, and the effect of the evidence is to contradict or impeach the writing. The plaintiff and defendant here made a parol or oral adjustment of plaintiff's loss by hail; thereafter a writing was presented to plaintiff to be signed, and he signed it in the full belief that it was in accordance with their oral adjustment, and it was so represented to him by defendant, and he, not being able to read the language in which the document was written, relied upon such representations when he signed the same. Such a writing does not make a contract, and plaintiff is not bound by it. Wigmore, Ev. p. 3396, ¶ 2415; Day v. Lown, 1 N. W. 786; Kranch v. Sherwood, 52 N. W. 741.

The adjustment was carried on and settled in the German language. Plaintiff can neither read, speak, nor write the language of the instrument afterward prepared and presented by the adjuster; plaintiff knew its contents only as told to him by the adjuster, and he signed the writing because he was glad to believe it was the same as the oral settle-

ment as to amount. These conditions show fraud as defined by our statute. Comp. Laws 1913, § 5849.

There can be no accord and satisfaction where under such circumstances the amount tendered is insufficient, and the plaintiff was not required to return the money actually paid, but had the right to retain it and sue to recover the actual balance due him under the oral adjustment, which amounted to a settled and fixed claim. Rauen v. Prudential Ins. Co. 106 N. W. 198, 1 C. J. 539, ¶ 40, and cases cited.

In order that the payment of a smaller sum than demanded shall operate as a satisfaction of the entire claim, it must be accepted as such. There must be a positive agreement to accept the amount paid as a full discharge of the debt. 1 C. J. 560, ¶ 83; Rapp v. Gidding, 57 N. W. 237.

In any event, if on the evidence the intention of the parties is in doubt, it is a question for the jury. 1 C. J. 583, ¶ 152.

Whether a release of a debt was fairly obtained, where such release is made the basis of a defense, the question is for the jury. 1 C. J. 561, ¶ 84; Rauen v. Prudential Ins. Co. 106 N. W. 198; 1 C. J. 580, ¶ 143.

The conditions upon which a tendered payment shall be received in full satisfaction of a larger amount of indebtedness must be stated clearly, fully, and explicitly, and the party to whom they are made must understand that he is accepting the conditions and taking the money subject to them. 1 C. J. 557, ¶ 80; Sanders v. Standard Wheel Co. 151 S. W. 674.

There must be no fraud, concealment, or misrepresentation as to material facts. Butler v. Richmond, etc., Co. 88 Ga. 594, 15 S. E. 668; 1 C. J. 571, ¶ 108.

ROBINSON, J. In this case defendant appeals from a judgment for $92 and costs. The complaint is that in 1914 plaintiff made to defendant his promissory note for $85.94, and in consideration of the same it agreed to insure him against loss by hail to the amount of over $500; that in July, 1914, the crops insured were destroyed by hail and the loss amounted to $500; that afterwards the loss was adjusted at $335, to be paid in cash and in return of the promissory note, and that no payment has been made excepting $164 and the return of the note.

The answer is that the loss was adjusted at the sum of $250, and

not $335, and that the contract of adjustment was reduced to writing and signed by the plaintiff. To the answer there was no reply. It did not state a counterclaim and hence there was no necessity for a reply.

On the trial the plaintiff gave testimony showing the insurance, the loss, and an oral contract of adjustment as alleged in the complaint. The defendant showed a contract of adjustment signed by the plaintiff as alleged in the answer. The testimony of the plaintiff was that he could not read English, and that, after the making of the oral contract for adjustment, he signed the papers, believing that it was in accord with the oral agreement.

The verdict for $92 is well sustained by the evidence. The jury had a right to believe the plaintiff and to find in his favor. Under the testimony the plaintiff contracted to adjust his loss at $335, including his promissory note, and by trick and smoothness the adjuster obtained the signature to a paper which was not the contract. Then, when oral testimony was offered to prove the facts and to show that the alleged written contract is not and never was a contract, it was claimed that such proof was not admissible.

The claim is that by any trick or device a party may obtain the signature of an ignorant, illiterate person to a document in the form of a contract, and then it may not be impeached by proof that it is not a contract. And in such cases by specious and deceptive arguments the judges are too often imposed upon and misled. They forget that the signing of a paper does not make a contract. Under the plain words of the statute there can be no contract where the consent of the parties to the terms of the same is not free and mutual, and consent is not free when it is obtained by fraud, undue influence, or mistake.

In this case the jury found, and had a right to find, that the document claimed to be a written contract was not a contract, and that in truth the contract was as stated in the complaint.

The verdict is just and right, and the judgment is affirmed.

GRACE, J. I dissent.

BIRDZELL and CHRISTIANSON, JJ. I concur in the result.

On Petition for Rehearing.

PER CURIAM. Appellant has filed a petition for a rehearing, wherein he asserts that the trial court erred: (1) In permitting the plaintiff to introduce evidence of fraud in the absence of any pleading on his part alleging fraud; (2) in permitting the plaintiff to introduce parol testimony to contradict the written agreement. And it is contended that the former decision either overlooked, and failed to decide these questions, or else decided them contrary to controlling decisions and statutes. We will consider these propositions in the order stated.

(1) While appellant makes the broad assertion that it was contrary to controlling decisions and statutes of this state to permit the plaintiff to introduce evidence of fraud in absence of pleading on his part alleging fraud, he has failed to cite any statute or decision of this court supporting his contention. And we are satisfied that none can be found. On the contrary, both the statutes and the decisions of this state are to the effect that a plaintiff is not required to reply to new matter in an answer not constituting a counterclaim, except by order of the court; but every allegation of new matter in the answer, not constituting a counterclaim, is deemed controverted by the plaintiff as upon a direct denial or avoidance, by operation of law, and the plaintiff may introduce evidence of any fact tending to deny or avoid the new matter set forth in the answer. See Comp. Laws 1913, §§ 7467, 7477, 7452; Moores v. Tomlinson, 33 N. D. 638, 157 N. W. 685. Appellant entirely ignores the rule announced in the statute, and argues that such rule is unjust and unfair to a defendant, as he may be surprised upon the trial by the introduction of evidence of fraud. A sufficient answer to appellant's contention is that the rule is prescribed by the statute. The statute was made by the legislature, and not by the court. In this connection it may be noted, however, that the statute affords to every defendant an opportunity to apply to the court for an order requiring the plaintiff to reply to new matter in an answer. Even where no such application is made, the court has undoubted power, even upon a trial of the cause, to order a continuance, if the introduction of evidence tends to surprise a defendant and prevent him from obtaining a fair trial. In the case at bar, defendant made no such application. Nor did it assert, either by objection or by motion, that

there was any such degree of variance between the pleadings and the proof as to constitute a failure of proof. And, while defendant moved for a directed verdict, it did not see fit to make this one of the grounds of its motion. Neither did it make any showing to the trial court that it was in any manner surprised or prejudiced by the introduction of the evidence. And "under the provisions of the Code of Civil Procedure (Comp. Laws 1913, § 7478), a variance is immaterial unless actually and prejudicially misleading, and shown to the satisfaction of the court to be so. The effect of these statutory provisions was considered by this court in Halloran v. Holmes, 13 N. D. 411, 416, 101 N. W. 310, wherein this court, speaking through Mr. Justice Engerud, said: "Under the provisions of the Code of Civil Procedure, a variance, unless it amounts to a failure of proof, is not material, unless 'it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.' If the objecting party asserts that such is its effect, 'the fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just.' Rev. Codes 1899, § 5293. 'When the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.' Rev. Codes 1899, § 5294. The effect of these provisions is to make the materiality of a variance depend upon satisfactory proof that it has actually misled the adverse party to his prejudice. Unless such proof is furnished the variance must be deemed immaterial and be disregarded. Washburn v. Winslow, 16 Minn. 33, Gil. 19; Catlin v. Gunter, 11 N. Y. 368, 62 Am. Dec. 113; North Star Boot & Shoe Co. v. Stebbins, 3 S. D. 540, 54 N. W. 593. In this case, although the defendants objected to the evidence in question on the ground of variance, they did not support their objection by proof, or offer of proof, that they were prejudicially misled by the variance in maintaining their defense on the merits. In the absence of such proof, an objection for variance is unavailing, unless the variance is of such a degree as to be a failure of proof, as defined in § 5295, Rev. Codes 1899. Under that section a failure of proof results only 'when . . . the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and

meaning.'" See also Robertson v. Moses, 15 N. D. 351, 108 N. W. 788; Maloney v. Geiser Mfg. Co. 17 N. D. 195, 115 N. W. 669; Rickel v. Sherman, 34 N. D. 298, 302, 158 N. W. 266.

(2) Upon the second proposition little need be said. For it is elementary that where a writing, by reason of fraud or mistake, does not represent the actual contract made between the parties, and evidences the proposition upon which their minds met, that then the writing may be impeached and the actual contract shown by parol. This proposition is so elementary that citation of authority thereon is wholly unnecessary. These two were the only errors assigned and argued by appellant, and, hence, are the only ones properly before the court on this appeal.

In his petition for rehearing, however, appellant also asserts that the acceptance and retention by the plaintiff of a draft sent by the defendant precludes him from bringing suit. A party who has been induced to enter into a contract by means of fraudulent representations has, on discovery of the fraud, two primary remedies. He may either rescind the contract or affirm it. In case of rescission, he must, as a general rule, restore or offer to restore to the other party the consideration received under the contract. 9 Cyc. 438. This is not only manifestly just, but is a logical result of rescission. For rescission is intended to abrogate the contract and restore the parties to their former position. Hence, a party cannot accept and retain the benefits of a contract which he repudiates. If he desires to rescind, he must rescind *in toto*. He cannot affirm a contract in part and repudiate it in part. He cannot accept the benefits on the one hand, and shirk the disadvantages on the other. 9 Cyc. 438. In case he affirms the contract he may keep what he has received under it, and also recover from the other party the difference between what he received and what he would have received, if the fraudulent representations had been true. Guild v. More, 32 N. D. 432, 155 N. W. 44. Affirmance of a contract voidable for fraud is not a waiver of the fraud, and does not bar the right of the defrauded party to maintain an action to recover the damages, which he has sustained by reason of the fraud, or set up such damages as a defense or by way of counterclaim, if sued upon the contract by the other party. Such affirmance merely bars the right subsequently to rescind the contract. 9 Cyc. 432. In the case at bar, the plaintiff did not seek to

rescind the adjustment agreement which he made with the defendant, and recover on the original cause of action. On the contrary, he bases his cause of action upon, and seeks to enforce, the contract of adjustment which he claims was actually made between the parties. He does not seek to recover the loss sustained under the insurance policy, but seeks to recover only the amount agreed upon in the adjustment between the parties. In this connection it may be noted that the amount which plaintiff seeks to recover, and which he was awarded by the jury, is exactly what he would have been entitled to recover in an action for deceit for the fraud practised upon him; *viz.*, the difference between what he received and what he would have received if the representations made by the defendant's adjuster had been true. And while the action is not one for deceit, it is difficult to see wherein the defendant could be prejudiced, as the issues would be substantially the same in an action for deceit as those which were submitted to the jury in this case. The primary question in the case was whether the plaintiff had been induced to sign the adjustment agreement by means of false and fraudulent representations as to the amount of the consideration to be received by him.

The evidence shows that the plaintiff is unable to read, speak, or understand the English language. Upon the trial he testified through an interpreter. He obtained the insurance policy through the defendant's agent, Graeber. He notified Graeber of the loss under the policy. Some three weeks thereafter the defendant company sent its adjuster, F. R. B. Lamberch, to adjust the loss. It is undisputed that all negotiations between the plaintiff and the adjuster were conducted in the German language. After they had agreed upon the amount of the loss a written loss adjustment was prepared and signed by the adjuster and the plaintiff. It is undisputed that the plaintiff had no knowledge of its contents, nor did any member of his family understand it. The amount of the loss or damage inserted in the agreement is $250. The plaintiff, however, testified positively that the agreement between him and the adjuster was that he (the plaintiff) was to be paid $335 in cash, and that his premium note was to be returned to him. In response to the question, "What was the adjustment?" the interpreter gives plaintiff's answer as follows: "Why, the agreement was that he was to be paid cash $335 and that he did not have to pay no insurance. That is,

he wouldn't have to pay the insurance fee. That was deducted also." The plaintiff reaffirmed this statement, both in his direct examination and his cross-examination. In answer to a question propounded by defendant's counsel upon cross-examination as to whether plaintiff knew the written instrument to be an adjustment of the loss of the grain at the time he signed it, the plaintiff answered that at the time he believed that it was for $335. The plaintiff was the only witness who testified. The defendant did not see fit to offer any testimony, either that of its adjuster or of its agent, Graeber. And as already stated no application was made for a continuance to obtain such testimony, nor was any motion for a new trial made. And so far as the record in this case shows, there is nothing to indicate that the plaintiff's version is not absolutely true. Under the facts as shown by the testimony, and as found by the jury, the adjuster of the defendant company agreed to pay the plaintiff $335 in cash and surrender the premium note to him. He made this agreement in the German language. He thereupon prepared a written adjustment in English and presented it to the plaintiff, who was wholly unable to read it, and manifestly signed it in the belief that it represented the adjustment agreed upon. It is clear that under this state of facts the plaintiff's signature to the adjustment agreement was obtained by fraud.

In his charge the trial judge instructed the jury that, "if the plaintiff signed the written adjustment as introduced in evidence, with full knowledge of its contents, then he is bound by such written adjustment." But that if he was under the impression, and it was represented to him, that the written adjustment was in accordance with their oral agreement, and the oral agreement provided for a different and larger consideration, then he is not bound by the written adjustment, provided his signature thereto was secured by misrepresentation as to what the written adjustment contained. The court further instructed the jury that the burden was on the plaintiff to explain satisfactorily to the jury his signature on the written instrument. And that in order to avoid its consequences he must establish, by a preponderance of the evidence, that the adjustment was different from that disclosed by the written contract, and that he had no knowledge of the contents of the written instrument, and that his signature thereto was obtained by means of, and in reliance upon, the false representations.

The court further instructed the jury that, "in order to avoid the conditions of the written instrument, the evidence must be clear and convincing that it was not the contract of the parties," and that plaintiff, without knowledge of its contents and through misrepresentation, was led to believe that it was different from what it was.

It is true the evidence also shows that the plaintiff received a check for $164.04, as well as his premium note for $85.96, making a total of $250, and that he indorsed the check, and that it was paid by the defendant company in due course. And that he has retained the premium note. It is also true that the authorities recognize the principle or rule of law, that a party may under certain circumstances waive a right of action for fraud. And that it is a general rule that if a defrauded party acquires knowledge of the fraud while the contract remains executory, and thereafter does any act in performance or affirmance of it, or exacts performance from the other party, he condones the fraud and waives his right of action, as under such circumstances the injuries would be largely, if not wholly, self-inflicted. These principles, however, do not conflict with the doctrine that the defrauded party has his election to repudiate the contract or affirm it and sue in deceit. And as the question of waiver is largely one of intent, it is generally one for the jury, and it is only in rare cases that waiver can be said to exist as a matter of law. Waiver requires knowledge. And "exists only where one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of the right, or of his intention to rely upon that right. . . . No one can be said to have waived that which he does not know; or where he has acted under a misapprehension of facts." 40 Cyc. 259, 260. And "acts done in affirmance of the contract can amount to a waiver of the fraud only where they are done with full knowledge of the fraud and of all material facts, and with the intention clearly manifested of abiding by the contract and waiving all right to recover for the deception. Acts which, although in affirmance of the contract, do not indicate any intention to waive the fraud, cannot be held to operate as a waiver." 20 Cyc. 93. In the case at bar the appellant did not raise the question of waiver. It was not presented as one of the grounds on which it moved for a directed verdict. Nor was it presented on this appeal as a ground for a reversal. But inas-

much as some reference is made thereto in the petition for rehearing, we deem it proper to say that we do not believe that, under the evidence in this case, it can be said as a matter of law that the plaintiff waived his right of action. The evidence shows that the plaintiff received the check and his premium note through the defendant's agent, Graeber. The plaintiff was unable to read the check and knew nothing about its contents, except as he was informed by Graeber. At Graeber's request, he indorsed it and turned it over to Graeber, who applied it upon certain indebtedness owing to Graeber by the plaintiff on a certain land contract. Bearing in mind the position of the parties, we are not prepared to say as a matter of law that the plaintiff, by indorsing the check presented to him by Graeber and accepting and retaining his premium note, intended to, and did, waive his right either to maintain an action for deceit, or to sue upon the adjustment actually made between himself and the defendant and insist upon the payment to him of the balance of the consideration actually agreed upon. Upon this feature of the case, the court instructed the jury: "Now, as to the further fact of the check. If a person signs a check or receipt, payment in full of a certain adjustment, he acquiesces in said settlement, provided, however, that he had knowledge of its contents. In other words, if he knew and it is brought home to him that this check was given in full settlement of his account, and he accepted it with the knowledge that it was in full settlement, then such receipt is binding upon him, but at the same time, if the check was given to him with the signature thereon acknowledging settlement in full without knowledge of its contents or without information concerning it, and was not of the opinion it was an adjustment in full, then he is not bound by such signature to an adjustment in full."

The primary and fundamental propositions upon which defendant's liability depended were fully submitted to the jury under instructions the fairness and correctness of which have not even been questioned. The jury found in plaintiff's favor, and awarded him only the amount to which he was legally entitled if his version of the transaction is true.

A rehearing is denied.

GRACE, J. (dissenting). I dissent from the per curiam opinion signed by the majority court, denying a rehearing. I am fully convinced

that a rehearing should be granted. I do not agree with most of the reasoning of the per curiam opinion.

The plaintiff had a loss to his crop by hail. It is claimed by the plaintiff that the adjustment was for $335 and a return of the premium note. The defendant claims the adjustment was for the amount stated in exhibit 1, which was $250. The adjustment was signed by the adjuster on behalf of the insurance company and by the plaintiff; and this adjustment constitutes a contract, in writing, of settlement, and remains a contract until rescinded and until any money received thereunder is returned. The plaintiff did receive under exhibit 1 the written contract of settlement in question, $164.04 in cash, and his premium note of $85.96, which two amounts aggregate $250, and which fully satisfied said written contract of adjustment and paid the total loss as agreed to in said written contract of adjustment. There is no allegation of fraud in the complaint, and there is no testimony showing that the adjuster made any false representations upon which plaintiff relied and was induced to sign the written contract of adjustment.

At the time plaintiff brought this action, he knew of exhibit 1, had his copy of it with him, and at that time had received and cashed a check for $164.04, and knew that he received $164.04, and admits it in his testimony, and admits receiving back the note. He then knew, or must be held to have known, that the amount of the written contract of adjustment was less than what he claims the adjustment actually was.

If the plaintiff's version is assumed to be true, he would not only have alleged the loss adjustment as he claims it was, but he should have alleged the making of the written contract of adjustment for $250, admitted the signing thereof, and have alleged that he was deceived and misled when he signed same, and pleaded that at the earliest opportunity he rescinded said written contract of adjustment and tendered back the $164.04 and his note, which were received under and by virtue of the terms of said written contract of adjustment; or if these facts should have appeared in the testimony, the plaintiff should ask to have amended his complaint so as to correspond with the proof and made the tender above referred to so that each party might be placed just where they were with reference to the subject of litigation.

As this case now stands, the written contract of loss adjustment has not been canceled or rescinded. The plaintiff still retains all the money and the note that he received from the defendant thereunder, and the defendant is held for a further loss upon an alleged entirely different and oral contract of settlement. It appears to me that this is directly in conflict with what our statutes require that a person who desires to rescind a contract must do.

Section 5934, Compiled Laws 1913, sets out very plainly what one who desires to rescind a contract must do. Such section in substance provides that, if the consent of the party rescinding was given by mistake or obtained through duress, menace, fraud, or undue influence exercised by or with the connivance of the party as to whom the contract is rescinded; or if through the fault of the party against whom the contract is rescinded the consideration fails in whole or in part; or if the consideration becomes entirely void or fails in any material respect from any cause, or by consent of all of the other parties,—the contract may be rescinded.

Section 5936, Compiled Laws 1913, provides that when not by consent rescission can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

1. He must rescind promptly upon discovering the facts which entitled him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.

That the loss adjustment in writing for $250, signed by the insurance company by their adjuster and the plaintiff, is a contract, cannot be disputed.

The plaintiff admits he signed that contract, as the following testimony of the plaintiff on cross-examination will show:

Q. I show you exhibit 1, the loss adjustment, and ask you if that is your name on the bottom?

A. Yes.

Q. You signed that?

A. Yes, that's my writing.

Q. You knew you were signing up an adjustment when you signed this?

A. Yes.

Q. That was the adjustment for the grain you had lost?

A. Yes.

Q. It was the insurance adjuster who handed you that to sign?

A. Yes.

Q. That was on the 12th day of August, 1914?

A. Yes.

Q. You got a copy of this paper you signed up?

A. Yes.

Q. And you have held that in your possession all the time since?

A. Yes.

Testimony which shows that at the time Mathias received the check he knew the amount of the check is as follows:

Q. Mr. Mathias, at the time you got your check you knew it was a check from the insurance company for your loss of grain?

A. Yes.

Q. And you knew the amount of it?

A. Yes.

Q. $164.04?

A. Yes.

Q. Jake Graeber told you all about that?

A. Yes.

Q. At that time Jake Graeber told you you were getting back your note marked paid as a part of the settlement of the insurance?

A. Yes.

Q. And you took the note?

A. Yes.

Q. And you took the check?

A. No.

Q. Well, you indorsed it and told Graeber to give you credit for the money?

A. Yes, it went on the land debt.

Q. Now, Jake Graeber explained this whole matter to you in German?

A. Yes, he told me. He just showed me the check.

Q. He told you who it was from and what it was for?

A. Yes.

Q. And you said that was all right when he handed those things to you?

A. He said it was not enough.

Q. But you took it?

A. What could I do? I didn't know better than to take it.

Q. But you took it?

A. Yes.

Q. At the time you signed exhibit 1 here, you knew it was an adjustment with respect to the loss of your grain?

A. Yes. He thought it was $335.

This testimony conclusively shows that the plaintiff signed exhibit 1, the written loss adjustment, and he knew what he was signing when he did sign it, and that when he signed the check for $164.04 he knew the amount of that check, and he accepted his note back, and without any protest so far as the testimony shows.

Throughout all this evidence there is nothing which charges deceit, misrepresentation, or fraud; and it cannot be successfully disputed that exhibit 1, the loss adjustment signed in writing by both the plaintiff and defendant, is a contract. Not only that, but it is a contract, the full benefits of which the plaintiff accepted and retained. He received and retained the full amount of said written settlement by receiving $164.04 and his note, a total of $250. He has never rescinded that contract; never offered to return the money received thereunder; never offered to return the note for the premium; and notwithstanding that this contract was admittedly made, the plaintiff proceeds to bring in court another action alleging a different cause of action, totally disregarding this contract and entirely failing to offer to rescind and restore to the defendant the money and the note and everything of value received under said contract.

In the case of Swan v. Great Northern R. Co. post, 258, L.R.A. 1918F, 1063, 168 N. W. 657, a case which the writer claims is simi-

lar in principle to the case at bar, where the decision was signed by every member of this court, the following language appears, referring to the statutory provisions above set forth:

"These statutory provisions seem to be decisive of this case. The rules announced are plain and specific. They apply to all contracts. *They permit a person who has been defrauded to rescind the contract to which his consent was obtained by fraud, but in order to rescind he must restore or offer to restore the consideration received on the condition that the other party shall do likewise, unless the latter is unable or positively refuses to do so. These rules are largely codifications of the common-law rules, and are founded upon elementary principles of justice. 'One who has been led into a contract upon which he has received something of value cannot ignore the contract however induced, and proceed in a court of law as if the relations of the parties were wholly unaffected thereby. He cannot, while retaining its benefits and thus affirming the contract, treat it as though it did not exist.' 'He cannot treat it as good in part and void in part, but must affirm or void it as a whole.'* Home Ins. Co. v. Howard, 111 Ind. 544, 13 N. E. 104.

"A contract induced by fraud is voidable at the option of the defrauded party. He has, upon discovery of the deceit, the option of either rescinding or affirming the transaction. He must do one or the other. He cannot do both. He cannot rescind in part and affirm the remainder. Guild v. More, 32 N. D. 432, 455, 155 N. W. 44.

"He cannot at the same time be permitted to abrogate the contract and retain the benefits he has received under it. Beare v. Wright, 14 N. D. 26, 31, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057; Black, Rescission & Cancellation, §§ 561 et seq. *If he desires to rescind he must comply with the provisions of the statute and restore or tender what he has received as consideration for the contract on the condition that the other party shall do likewise, unless the latter is unable or positively refuses to do so."*

In the case of Swan v. Great Northern R. Co. where the suit was against the railway company for damages, and the company claiming that for a certain sum in settlement in writing of plaintiff's claim for damages, plaintiff gave said company a release, this court said concerning plaintiff's claim for damages: "Respondent has cited sev-

eral cases in support of the general proposition that it is unnecessary to return or tender the consideration received for a release obtained by fraud as a condition precedent to the maintenance of a suit for damages, but that the amount received may be deducted from the verdict if one is obtained against the defendant. The decisions cited by the respondent are, by no means, the only judicial expression upon the subject. On the contrary, there is a square conflict in the decision. A large and probably the largest number of modern decisions announce a doctrine contrary to that contended for by respondent and support a rule in harmony with the conclusions we have reached in applying the provisions of our statutes. See 34 Cyc. 1071; Charron v. Northwestern Fuel Co. 149 Wis. 240, 49 L.R.A.(N.S.) 1162, 134 N. W. 1048, Ann. Cas. 1913E, 939; Burns v. Reading, 188 Mich. 591, 155 N. W. 479. As already stated, a release is a contract, and where a person, with full understanding of the character and nature of the instrument, executes a release and receives a consideration therefor, there is no more reason why he should be excused from returning or tendering a return of the consideration received than in other cases where a rescission is sought."

The case of Swan v. Great Northern R. Co. was an action for damages, and in rescission of a contract, and this court has unanimously held that, before said action could be obtained, Swan would be compelled to return the benefits which he received under the alleged settlement for which he gave his release.

It is clear the same principle applies to the case at bar. The plaintiff, knowing that he had signed the written contract of settlement and knowing that he had received $164.04, and his premium note back under said written settlement, if he desired to recover upon any other cause of action or any other alleged contract, he was in duty bound to tender back the benefits which he had received by reason of having signed a written contract in settlement of his claims against the insurance company.

MIKE SWAN, Respondent, v. GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant.

(L.R.A.1918F, 1063, 168 N. W. 657.)

Railway company — claim against — compromise settlement — operates as a merger — all right of action included — pre-existing claim — compromise agreement substituted for — rights and liabilities — measured by such agreement — limited thereto.

1. A compromise and settlement fairly made operates as a merger of, and bars all right to recovery on, the claim or right of action included therein. The compromise agreement is substituted for the pre-existing claim or right, and the rights and liabilities of the parties are measured and limited by the terms of the agreement.

Contracts — compromise settlement rests upon same footing — enforcement of — damages for breach — if procured by fraud — may be rescinded — election.

2. A compromise stands upon the same footing as other contracts. Either party may enforce it, or recover damages for its breach. And if procured by fraud, the defrauded party may rescind it, if he elects to do so.

Rescission — mutual restoration of consideration — refusal or failure of either party — to restore — or offer to restore.

3. In order to effect rescission, the party rescinding must ordinarily restore or offer to restore the consideration received on the condition that the other party shall do likewise, unless the latter is unable or positively refuses to do so.

Personal injuries — claim for — agreement of compromise settlement — full knowledge of facts and contents — release of claim — cannot avoid such settlement and release — suit on original claim — cannot maintain — unless consideration returned — or offer of return made and refused.

4. Where a party agrees to compromise and settle a claim for personal injuries, and with full knowledge of the contents, and the nature, character, purpose, and effect of the instrument executes and delivers to the other party a release of the claim for personal injuries, he cannot avoid the compromise and release and recover on the original cause of action on the ground that the compromise or release was procured by fraud, unless he repays or tenders back the consideration received.

Opinion filed June 10, 1918. Rehearing denied July 30, 1918.

From a judgment of the District Court of Eddy County, *Buttz*, J., defendant appeals.

Reversed.

Murphy & Toner, for appellant.

This lawsuit is governed by the Federal Employers' Liability Act; the case was not so pleaded or proved, and on defendant's motion should have been dismissed.

The railway line of defendant on which plaintiff was injured was a through line; the company was engaged in interstate commerce; plaintiff was an employee of defendant, and as such, under the existing facts, was employed in interstate commerce. Hein v. G. N. Ry. Co. 34 N. D. 440–446; Pederson v. Ry. Co. 229 U. S. 146; Ry. Co. v. Williams (Ky.) 103 S. W. 920.

Upon defendant's motion a verdict of dismissal should have been directed. Walker v. Ry. Co. 241 Fed. 395; Ry. Co. v. Wright, 239 U. S. 548; Ry. Co. v. Hayes, 234 U. S. 86; Ry. Co. v. Slavin, 236 U. S. 454.

The fact that the Federal act was not pleaded is immaterial; either party had the right to take advantage of it. Hein v. G. N. Ry. Co. 34 N. D. 440; Ry. Co. v. Lindsay, 233 U. S. 42; Ry. Co. v. Duvall, 225 U. S. 477; Lamphere v. Ry. Co. 47 L.R.A.(N.S.) 75; Ry. Co. v. Seale, 229 U. S. 156.

The right to demand and obtain sufficient security for costs exists even in the absence of statutory provision. 11 Cyc. 171, 174, 190.

In this case an original claim for damages for personal injuries was made. The claim was settled between the parties by a compromise amount; the defendant signed the release of claim and accepted and retained the amount of money paid to him under such compromise settlement agreement and release; he has never returned or offered to return such money, or any part of it. The plaintiff cannot maintain this action. Comp. Laws 1913, § 5936; Ry. Co. v. McElroy, 100 Ky. 153, 37 S. W. 844; Hill v. N. P. Ry. 113 Fed. 914; Price v. Comers, 146 Fed. 503; Heck v. Ry. Co. 147 Fed. 775.

There is no claim or evidence of fraud or misrepresentation at the time or as a part of the compromise agreement, therefore, the release was not void, but merely voidable, and cannot be revoked in an action at law. Smith v. Ry. Co. (Miss.) 73 So. 801; Shampeau v.

Lumber Co. 42 Fed. 760; Perry v. M. O'Neill & Co. 78 Ohio St. 200, 85 N. E. 41; Moline v. Bostwick, 109 N. W. 925; Insurance Co. v. Webb, 157 Fed. 155; Kosztelnik v. Co. 91 Fed. 606; Connor v. Chemical Works, 50 N. J. L. 257, 12 Atl. 713; Hill v. N. P. Ry. Co. 104 Fed. 754, 113 Fed. 914; Vandervelden v. Ry. Co. 61 Fed. 54; Ry. Co. v. Welch, 52 Ill. 183; McMahon v. Plummer, 50 N. W. 480; Ry. Co. v. Lewis, 109 Ill. 120; Hartley v. Ry. Co. 214 Ill. 78, 73 N. E. 398; Ry. Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242; Homuth v. Ry. Co. 129 Mo. 629, 31 S. W. 903; Hancock v. Blackwell, 139 Mo. 440, 41 S. W. 205.

Plaintiff at most has only pleaded a breach of contract. A promise made by one party to another, performance of which can be enforced, or damages recovered in a proper action for its breach, does not contain within it any element of fraud. This is true whether the promise was made with or without intention to perform it. 12 Cyc. 13; Comp. Laws 1913, §§ 5846, 5849; Tamlyn v. Peterson, 15 N. D. 488.

The court erred in its entire failure to instruct the jury on the doctrine of assumption of risk. Ry. Co. v. Deatley, 241 U. S. 310.

N. J. Bothne, for respondent.

This is the first time defendant has ever mentioned the Federal act or its application to this case.

"It is elementary that a party cannot adopt one position in the trial court and thereafter urge a different one here for reversal. This court must rule upon the same issues as did the trial court, and not upon new ones." Lynn v. Seby, 29 N. D. 420.

"In reviewing a ruling on a motion for nonsuit or a directed verdict, the appellate court will consider only the grounds urged in the trial court, and appellant will not be permitted to change them or to add others in the appellate court." Erickson v. Wiper, 33 N. D. 193; McLain v. Nurnberg, 16 N. D. 144; Poirier Co. v. Kitts, 18 N. D. 556; Petrie v. Wyman, 35 N. D. 126.

By failing to object to the complaint; by pleading contributory negligence, which is no defense under the Federal act; by failing to object to the evidence and instructions of the court on that ground; by failing to call the court's attention to the matter, and by trying the case on the theory that the state statute was applicable,—the defendant has waived its right under the Federal statute, if any existed, and

cannot now raise the point here for the first time on appeal. Leora v. Ry. Co. 146 N. W. 520.

"The rule seems to be well established and settled that a defendant, as in the instant case, will not be permitted for the first time in an appellate court to invoke the protection of a Federal statute." Hanson v. Ry. Co. 146 N. W. 524; Chicago, etc., Ry. Co. v. McBee, 145 Pac. 331; Chicago, etc., Ry. Co. v. Holliday, 145 Pac. 786; Louisville & N. R. Co. v. Woodford, 234 U. S. 46; Ry. Co. v. Rogers, 150 S .W. 281; Freeman v. Powell, 144 S. W. 1033; Pelton v. Ry. Co. 150 N. W. 236; Bradbury v. Ry. Co. 128 N. W. 1; Midland, etc., Co. v. LeMoyne, 148 S. W. 654; Ry. Co. v. Neaves, 127 S. W. 1090.

"Where the declaration did not aver that the defendant was doing interstate business, nor allege facts to show that the Federal act controlled the case, is to be decided by the state law." Hemick v. Ry. Co. 184 Ill. App. 275; Bradbury v. Ry. Co. 128 N. W. 1; Hein v. G. N. Ry. Co. 34 N. D. 440.

The Federal statute does not attempt to define negligence, and hence the question of what constitutes negligence will be determined by the state law. Ry. Co. v. Swamm, 169 S. W. 886; Helm v. Ry. Co. 160 S. W. 945.

The state law also controls as to the rules of evidence and procedure. Ry. Co. v. Leslie, 167 S. W. 83; Ry. Co. v. Holloway, 173 S. W. 343.

Under our law contributory negligence is no bar to a recovery of damages for injuries by an employee, and can only be considered by the jury in apportioning the damages. Comp. Laws 1913, § 4805; Peterson v. Ry. Co. (N. D.) 164 N. W. 42.

The trial court fully instructed the jury, under this state statute, and it was not necessary to further instruct. Cole v. Atchison, 139 Pac. 1177; Graber v. Ry. Co. 150 N. W. 489; Ry. Co. v. Strange, 161 S. W. 239.

Assumption of risk is a matter of defense which must be pleaded in order to entitle the defendant to an instruction on that point. Carr & Erickson v. Soo Ry. Co. 16 N. D. 217.

"A party cannot in a court of error avail himself of an omission of the trial court to instruct the jury upon a point in respect to which he asked no instruction." Frye v. Ferguson, 6 S. D. 392.

"The employee does not assume the risk of injury caused by the

master's negligence, where he had no knowledge of the existing danger." Mechan v. G. N. Ry. Co. 13 N. D. 432.

"It is error to submit to the jury issues on which there is no evidence." Douda v. Ry. Co. 119 N. W. 272; 13 Standard Proc. 792; N. D. Comp. Laws, § 4807; Federal Employers' Liability Act, § 6.

It is not error for the trial court to refuse to dismiss the action for failure of a nonresident to give security for costs, when such motion is made at the opening of the trial and without other notice. Bergh v. Wyman Farm Land Co. 30 N. D. 158.

A release of claim obtained by fraud may be avoided in an action at law, and a suit for damages maintained without first obtaining a decree in equity canceling the release. Clark v. N. P. R. Co. 36 N. D. 503.

Such releases are treated in the law as merely partial payments, and under proper instructions the jury, if it awards a greater amount by its verdict, may deduct or allow for in any other manner, the amount of the release, and render verdict for the net balance they may decide to give plaintiff. Hedlum v. Holy Terror Min. Co. 16 S. D. 261; O'Brien v. Ry. Co. 57 N. W. 425; 35 L.R.A.(N.S.) 660; Girard v. St. Louis Car Wheel Co. 25 L.R.A. 514.

The release here was not only voidable for partial failure of consideration, but was voidable on the ground of actual fraud. Actual fraud, among other things, consists of "a promise made without any intention of performing it, or any other act fitted to deceive." Comp. Laws 1913, § 5849; Tamlyn v. Peterson, 15 N. D. 488; Pollard v. McKenney, 96 N. W. 679; Cerny v. Pacton Co. 110 N. W. 882; Lawrence v. Gayetty, 78 Cal. 126; Langley v. Rodriquez, 122 Cal. 580.

In such cases as this one, misrepresentations on the part of the physician as to the nature and extent of the injuries will avoid a release. The concealment of a material fact is as fraudulent as a misrepresentation. Clark v. N. P. R. Co. 36 N. D. 503; Viallet v. Co. 5 L.R.A.(N.S.) 663, and note; Haigh v. Co. 50 L.R.A.(N.S.) 1091 and note; Jacobsen v. Ry. Co. 156 N. W. 251.

Where a person who is illiterate and does not understand the language in which a release is written, and did not know what he was signing, it is the duty of the person presenting such release or instrument for signature to fully explain its true contents and the meaning

of the same, and a failure to do so is evidence of fraud. Christianson v. Ry. Co. 69 N. W. 640; Peterson v. Butler Bros. 144 N. W. 407; Lusted v. Ry. Co. 36 N. W. 857; Miller v. Ry. Co. 143 Pac. 981; Bearden v. Ry. Co. 103 Ark. 341; Pierson v. Milling Co. 139 Pac. 394; Stanwood Co. v. Pain, 157 Ky. 623; Ry. Co. v. Nichols, 136 Pac. 159; Woods v. Wickstrom, 135 Pac. 192.

Although the amount paid for such a release may be very unfair and unconscionable, this fact alone is not sufficient to avoid it; but it is an evidence of fraud and is a proper question for the jury, and their finding of a general verdict for plaintiff covers and includes a finding upon such question. Russell v. Coal Co. 70 S. W. 1; Kelly v. Ry. Co. 114 N. W. 536.

Where a reply which has been improperly interposed is withdrawn before the commencement of the trial, it is thereafter no part of the case, and should not be referred to for any purpose. Comp. Laws 1913, § 7452; Regan v. Jones, 14 N. D. 591; Erickson v. Elliott, 17 N. D. 389; America, etc., Co. v. Walton Co. 22 N. D. 187.

The release was a matter of defense, and it was not incumbent on plaintiff to anticipate such defense and set it up in the complaint. Trotter v. Association, 9 S. D. 596; Hedlum v. Holy Terror, etc., Co. 16 S. D. 261.

The respondent had the right to show the release was fraudulent without raising the question by a reply, for none was necessary under our statute. Lyon v. Bank (S. D.) 89 N. W. 1017.

Where the main issue in a case is the question of fraud, evidence, or any circumstance which tends to establish it, is proper. Comp. Laws 1913, § 5852.

The admission of improper evidence is harmless if the fact is afterwards established by proper evidence. 38 Cyc. 1422, 1430, and citations.

The charge of the trial court must be considered as a whole. Buchanan v. Machine Co. 17 N. D. 343; McBride v. Wallace, 17 N. D. 495.

CHRISTIANSON, J. The plaintiff was employed by the defendant as a section laborer. On or about October 5, 1915, while in such employ, he was injured by being thrown from a motor car. This action was

brought by plaintiff to recover damages in the sum of $2,975, alleged to have been sustained by him by reason of the injury then received. The defendant, by answer, alleged affirmatively that plaintiff, for a valuable consideration paid to him by the defendant, settled and adjusted all claims and demands against the defendant on account of the alleged cause of action set forth in the complaint, and fully released and discharged the defendant from all liability thereon.

The evidence shows that some time after the accident the defendant's claim agent, one Mulcahy, entered into negotiations with the plaintiff with the result that plaintiff executed the following written release:

Know all men by these presents, that, In consideration of the sum of three hundred seventy-five and no/100 dollars, to me in hand paid by the Great Northern Railway Company, the receipt whereof is hereby acknowledged, have released, acquitted, and discharged, and do, by these presents, release, acquit, and discharge said railway company, its successors, and assigns of and from any and all liability, causes of action, costs, charges, claims, or demands of every name and nature, in any manner arising or growing out of, or to arise or grow out of, personal injuries received by me, at or near New Rockford, in the state of North Dakota, on or about the 5th day of November, 1915, while acting as a section laborer, I met with an accident and sustained personal injuries, or arising or to arise, out of any and all personal injuries sustained by me at any time or place while in the employ of said railway company prior to the date of these presents.

No promise of further employment has been made to me by said railway company as part consideration of this settlement and release, or otherwise.

In witness whereof, I have hereunto set my hand and seal this 27th day of December, A. D. 1915.

In presence of Mike Swan.

E. M. Watson,

E. F. Mulcahy.

At the time of the execution of the release, the claim agent delivered to plaintiff a draft for $375, on the treasurer of the railway company.

The plaintiff indorsed and cashed the draft at one of the local banks and received $375 in cash. The draft was duly paid by the defendant in regular course of business. The plaintiff retained the money received, and has never returned or offered to return it to the defendant.

The witnesses all agree that during the negotiations between the plaintiff and the claim agent something was said with respect to plaintiff being continued in defendant's employ, but they differ as to what was said. They agree that plaintiff stated that he wanted employment, and objected to the clause in the release, which stated that no promise of future employment had been made to him by the railway company. They also agree that the claim agent stated that he could not permit this clause to be stricken out, as the company would not accept the release unless it contained this clause. The plaintiff, however, claims that the claim agent promised that notwithstanding such clause the defendant would give plaintiff a steady, light job as long as he could work; that it was by reason of and in reliance upon this promise and representation that he signed the release, and that he would not have signed it unless such representation had been made. The claim agent, on the other hand, contends that he made no promise that defendant would retain plaintiff in its employ, but merely stated that he (the claim agent) would use his personal influence to procure such job for the plaintiff.

The court submitted to the jury, among others, the question whether the defendant, with intent to deceive the plaintiff, induced him to execute the release by (1) a promise made without any intention of performing it; or (2) any other act fitted to deceive. Comp. Laws 1913, § 5849. The jury returned a verdict in favor of the plaintiff for $1,284. Judgment was entered pursuant to the verdict, and defendant appeals.

The record shows that the defendant at the close of the testimony moved for a directed verdict of dismissal, on the ground, among others, that plaintiff had failed to return or tender a return of the consideration received, and consequently could not maintain the action. Error is predicated upon the denial of this motion. Defendant contends that plaintiff cannot maintain the present action without first having restored or tendered to the defendant the moneys received from the defendant as consideration for the execution of the release.

In our opinion defendant's contention is correct, and must be sustained. It is elementary that parties not under any disability to contract may enter into a valid agreement for the settlement of a controversy between them. The right to compromise controversies is recognized by the laws of this state. The only restriction placed on such right is that certain public offenses cannot be compromised. Comp. Laws 1913, § 11,077. A compromise and settlement when full and complete and fairly made operates as a merger of, and bars all right to recovery on, the claim or cause of action included therein. 8 Cyc. 516. In other words the compromise agreement is substituted for the pre-existing claim or right. The rights of the parties are measured and limited by the agreement. A compromise stands upon the same footing as other contracts. Either party may maintain suit to enforce it. And if procured by fraud the defrauded party may rescind it, if he elects to do so.

Under the laws of this state a party to a contract may extinguish the same by rescission in the following cases only: "1. If the consent of the party rescinding, or of any party jointly contracting with him was given by mistake or obtained through duress, menace, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds or of any other party to the contract jointly interested with such party. 2. If through the fault of the party as to whom he rescinds the consideration for his obligation fails in whole or in part. 3. If such consideration becomes entirely void from any cause. 4. If such consideration before it is rendered to him fails in a material respect from any cause; or 5. By consent of all of the other parties." Comp. Laws 1913, § 5934. But "rescission when not affected by consent can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: 1. He must rescind promptly upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence or disability and is aware of his right to rescind; and, 2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." Comp. Laws 1913, § 5936.

These statutory provisions seem to be decisive of this case. The

rules announced are plain and specific. They apply to all contracts. They permit a person who has been defrauded to rescind the contract to which his consent was obtained by fraud, but in order to rescind he must restore, or offer to restore, the consideration received on the condition that the other party shall do likewise, unless the latter is unable or positively refuses to do so. These rules are largely codifications of the common-law rules, and are founded upon elementary principles of justice. "One who has been led into a contract upon which he has received something of value cannot ignore the contract, however induced, and proceed in a court of law as if the relations of the parties were wholly unaffected thereby. He cannot, while retaining its benefits, and thus affirming the contract, treat it as though it did not exist. 'He cannot treat it as good in part and void in part, but must affirm or avoid it as a whole.'" Home Ins. Co. v. Howard, 111 Ind. 544, 547, 13 N. E. 103, 104. A contract induced by fraud is voidable at the option of the defrauded party. He has, upon discovery of the deceit, the option of either rescinding or affirming the transaction. He must do one or the other. He cannot do both. He cannot rescind in part and affirm the remainder. Guild v. More, 32 N. D. 432, 455, 155 N. W. 44. He cannot at the same time be permitted to abrogate the contract and retain the benefits he has received under it. Beare v. Wright, 14 N. D. 26, 31, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057; Black, Rescission & Cancellation, §§ 561 et seq. If he desires to rescind he must comply with the provisions of the statute, and restore or tender what he has received as consideration for the contract, on the condition that the other party shall do likewise, unless the latter is unable or positively refuses to do so. To rescind is to abrogate, annul, avoid or cancel—in other words to undo—a contract. "The term 'rescission,'" says Bishop (Bishop, Contr. § 679), "denotes the avoiding of a voidable contract." The word "rescission" has a well-defined meaning in law, and includes the idea of restoration of both parties to their *status quo,* and return by each to the other of the consideration given and received (4 Words & Phrases, 2d Series, 328). As was said by this court in Raymond v. Edelbrock, 15 N. D. 231, 107 N. W. 194: "Rescission of a contract is the act of canceling it by restoring the conditions existing immediately before it was made. Rescission is effected by each party returning to the other what has been

received pursuant to the contract or its equivalent." Not only is the party who seeks to be relieved from a contract voidable for fraud required to put the other party back in his original position, but ordinarily, "the contract can only be rescinded where it is possible to put the parties back in their original position and with their original rights." 9 Cyc. 437, 438. "A contract induced by fraud is voidable not because of any supposed pecuniary damage done to the defrauded party, but because the consent of the latter was not free." Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057; Crane & O. Co. v. Sykeston School Dist. 36 N. D. 254, 259, 162 N. W. 413. And such voidable contract does not become binding upon the defrauded party unless, with knowledge of the fraud, he ratifies or affirms it. In case of rescission, "the contract ceases to exist for any purpose, and the parties stand in the same position as though it had never been made, and hence, it is necessary that they be placed in the same position in which they were before the transaction took place. Therefore the party defrauded, in such case, is entitled to recover back whatever consideration he parted with, but he must also return or offer to return to the other party whatever he received. In case of affirmance, he retains what he received, and is entitled to be compensated for the damages he sustained by reason of the false representation. That is, the wrongdoer will be compelled to pay damages equal to the difference in value between what he gave and what he represented he would give. . . . The transaction may be affirmed either expressly or by implication. And a person who retains as his own the property which he received in the transaction will necessarily be deemed the owner thereof. And, having elected to assume the position of owner, will be compelled to abide by the selection made, and to be not only invested with the rights and prerogatives, but also burdened with the duties and liabilities, incident to such ownership. Hence, in such case the measure of damages for the fraud and deceit practised upon him is very properly predicated upon the basis that the defrauded party is the owner of the property, and therefore his damage is equal to the difference in value between the property he received and what he would have received if the representations had been true." Guild v. More, 32 N. D. 432, 454, 455, 155 N. W. 44.

"It is well settled by repeated decisions of this court," said the Su-

preme Court of the United States (Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed. 419, 24 Sup. Ct. Rep. 259), "that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract. Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798; McLean v. Clapp, 141 U. S. 429, 35 L. ed. 804, 12 Sup. Ct. Rep. 29. In other words, when a party discovers that he has been deceived in a transaction of this character he may resort to an action at law to recover damages, or he may have the transaction set aside in which he has been wronged by the rescission of the contract. If he choose the latter remedy, he must act promptly, 'announce his purpose and adhere to it,' and not by acts of ownership continue to assert right and title over the property as though it belonged to him." We are aware of no rule or reason which would justify us in refusing to apply these rules in dealing with compromises and releases. We believe that they are fully as applicable to those as to other contracts. See Urtz v. New York C. & H. R. R. Co. 137 App. Div. 404, 121 N. Y. Supp. 879; Duquette v. New York C. & H. R. R. Co. 137 App. Div. 412, 121 N. Y. Supp. 876; Strong v. Strong, 102 N. Y. 69, 5 N. E. 799; Home Ins. Co. v. Howard, 111 Ind. 544, 13 N. E. 103.

Respondent has cited several cases in support of the general proposition that it is unnecessary to return or tender the consideration received for a release obtained by fraud, as a condition precedent to the maintenance of a suit for damages, but that the amount received may be deducted from the verdict, if one is obtained against the defendant. The decisions cited by the respondent are by no means the only judicial expressions upon the subject. On the contrary, there is a square conflict in the decisions. A large, and probably the larger, number of modern decisions announce a doctrine contrary to that contended for by respondent, and support a rule in harmony with the conclusions we have reached in applying the provisions of our statute. See 34 Cyc. 1071; Charron v. Northwestern Fuel Co. 149 Wis. 240, 49 L.R.A. (N.S.) 162, 134 N. W. 1048, Ann. Cas. 1913C, 939; Burns v. Reading, 188 Mich. 591, 155 N. W. 479.

As already stated a release is a contract, and where a person with

full understanding of the character and nature of the instrument executes a release, and receives a consideration therefor, there is no more reason why he should be excused from returning or tendering a return of the consideration received than in other cases where a rescission is sought.

"It is elementary," said Corliss, J. (McGlynn v. Scott, 4 N. D. 18, 21, 58 N. W. 460), "that the courts look with the highest favor upon every honest adjustment of private differences." For compromises and settlements tend to diminish litigation and promote the repose of society. And "the law loves peace, and hates dissensions and turmoils, and its policy and maxims are against their being revived or unnecessarily prolonged." Kercheval v. Doty, 31 Wis. 476, 484.

The doctrine, announced by some of the courts, and for which respondent contends, would distinctly tend to discourage and prevent the compromise of controversies, and to increase litigation. Under the rule contended for, a party who has compromised a disputed, unliquidated claim may retain the money received under the compromise agreement and prosecute an action upon the claim which formed the subject of the compromise agreement. In fact he may use the very moneys which he received as a consideration for the compromise to prosecute the subsequent action. He is permitted to deny the validity of a contract and at the same time retain the benefits which he has received under it. The rule contended for seems illogical and unsound.

As was well said by the supreme court of Kentucky in Louisville & N. R. Co. v. McElroy, 100 Ky. 153, 37 S. W. 844: "Either the company paid the money to avoid the risk of a greater damage being awarded against it in the event of litigation, or it paid the money in the belief that the expense of the litigation, though it defeated a recovery, would amount to as much or more than the sum paid. It sought to buy its immunity from damages and expense of having the question of its liability determined. It is not reasonable to suppose that the company would have paid the money if the right of the plaintiff still existed to maintain his action upon the original cause of action. There is no pretense that the company paid its money as a credit on its supposed liability. It paid it to extinguish its liability, if such existed. If, upon the trial of the case, the verdict had been for the

company, because the injury was not the result of the gross negligence of the foreman or the party operating the engine, then the plaintiff would have the money and the company the expense of the litigation which it sought to avoid, and the court powerless to enforce a return of the money. This statement illustrates the correctness of the well-recognized rule which requires a repayment or a tender of the money before bringing the action." Some courts, while recognizing the correctness of the general rule that in order to effect rescission, the rescinding party must place the other party *in statu quo* by returning or tendering a return of whatever consideration he has received under the agreement, and the applicability of this rule to compromises and releases, have also recognized certain exceptions to the rule.

Thus, it has been held that the consideration need not be returned in order to effect a rescission and entitle the defrauded party to maintain an action upon the original claim: (1) Where a tender would have been useless, or where the thing is utterly worthless; (2) where there may be a severance of one part of the contract, in which event a partial rescission is sometimes allowed in the interests of justice; (3) where the plaintiff was entitled to receive the consideration irrespective of the assent got by its delivery to him, as where the liability of the debtor and the amount of the claim are conceded and the creditor agrees to release upon receiving payment of an amount less than what is conceded to be due; (4) where the very existence of the compromise or release is denied, and there was in fact no contract created,—as where a release is misread to the releasor, or where there is a substitution of one paper for another, or where a party is tricked into signing an instrument which he did not intend to execute.

The cases which fall within the fourth exception proceed upon the theory that the effect of fraud upon a contract and the rights and obligations arising thereunder, including the necessity of returning the consideration, depend upon the nature of the fraud. These cases divide fraud into classes:

(1) One class of fraud goes to the very existence of the contract, as where a release is misread to the releasor, or where one paper is surreptitiously substituted for another, or where a party is tricked into signing an instrument which he did not intend to execute. In such cases the minds of the parties did not meet upon, and there was

no consent whatever by the defrauded party to, the ultimate propositions purported to be covered by the contract, and the consideration received by the defrauded party was not received for consenting to the terms of the alleged contract, but for his consent to entirely different propositions. In such cases it is not a question of a contract voidable because the consent to its terms was not free and mutual, but there was no consent whatever. In other words, it is held that it is not a question of a contract voidable for fraud, but a question of no contract at all.

(2) Another species of fraud goes to the representations, or means, used to induce a party to enter into the contract. In such cases the party knows the character of the instrument which he signs, and intends when he signs and delivers it that it shall have the purpose and effect which the law imputes to it. In such cases the minds of the parties have actually met upon the ultimate propositions contemplated by them and evidenced by the contract, but the contract is voidable for the reason that the consent of the defrauded party to its provisions was obtained by false and fraudulent representations, such as false statements as to the nature and value of the consideration, or as to the extent of his injuries, or other material matters. The cases referred to, which recognize and discuss this distinction between the two classes of fraud hold that with respect to the first class it is not necessary to return or offer to return the consideration before maintaining an action upon the original claim. But that in cases involving fraud of the second class, the consideration must be returned or tendered in order to maintain an action upon the original claim. One of the foremost courts in the country which has recognized this distinction is the supreme court of Massachusetts. And this distinction was pointed out by that court in the case of Mullen v. Old Colony R. Co. 127 Mass. 86, 34 Am. Rep. 349. In that case the court, after recognizing the rule that it was necessary to return the consideration received for a release before the releasor might institute an action on the original demand, says: "The principle on which these decisions rest is just; but it applies to those cases only where that which was received, and which must be returned, was the consideration of the contract or settlement which the receiver intended to make, and understood that he was making, and which he seeks to avoid by reason of fraudulent

practices of the other party which led him to agree to its terms. It does not apply to cases where a party holds out that he gives the consideration for one thing, and by fraud obtains an agreement that it was given for another thing." (The correctness of this distinction has been questioned by other courts. See Rockwell v. Capital Traction Co. 25 App. D. C. 98, 4 Ann. Cas. 648.) It is unnecessary for us in this case to either approve or disapprove of these holdings, for the instant case does not fall within any of these exceptions.

The defendant raised the question of the necessity of a tender or restoration of the consideration at the earliest opportunity upon the trial, and continued to urge it until the last. There is nothing to indicate that an offer to restore the consideration would have been refused. It cannot be said that a tender would have been useless.

In this case the compromise affected on right of action only; there was no room for severance.

The claim involved was an unliquidated one. The liability of the defendant was by no means conceded. The evidence shows that during the negotiations between the claim agent and the plaintiff different offers and counter offers were made. The plaintiff demanded a larger cash consideration than was finally paid, and the claim agent offered a lesser one. They finally agreed upon the terms of the settlement. And while there is a dispute as to some of the terms, there is no dispute as to the amount of cash consideration agreed upon. It is undisputed that this was fixed at $375, and that it was paid to the plaintiff, and that he has retained it ever since, and has at no time restored or offered to restore it to defendant.

It is undisputed that at the time plaintiff received the money he executed the written release. "It is further undisputed that this release was carefully read over to the plaintiff before he signed it. He was not deceived as to its contents or its purpose. He knew that its purpose and effect was to release and discharge his right of action against the defendant. He signed the very instrument which he intended to sign." If his signature to the release was obtained by means of fraud and deceit the law affords him ample remedy. However, he

has no right to retain that which he received as consideration, and repudiate the remainder of the contract.

The judgment appealed from is reversed, and the cause remanded for further proceedings in conformity with this opinion.

GRACE, J. I concur in the result.

ROBINSON, J. (concurring). This is a personal injury case. Defendant appeals from a judgment for $1,284. As a section hand in the employ of defendant, plaintiff was on a gasolene motor which ran into an open switch so he was thrown to the ground and severely injured. Some two months after the injury a settlement was made with defendant and he signed a release for $375, which he received and retained. It is claimed that in part consideration for the release the company contracted to retain the plaintiff in its services at some easy job, and then in six weeks discharged him without cause. If that be true, of course the plaintiff may recover damages for the discharge, and his right of action is not barred by a sharp clause in the release that the company made no promises of future employment. Plaintiff did not read, and he could not read, the release, and it does not bar him from recovering damages in case he was wrongfully discharged.

However, it is certain the plaintiff received $375, and for that sum and such promises, if any, as the company made to him, he knowingly signed the release of any claim for the injury, and he received and retained $375. Were he at liberty to do that and then to sue for damages in the same manner as if he had never made a contract of release, then no force or effect may be given to any such contract. For a settlement and release amounts to nothing if it has no validity, and the right to make a valid settlement is a valuable privilege. A bird in the hand is worth two or three in the bush. A dollar without a damage suit is worth several dollars at the end of the suit.

The release is a contract, and under the plain words of the statute the plaintiff was not at liberty to repudiate it without returning or offering to return the consideration. Were it otherwise, a party injured might accept any offer as a settlement and then bring suit for damages without any risk of losing the money received. Then no person of common sense would pay out good money for a settlement which

would only put him at a sure and certain disadvantage in a suit for damages. To every man the right to make a valid contract is of great value. The right should not be denied to the poor and illiterate by treating them as children and giving no force or effect to their contracts.

The questions arising in regard to the pleadings are of minor importance. If the $375 had been returned to and received by the company, the complaint might well have ignored the settlement. Otherwise the complaint should have stated the contract of release, and the grounds of rescission, and a proper offer to rescind and to return the purchase money, with payment of the same into court.

Judgment should be reversed and case dismissed.

On Petition for Rehearing.

CHRISTIANSON, J. Plaintiff has filed a petition for a rehearing. In such petition he contends that "the statutory provisions referred to in the opinion as to the necessity of returning the consideration before suit do not apply in this case, but apply particularly to actions for rescission and cancelation of contracts." We are unable to agree with this contention. These statutory provisions, by their express terms, apply to all contracts. They are provisions of substantive, and not of adjective, law. They relate to the right, and not to the remedy. They apply not only in suits for rescission or cancelation of contracts, but in any suit wherein the question arises whether a contract has been rescinded or remains effective. It seems self-evident that when a cause of action has been settled, it is extinguished and merged in the contract of settlement. If such contract is valid, it concludes the right of the parties for all time. And if it is voidable for fraud, there is no reason why the party who seeks to avoid it should not do what the law requires to be done by one who seeks to avoid a fraudulent contract.

Plaintiff again argues that this court ought to adopt the rule that a party who seeks to repudiate a settlement for personal injuries may be permitted to sue upon the original cause of action without returning or tendering the consideration received, and that by allowing credit upon the verdict the same purpose is accomplished. In this connection, he argues that the payment of a consideration for a release

constitutes an implied admission of liability by the party who makes the payment. And in the instant case it is asserted that "there was an implied admission of liability to the extent of $375." And that "the amount so paid is conceded to be due, whatever the result of the litigation." While the theory just advanced has been suggested in one of the cases dealing with this subject, it is, in our opinion, entirely unsound. The law favors settlements and compromises. And an offer of compromise by a party who attempts to purchase peace in a controversy is privileged, and does not constitute an admission against the party who makes the offer. 1 Enc. Ev. 596, 599. It is well known to every practising attorney that compromises and settlements are by no means limited to cases wherein liability is unquestioned, but they are at least as, and probably more, frequently effected in cases where liability is doubtful or nonexistent. The cases are by no means infrequent wherein a party deems it better and less expensive to buy his peace than to be put to the trouble and expense of a lawsuit, even though no liability exists. Clearly, the fact that a compromise has been effected and one party has paid a consideration to the other should not be deemed an admission of liability on the part of the one who paid the consideration, where the party who received it seeks to repudiate the contract of settlement under which the consideration was paid.

It is next contended that, inasmuch as the defendant pleaded the release as a defense, an offer to return the consideration received by the plaintiff for the release would have been useless. In other words, it is asserted that the defendant, by pleading the release, waived the necessity of a tender. This contention is without merit. Under the Code, a release is an affirmative defense of new matter, which must be specially pleaded in order to be available. 18 Enc. Pl. & Pr. pp. 89, 90; 34 Cyc. 1094; Comp. Laws 1913, § 7448. If plaintiff's contention is sustained, it will lead to this result; a defendant who is sued upon a cause of action which has been released must plead the release or he will be precluded from introducing the release in evidence; but if he pleads the release in defense, he waives a return of the consideration on the part of the party who executed and seeks to avoid the release. A bare statement of the contention demonstrates its unsoundness.

The plaintiff also contends that we were in error when we stated

in the former opinion "that this release was carefully read over to the plaintiff before he signed it. He was not deceived as to its contents or its purpose. He knew that its purpose and effect was to release and discharge his right of action against the defendant. He signed the very instrument which he intended to sign." It is true, plaintiff in answer to leading questions put to him by his counsel stated that he did not know the contents or meaning of the instrument which he signed.

But while examined by his own counsel he also testified:

Q. Mr. Swan, who called you down to the doctor's office at the time you made this *settlement with the company?*

A. Claim agent. . . .

Q. Did you have any talk about *the settlement* in Doctor Watson's office before Rodenberg came in? On the day *the settlement* was made?

A. Yes, sir. . . .

Q. Now that was the same day of *the settlement,* or the same day *the settlement* was made, at the time you signed the papers?

A. Yes, sir.

(The plaintiff, thereupon, testifies to the effect that the claim agent called Rodenberg, the interpreter.) He further testified:

Q. The claim agent first talked to Rodenberg and then what did Rodenberg say to you?

A. I wanted more money than the claim agent would give to me.

. . .

Q. What did Rodenberg then tell you?

A. There was $50 between us, and the claim agent said, "Let's split that $50," and I said "All right."

During the course of plaintiff's cross-examination the court propounded this question: "How did you happen to be talking about that (the matter of a job)?"

Plaintiff answered: "I wanted to get $600 and a light job and they just jewed me down to $375 and a light job."

He further testified:

Q. At the time that you got this $375 and signed this release you knew you were settling with the company?

A. Yes.

Q. You knew at the time you settled you had the rupture, didn't you?

A. Yes, sir.

Some reference is also made in plaintiff's testimony to the effect that he wanted the claim agent to give "it on black and white," and that in reply the claim agent "knocked on his breast" and said, "I am standing good for it, that you get a light job."

The claim agent, Mulcahy, testified:

I think I went to Mr. Swan's house and he came to doctor's office with me, or we telephoned, either one of those. We had had some previous conversation regarding a settlement, and he wanted on that day $500, but I told him I couldn't pay him that. I offered $300 and to pay the doctor's bill and buy him a truss and also for an operation if he wanted it. He stated he didn't want an operation, so we finally got down to business and he accepted $375.

Q. Was Mr. Rodenberg present?

A. Yes, sir.

Q. Were you talking to Mr. Rodenberg in English and then he would translate it to Swan, then Swan talk to him and Mr. Rodenberg translate back to you?

A. Yes.

Q. And as you talked about all the conversation took place between you and Mr. Rodenberg, the interpreter?

A. Yes, he was acting as interpreter for Swan.

Q. Do you recollect the testimony of Mr. Rodenberg as to a light job?

A. Yes, sir.

Q. Do you recollect just what the conversation was about the job; how it came up?

A. When Mr. Rodenberg was reading the release to him and explaining it to him, and when he came to where it states, There is no promise for future employment to have been made as a part consideration of the release, Swan objected to that part and asked if I couldn't leave that out, and I told him, "no," the company wouldn't make any promises of any future employment whatever; that it had to be just

as the release was, but I, myself, would use my influence to see he got a job.

Rodenberg, who acted as interpreter between the claim agent and the plaintiff at the time the release was executed, testified as follows:

Q. Was there anything said, Mr. Rodenberg, by Mr. Mulcahy and interpreted by you to Mr. Swan as to whether or not the company would put any provisions in this settlement as to a job?

A. Yes, there was something said.

Q. What was said?

A. *The claim agent said he couldn't put it in the release. He couldn't put anything in the release about the job.*

Q. Did he say why he couldn't?

A. He said the company wouldn't accept the release.

Q. What did Mr. Mulcahy say to Mr. Swan and what did Mr. Swan say back?

A. Swan said he wouldn't sign the release if no job was put in.

Q. What did the claim agent say?

A. He couldn't put it in the release, but he would get him a job.

Q. What was said next?

A. Swan, he doubted it, he would like to have it in black and white, and the agent says he couldn't do it, as the railway company wouldn't accept the release, and he promised him a job again absolutely.

Q. What did he say that made you think that?

A. He said, knocking his breast, I will see you get a job.

Q. Did you interpret that to Swan?

A. I did.

When all this testimony is considered and the most favorable construction placed upon plaintiff's testimony, it seems clear that reasonable men can reach only one conclusion; namely, that he was well aware of the transaction in which he was engaged. He knew that he was making a settlement for his personal injuries. Offers and counter offers were made. He signed an instrument, the purpose and effect of which was to complete the settlement. He knowingly received $375, stipulated as a consideration, and this he has kept and never offered to return. We are entirely satisfied that the instant case falls within the rule announced in our former opinion, that a party who repudiates

a settlement for personal injuries because of fraud and sues upon the original cause of action must return or tender a return of the consideration received. And "it is no answer to the objection that the money has not been returned, or offered to be returned, that the amount received by the plaintiff under the release has been discounted from the verdict. Suppose the verdict had been found for the defendants, because of insufficient proof of negligence on their part, or because of contributory negligence on the part of the plaintiff, what would have been the predicament of the defendants in respect to the money paid under the release? Clearly they could have no recourse to recover it back from the plaintiff. The plaintiff cannot be allowed both to affirm and disaffirm, according as the case may terminate; he cannot affirm for what he has received, and disaffirm and repudiate the release as to the difference between that amount and what he might expect to recover by the verdict of the jury. He must disaffirm and rescind the release *in toto,* if the facts justify him in so doing, and return or offer to return what he has received under it." Lyons v. Allen, 11 App. D. C. 543, 552.

It is suggested that the decision deprives plaintiff of all remedy for the fraud alleged to have been practised upon him by the defendant. The suggestion, while not material, is incorrect. Even though it be true (as plaintiff assumes) that it is now too late to tender or return the consideration and sue upon the original cause of action (and upon this question we express no opinion), the plaintiff still has the right to maintain an action for the deceit which he claims was practised upon him, and, if he prevails in such action, he will receive all the relief to which he is justly entitled.

A rehearing is denied.

GRACE, J. I concur in the result.

COUNTY OF MORTON, Respondent, v. A. G. FORESTER, Appellant.

(168 N. W. 787.)

Public highways — absence of constitutional restriction — under full control of legislature — vacation of — only as prescribed by legislature.

1. In the absence of constitutional restriction, public highways are under full control of the legislature, and may be vacated in such manner and through such instrumentalities only as the legislature prescribes.

Public highways — vacation of — petition for — township supervisors.

2. Under the provisions of §§ 1921 and 1923, Comp. Laws 1913, the board of township supervisors of an organized township has power, upon petition, to vacate a highway situated within the township.

Highway in township — connected with highway in adjoining township — township supervisors — part of highway situated in township — supervisors — jurisdiction over.

3. The fact that a highway situated within a township connects with a highway situated in adjoining townships and does, in fact, form a portion of a continuous, traveled highway originating and terminating at points outside of the boundaries of the township, does not devest the board of township supervisors of jurisdiction over such highway as is actually situated within the boundaries of the township.

Opinion filed July 31, 1918.

Appeal from the District Court of Morton County, *Nuessle,* Special Judge.

From an order sustaining a demurrer to the answer, defendant appeals.

Reversed.

Sullivan & Sullivan, for appellant.

A board of supervisors of an organized township has full control over the highways in such township, and may lay out, alter, or vacate highways within the limits of such township, upon proper petition. In the absence of constitutional restriction, such board has exclusive jurisdiction with the boundaries of the township; and the mere fact that the highway sought to be vacated connects with a highway in an adjoining township does not devest the board of jurisdiction to act con-

cerning that part which is actually situated within its township. Comp. Laws 1913, §§ 1921, 1923.

L. H. Connolly, for respondent.

The board of supervisors of one township, through which a continuous highway from and through other adjoining townships runs, has no authority to vacate that part of such highway which is within its township, without concurrent action of the supervisors of other adjoining townships through or into which such highway runs. Comp. Laws 1913, § 1921; Brewer v. Gerow (Mich.) 47 N. W. 113.

CHRISTIANSON, J. This is an action to enjoin the maintenance of an obstruction to a public highway. The appeal is from an order sustaining a demurrer to the answer. The highway involved runs from Mandan in a southwesterly direction through the county of Morton. The highway runs across both organized and unorganized townships in Morton county. The premises involved in this action are situated in Fair Valley township, which is an organized civil township. Immediately east of Fair Valley township the highway runs across certain unorganized territory, and immediately south of said Fair Valley township it enters the organized township of Flasher.

The answer of the defendant alleges that Fair Valley township is a duly organized civil township, having a duly elected and qualified board of supervisors; and that such board of supervisors, upon the petition of more than ten legal voters of said township owning and occupying real estate within 1 mile of said highway within said township, after notice and proceedings had as provided by the laws of this state in such cases made and provided, entered an order discontinuing and vacating such highway in Fair Valley township. The answer alleges the proceedings had with respect to such discontinuance with particularity, and it is conceded that the statutory provisions relative to vacation of highways by a board of township supervisors were fully complied with.

The parties are agreed that the only question presented for determination on this appeal is whether the board of supervisors of Fair Valley township had authority to vacate the highway in question. If they had such authority, then the highway no longer exists, and the defendant has not erected, nor does he maintain, an obstruction in a

highway. On the other hand, if the board of supervisors had no such authority, then the highway has never been vacated; it still exists and the defendant has erected and is maintaining an obstruction therein.

Our statutes provide:

"In the opening, vacating or changing of a highway outside of the limits of incorporated cities, villages or towns, all proceedings relating thereto to acquire right of way and to all other matters connected therewith shall be under the charge and in the name:

"1. Of the board of county commissioners, if the county is without a civil township organization, or if the road is in terrritory not organized into a civil township.

"2. Of the board of township supervisors of organized townships.

"3. Of the board of county commissioners of each county in case the road is between or in two or more counties.

"4. Of the board of township supervisors of each organized civil township in which any part of the road is situated if the road is situated between two civil townships or in more than one civil township.

"5. Of the board of township supervisors of each organized township and of the board of county commissioners in case the road is situated partly in an organized township and partly in an unorganized township.

"6. Of the board of county commissioners in any case arising under subdivision 4 where the board of township supervisors of the respective civil townships cannot agree or will not take action on petition so to do." Comp. Laws 1913, § 1921.

And, that "the board having jurisdiction as provided by the provisions of the preceding section may alter or discontinue any road or lay out any new road upon the petition of not less than six legal voters, who own real estate, or who occupy real estate under the Homestead Laws of the United States, or under contract from the state of North Dakota, in the vicinity of the road to be altered, discontinued, or laid out. . . . Comp. Laws 1913, § 1923.

It is the contention of the respondent that the highway involved in this proceeding is situated partly in the organized township of Fair Valley and partly in an unorganized township, and that consequently the board of supervisors of Fair Valley township have no authority

to vacate that portion of the highway situated within Fair Valley township, but that such authority could only be exercised by the board of township supervisors and the board of county commissioners acting jointly under the provisions of subdivision 5, § 1921, supra. This contention is predicated solely upon the proposition that the highway as traveled does, in fact, run across both Fair Valley township and the unorganized township lying immediately east of it. There is no contention that the highway in question was laid out by the joint action of the boards of supervisors of organized townships through which it passes, and the board of county commissioners.

In the absence of constitutional restriction, public highways are under full control of the legislature and may be created or vacated in such manner and through such instrumentalities as the legislature may designate. 37 Cyc. 175. Public highways can only be vacated through the instrumentality and in the mode prescribed by law. 37 Cyc. 176. Ordinarily, the power of vacation is conferred upon the appropriate officers of local governmental subdivisions. And where the statute confers general authority upon a board to vacate public highways, the power extends to all public highways, regardless how they originated. 37 Cyc. 176, 177; State, Snedeker, Prosecutor, v. Snedeker, 30 N. J. L. 80.

It will be noted that § 1921, supra, confers exclusive jurisdiction upon the board of county commissioners to open, vacate, or alter highways situated in unorganized territory in the county. And it confers similar authority upon the board of township supervisors with respect to highways situated in an organized township. It will also be noted that highways within the limits of incorporated cities and villages are expressly exempted from the jurisdiction of such board. In this connection, it may be further noted that § 3599, subd. 7, Comp. Laws 1913, confers power upon the city council to lay out, establish, open, alter, and improve streets and alleys in cities, and § 3889 and § 3861, subd. 9, Comp. Laws 1913, confer similar power upon the boards of trustees of villages with respect to streets and alleys situated within a village. The policy of the legislature, as evinced by these different statutes, was to delegate and intrust the power to open, vacate, and change highways within the different organized villages, cities, and townships, to their governing bodies, and to restrict the power of the

county commissioners to highways lying within territory not organized into local governmental subdivisions. The wisdom of this policy may be questioned, but that is a matter for the legislature, and not for the courts. And legislation recently enacted in this state evidences a change in the policy, and an intent on the part of the legislature to exercise through the State Highway Commission a more direct state control over the public highways of the state. See Laws 1917, chap. 131.

It will be noted that § 1921, supra, contemplates that the same conditions will confer jurisdiction to vacate a highway which, in the first instance, would confer jurisdiction to establish it. Suppose the proceeding involved in this action had been one to open and lay out the highway in question through Fair Valley township, could it be seriously contended that the board of supervisors would have been without jurisdiction to lay out the highway, merely because it was contemplated that another highway would be established to connect with it in adjoining territory, or merely because the proposed highway within the township would, in fact, become a part of a continuous highway between points outside of the township? Clearly not. The questions arising upon an application to establish a highway are primarily for the determination of the board intrusted with the duty of passing upon the application. And where the usefulness of a proposed highway depends largely upon the establishment of a connecting highway in an adjoining township, this fact may be a persuasive argument against the establishment of the highway, but it does not affect the question of jurisdiction. Hebron v. Oxford County, 63 Me. 314. The board may lay out the highway within its own borders and trust to the adjoining township to establish one to connect with it. Re Burdick, 27 Misc. 298, 58 N. Y. Supp. 759.

In this state, highways are generally laid out along section and township lines, and it is rare, indeed, to find a highway which (as traveled) begins and ends within a township. The main-traveled roads in this state, such as the Wonderland trail and the Red trail, form continuous highways across the state, yet the different portions of such highways have been laid out by, and are under the jurisdiction of, the different organized townships, cities, villages, and counties through which they pass. The highways established along section

lines do, in fact, form continuous highways through the several townships and counties of the state. This condition, however, does not devest township boards of jurisdiction over highways established or to be established upon the section lines within the boundaries of the township. Keen v. Fairview Twp. 8 S. D. 558, 67 N. W. 623. The fact that a highway situated within a township in fact forms a portion of a continuous highway originating and terminating at points outside of the boundaries of the township does not devest the board of township supervisors of jurisdiction over the highway which is actually situated within the boundaries of the township. If this were not so, there would indeed be very few highways over which boards of township supervisors would have any jurisdiction.

A question somewhat similar to that involved in this case was considered by the supreme court of Iowa in Lamansky v. Williams, 125 Iowa, 578, 101 N. W. 445. The Iowa statute authorized the board of supervisors of a county to establish and change highways upon petition, but provided that highways "established by the joint action of the boards of supervisors of two or more counties can be altered or discontinued only by the joint action of the boards of the counties in which situated." The Iowa court held that where a road terminating at the county line had been established by the independent action of the board of the county in which it was situated, it could be vacated by the independent action of such board, even though the adjoining county had established a road connecting therewith, so that the highway (as traveled) in fact formed a continuous highway in both counties. The court further held that the board was not devested of jurisdiction to vacate the highway because the petition for the vacation of the road recited that a like petition was being presented to the board of supervisors in the adjoining county to vacate the connecting road.

In Millet v. Franklin County, 81 Me. 257, 260, 16 Atl. 897, the supreme court of Maine said: "It is said that the way begins in a field at the end of a town way which extends into another county; that the way desired was virtually a way extending into two counties, and that the commissioners of the two counties should have acted together in locating it. We do not think this is a valid objection. County commissioners are authorized to locate highways within their several counties, and we do not think that the mere fact that one end of a way thus

located begins at the end of a town way, extending into another county, is a valid objection to the location. We can perceive no reason for such an objection, and none is suggested, and no authority is cited in support of it. We do not think it can be sustained."

It is suggested that it would be unwise to intrust boards of township supervisors with power to vacate portions of main-traveled highways situated within their respective townships, and that some township board might vacate a highway within a township and thereby seriously disarrange an established highway system. As already stated, this is a matter of legislative policy. The question is one for the legislature, and not one for the courts. In this connection, however, it may be observed that the laws of this state afford ample relief against arbitrary and unwarranted action by any board in the establishment, alteration, or vacation of a highway. Our statutes expressly authorize any person who feels himself aggrieved by any determination of a board of township supervisors or county commissioners in laying out, altering, or discontinuing, or in refusing to lay out, alter, or discontinue any highway, to appeal from the determination of such board to the district court. Comp. Laws 1913, § 1925. On such appeal a trial *de novo* is allowed before the court and a jury. Comp Laws 1913, § 1925; Williams v. Turner Twp. 15 S. D. 182, 87 N. W. 968. The legality and propriety of the order opening, altering, or vacating the highway is determined upon the conditions existing, and the order will be affirmed or reversed by the district court as the facts and the law may warrant. Miller v. Oakwood Twp. 9 N. D. 623, 84 N. W. 556. And when the determination of the board of supervisors or county commissioners "shall have been reversed or altered, the supervisors or commissioners from whose determination such appeal was taken shall proceed to lay out, alter or discontinue such highway in conformity with the decision of such appeal and the proceedings thereon shall be the same as if they had originally so determined to lay out, alter or discontinue such highway." Comp. Laws 1913, § 1939. The petition involved in this proceeding merely asked for the vacation of a highway situated within Fair Valley township. No reference was made to any highway in any other township. There is no contention that there was any attempt on the part of the petitioners or the township authorities to cause the vacation of a highway

except within the borders of such township. We are of the opinion that the supervisors of Fair Valley township had jurisdiction of the matter presented by the petition, and that they had authority to discontinue the highway in question within the boundaries of Fair Valley township. Consequently, the answer of the defendant states a good defense. The demurrer to the answer should therefore be overruled. The order appealed from is reversed and the cause remanded for further proceedings in conformity with this opinion.

ROBINSON, J. I dissent.

STATE OF NORTH DAKOTA, Respondent, v. VERN AUSTIN, Appellant.

(168 N. W. 790.)

Adultery — crime of — trial — particeps criminis — chastity — evidence of — reputation for — committing of offense — opportunity for — specific act of adultery — with other man than defendant — not permissible.

On the trial of a man for the crime of adultery, evidence of the reputation for chastity of the *particeps criminis* is admissible in connection with evidence of facts showing opportunity for committing the offense, but evidence of a specific act of adultery committed with another than the defendant is not admissible.

Opinion filed August 1, 1918.

Prosecution for adultery.

Appeal from the District Court of Mountrail County, Honorable *Frank Fisk*, Judge.

Judgment for plaintiff. Defendant appeals.

Reversed.

Statement of facts by BRUCE, Ch. J.

The defendant, Vern Austin, was convicted of the crime of adultery alleged to have been committed with one Julia Veum.

NOTE.—On evidence of other crimes in prosecution for adultery, see note in 62 L.R.A. 335.

Error is assigned on the admission of evidence of a similar act committed by the said Julia Veum with another man, and, according to the state's attorney, "simply to show the adulterous disposition of the woman."

It is also claimed that error was committed, and the first error accentuated by the giving of the following instruction:

"You may take into consideration in determining the guilt or innocence of the defendant, evidence tending to show an adulterous or amorous disposition on the part of the accused and also on the part of Julia Veum (corespondent), *and any adulterous or amorous disposition* or evidence tending to show an inclination on the part of the parties *to commit adultery.* You may take into consideration *any evidence tending to show such a disposition, either before or at the time when the crime is alleged to have been committed,* and you may take into consideration any evidence tending to show *that the act was committed at any other times and places,* although it may show distinct and separate crimes, because such evidence would tend to show an adulterous disposition or inclination on the part of the parties."

It is claimed by appellant that this instruction would have a tendency to lead the jury to believe that they would be free to consider on the question of the guilt of the defendant an act of adultery of the corespondent with a third person, especially *as no evidence of a prior act between the defendant and the said corespondent had been produced,* but between the corespondent and a third person merely.

It is also claimed that such error was emphasized by counsel for the prosecution stating to the jury in his closing argument and in regard to this prior act of the corespondent, "that the person accompanying Julia Veum into rooms 9 and 11 on that day, according to the testimony of witness Marks, and testified to by Marks, was defendant, Vern Austin, and that the jury could convict the defendant of the crime of adultery for that incident alone," when the witness Marks had refused to identify the said defendant as the man involved, but rather that "he appeared to be a larger man;" and the defendant himself positively denied the incident, and the evidence was, according to the statement of counsel in open court, and after a motion to strike had been made, was only offered "to show the adulterous disposition

of the woman," and only admitted by the court on that theory and for that purpose.

It is also claimed that the prior error was emphasized and new error committed by the court refusing to instruct the jury at the request of the defendant to the effect that "defendant cannot be convicted upon the incident testified to by witness Marks,—his testimony was received solely and only on the likelihood of Julia Veum having had sexual intercourse with defendant,—if you should find that the woman Marks testified to having seen was Julia Veum."

McGee & Goss, for appellant.

Upon a trial for adultery, evidence of the acts of the woman with a third person in the absence of defendant is wholly incompetent and inadmissible. Cargill v. Com. 12 Ky. L. Rep. 149, 13 S. W. 916.

"On a trial for assault with intent to commit rape, evidence of an attempt of defendant to commit a similar crime on another person an hour before the assault charged is inadmissible." McAllister v. State, 112 Wis. 496, 88 N. W. 212.

"While there is some contrariety of opinion, it may be said to be a fairly well-established rule founded on sound reason, that on a trial for adultery or fornication, evidence of previous improper familiarities or specific acts of intercourse is admissible to throw light on the probability of the commission of the offense charged. Evidence of this character, however, is only relevant where there is some evidence of the unlawful intercourse charged which may be rendered more clear by the admission of evidence of the prior conduct of the parties. The exclusion of the evidence of previous intercourse and of familiarity with other men can of course do no harm to the accused; theoretically it is damaging and not beneficial to his case." Richy v. State (Ind.) 139 Am. St. Rep. 373; 1 R. C. L. 646, § 25; Bass v. State, 103 Ga. 227, 29 S. E. 966; 62 L.R.A. 335.

"Proof of an adulterous inclination in the minds of the parties and an opportunity to justify it justifies an inference of sexual intercourse. In any event, when such inclination is shown to exist between the parties at the time of the alleged act, then mere opportunity with comparatively slight circumstances showing guilty will be sufficient to justify the inference that criminal intercourse has actually taken place. Ac-

cordingly it is competent to prove the mutual adulterous inclinations of the persons charged with having committed the offense, and any evidence is admissible which tends to show that they had an opportunity to satisfy that inclination. But the inclination must extend to conduct reasonably suggesting a libidinous tendency of each of the parties toward the other." 1 Cyc. 969; 2 C. J. p. 22; Till v. State, 132 Wis. 242, 111 N. W. 1109; Baker v. United States, 1 Pinney (Wis.) 641; Thompson v. State, 111 N. W. 319; People v. Koller (Cal.) 76 Pac. 500; State v. Butte, 78 N. W. 687.

Mere proof of an opportunity to commit adultery is insufficient to convict a person of that crime, unless there be proof also of an adulterous mind on the part of both parties; and to prove this state of mind circumstantial evidence is admissible to show a purpose or inclination to commit the act. State v. Scott (Or.) 32 Pac. 1; Bishop, Statutory Crimes, § 679.

But hearing hearsay evidence of conduct of the *particeps criminis* with third persons is nowhere permitted to bind a defendant where it is not shown that he was in some way responsible or connected therewith. 1 Enc. Ev. 629.

To instruct the jury that such evidence would tend to show such a disposition is clearly erroneous. This amounts to a direction and concludes the case against the defendant. The trial court has no right to fix any arbitrary rule for the measure or weighing of testimony by the jury. State v. Denny, 17 N. D. 519.

After gross and improper language and directions by the state's attorney in his address to the jury, cautionary instructions by the court do not cure the error. Crisp v. Bank, 32 N. D. 264, 155 N. W. 78; State v. Nyhus, 19 N. D. 326; Fawcett v. Ryder, 23 N. D. 20, 135 N. W. 800.

Either party may request full instruction on any and all pertinent issues, and it is the duty of the court to so fully instruct, and not to give abridged or indifferent instructions in lieu thereof. Comp. Laws 1913, §§ 7620, 7621; Rev. Codes 1905, §§ 7021, 7621; State v. Barry, 11 N. D. 428, 443.

William Langer, Attorney General, *Wm. Owens,* Assistant Attorney General, and *F. F. Wyckoff,* State's Attorney, for respondent.

In adultery cases, where there is evidence of an adulterous or amorous

disposition on the part of the accused, and also on the part of the woman, it is proper to charge that the jury may consider any such evidence or any adulterous or amorous disposition, or evidence tending to show an inclination on the part of both parties to commit adultery. Such disposition may be shown either before or at the time of the commission of the act charged, and the jury may consider all such evidence. State v. Ellgeston, 45 Or. 346, 77 Pac. 738, 742.

The reputation and character of the woman along such line may also be shown. It is very material to show that the woman was inclined to be adulterous, and such fact, coupled with proof of opportunity, would tend to show defendant's guilt. Com. v. Gray, 129 Mass. 474, 37 Am. Rep. 378.

In such a case the defendant may be convicted upon wholly circumstantial evidence, and therefore evidence of the reputation and character of the woman for chastity is competent. 2 C. J. p. 25, ¶ 8; 1 R. C. L. p. 645.

It is true a defendant in a criminal case is presumed to be innocent until proved guilty by competent evidence, beyond a reasonable doubt. But when the verdict is returned and filed, the presumption of innocence has fulfilled its mission, and the presumption of the correctness of the trial takes its place. State v. Wright, 20 N. D. 216, 220; State v. Peltier, 21 N. D. 188, 191.

BRUCE, Ch. J. (after stating the facts as above). Error was committed and a new trial should be had.

We are satisfied that the rule of law is that, on the trial of a man for adultery, evidence of the reputation for chastity of the *particeps criminis* is admissible in connection with evidence of facts showing opportunity for committing the offense, but evidence of a specific *act of adultery with another than the defendant* is not admissible. State v. Walters, 45 Iowa, 389; People v. Molineux, 62 L.R.A. 193, and note 335, 168 N. Y. 264, 61 N. E. 286; McAllister v. State, 112 Wis. 496, 88 N. W. 212; Whart. Crim. Ev. 9th ed. § 46.

There are, it is true, few adjudicated cases upon the subject. It, however, seems to be generally conceded that the adulterous inclination must be mutual. Bass v. State, 103 Ga. 227, 29 S. E. 966; 1 Cyc. 969, 2 C. J. 22.

Thus in the case of Till v. State, 132 Wis. 242, 111 N. W. 1109, the court says: "The crime of adultery, perhaps more frequently than any other, must ordinarily be proved by circumstantial evidence, and the rule is thoroughly established that proof of adulterous inclination *between the parties* existing prior to the alleged offense, combined with proof that the parties have been together 'in equivocal circumstances, such as would lead the guarded discretion of a reasonable and just man under the circumstances to the conclusion of guilt beyond a reasonable doubt,' are sufficient to justify an inference that adultery did take place between them at the time of such opportunity. . . . This rule is commonly abbreviated into the statement that proof of inclination and opportunity suffice; but that rule is correct only when it is understood that inclination means more than ordinary human tendencies, and must extend to proof of conduct reasonably suggesting specific libidinous tendency *of each of the parties toward the other.*"

In this view of the law the evidence of the witness Marks should have been stricken out, the remarks of counsel for the state were improper, and the instruction which was given by the court was at least confusing. The instruction also that asked by counsel for the defendant should, under the circumstances of the case, have been given; for although the record shows that it was "denied as coming too late—arguments having been concluded July 24, 1917, and this request having been presented July 25, 1917, 9 A. M., just as the jury was about to be instructed,"—the record shows that the arguments of counsel were not closed "until just before the time for adjournment on the 24th," and the instruction was clearly made necessary by the improper remarks of counsel for the state, which emphasized the error in the admission of the testimony; and though counsel for the defendant did not object to the statement during the argument, we are clearly of the opinion that he was not required to do so, but might seek to cure the wrong by asking for an appropriate instruction. Taft v. Fiske, 140 Mass. 250, 54 Am. Rep. 459, 5 N. E. 621.

Even if the request for the instruction came too late, the court, in view of his error in allowing the objectionable testimony to remain in the record and of the remarks of the counsel for the prosecution, should

not have given the misleading instruction that he gave and which is first complained of. State v. Barry, 11 N. D. 428, 92 N. W. 809.

The order of the District Court is reversed and a new trial is ordered.

GRACE, J. I concur in the result.

GUST ECKSTRAND, Respondent, v. GUST JOHNSON, Appellant.

(168 N. W. 824.)

New trial — motion for — ground of — newly discovered evidence — judicial discretion of court — addressed to — decision will not be disturbed — unless abuse of discretion is shown.

1. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its ruling on the motion will not be disturbed, unless a clear abuse of discretion is shown.

Trial court — new trial — motion for — discretion.

2. In the instant case it is *held* that the trial court did not abuse its discretion in denying a new trial.

Opinion filed August 3, 1918.

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

Defendant appeals from an order denying a new trial.

Affirmed.

J. C. Adamson and *H. S. Blood*, for appellant.

On a motion for a new trial based on the ground of newly discovered evidence, and the showing is such that on a new trial the jury ought to return a different verdict, the motion should be granted. Where the plaintiff declares upon an express contract to pay a specific price or sum, he must prove the contract as alleged, or fail. Lowe v. Jensen (N. D.) 132 N. W. 66; 9 Cyc. 749 and cases cited.

Combs & Ritchie, for respondent.

The question here is not whether a new trial should be granted, or not, but whether or not the trial court exercised its sound, judicial discretion, or abused it, in denying the motion for a new trial. Such

a motion, made on the ground of newly discovered evidence, is addressed largely to the discretion of the trial court, and its decision will not be disturbed, unless abuse clearly appears. Aylmer v. Adams (N. D.) 153 N. W. 419.

"The test of what is within the discretion of the 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." Hayne, New Trial & Appeal, ¶ 289, p. 1650.

The question of granting or refusing a new trial, where the motion is based upon such ground, is primarily a question for the trial court. The function of the appellate court on this appeal is merely to review the ruling of the trial court on the motion, and such review is limited to a determination of the question of whether, in denying a new trial, the trial court abused its discretion and thereby brought into existence an injustice. State v. Cray (N. D.) 153 N. W. 425; Aylmer v. Adams, 153 N. W. 419; McGregor v. Gt. Northern R. Co. 154 N. W. 261; Fisk v. Fehrs, 155 N. W. 676; Nor. Trust Co. v. Bruegger, 159 N. W. 859; Keystone Grain Co. v. Johnson (N. D.) 165 N. W. 977.

CHRISTIANSON, J. Plaintiff brought this action to recover for certain work and labor performed by him for the defendant during the year 1915. In his complaint, plaintiff alleges that he performed such work and labor "for the defendant at the agreed price and actual value of $291.05," and that there remains due, after allowing credit for payments made, the sum of $205.80, with interest. The defendant in his answer admits that he hired the plaintiff and that plaintiff performed certain services, but "specifically denies that there was any agreement as to the compensation which defendant was to pay said plaintiff for the work, labor, and services which he performed while in defendant's employ." And defendant alleges that the services performed were of the reasonable value of $176.16, and no more, and that defendant has paid the plaintiff in the aggregate the sum of $115.15, and that consequently he is indebted to the plaintiff in the sum of $61.01, and no more.

Upon the trial, the plaintiff testified that he performed the services for the defendant under a specific agreement whereby the defend-

ant agreed to pay certain amounts for the services to be performed. The defendant, on the other hand, testified that he made no agreement as to the compensation to be paid. The defendant called one Ross, who claims to have been present when the defendant hired the plaintiff, and Ross testified that nothing was said at that time with respect to the compensation to be paid the plaintiff for his services. The defendant also called one Matson, who testified that the plaintiff had told him that he did not know how much he was to receive for his services. The plaintiff denied such conversation.

The only question contested upon the trial was whether there was an agreement between the plaintiff and defendant as to the compensation to be paid to the plaintiff for his services. The evidence related to this question, and neither party offered any evidence as to the reasonable value of the services. The case was tried to the court, without a jury. The court made findings of fact in favor of the plaintiff to the effect that the defendant had promised to pay the plaintiff $291.05 for the services performed, and that defendant had made payments aggregating $95.15, leaving a balance due the plaintiff of $195.-90. Judgment was entered in plaintiff's favor for the sum found due. After judgment, the defendant moved for a new trial on the ground of newly discovered evidence. The newly discovered evidence which defendant proposes to adduce upon a retrial of the action is that of one Ross and one Ostlund. Ross makes affidavit to the effect that three or four weeks after the work involved in this action had been done, he had a conversation with the plaintiff, Eckstrand, and that in such conversation the plaintiff stated that he had no contract as to the amount he was to receive for the work which he had performed for the plaintiff, and asked Ross what he thought the defendant would be willing to pay therefor. The affidavit of Ostlund is to the effect that he had a conversation with the plaintiff after some of the work involved in this action had been performed, and that in such conversation the plaintiff asked what he (Ostlund) thought such work was worth and how much he thought the defendant, Johnson, "would stand therefor;" that he (plaintiff) had no agreement with the defendant as to how much he was to receive for doing such work, but that he was going to charge the defendant $5 per day for the time he worked as a stone mason in laying the foundation under a certain

hotel building, for the reason that the defendant had discharged the plaintiff from his employ. There is also an affidavit from the defendant to the effect that he had no knowledge of such proposed new evidence at the time of the trial of the action. It will be noted that the witness Ross testified upon the trial of the action. He then testified that he was present when the defendant hired the plaintiff to perform the work involved in this action, and that there was no agreement made as to the wages to be paid by the defendant to the plaintiff for the work to be performed. Manifestly, the proposed additional testimony of Ross with respect to the subsequent conversation had with the plaintiff would add little, if any, force to his former testimony.

The sole question presented for determination on this appeal is whether the court erred in denying defendant's motion for a new trial. It is elementary that a motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court. "The rules applicable to new trials on discretionary grounds, and the respective functions of trial and appellate courts on such motions have been so fully discussed by this court in several recent decisions that little [if anything] remains to be said in regard thereto. (See Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261, Ann. Cas. 1917E, 141; State v. Cray, 31 N. D. 67, 153 N. W. 425; Blackorby v. Ginther, 34 N. D. 248, 158 N. W. 354; First International Bank v. Davidson, 36 N. D. 1, 161 N. W. 281; Reid v. Ehr, 36 N. D. 552, 162 N. W. 903; Wagoner v. Bodal, 37 N. D. 594, 164 N. W. 147.)" Keystone Grain Co. v. Johnson, 38 N. D. 562, 165 N. W. 977.

Whether a new trial ought to be granted is primarily a question for the trial court. The function of this court on appeal is merely to review the ruling of the trial court on the motion, and such review is limited to a determination of whether the trial court abused its discretion and effected an injustice by denying a new trial. The discretion vested in the trial court should always be exercised in the interest of justice. The presumption is that it was so exercised. Even if all the newly discovered evidence had been offered and received at the trial, the findings of the trial court would still have substantial sup-

port in the evidence. And evidently the trial court, after considering the proposed newly discovered evidence and weighing the same with the evidence adduced upon the trial, was of the opinion that its former findings were correct and that substantial justice had been accomplished at the former trial. We are entirely agreed that the trial court in no manner abused its discretion in denying a new trial in this case.

The order appealed from must be affirmed. It is so ordered.

ROBINSON, J. (concurring specially). The plaintiff avers that at Van Hook, North Dakota, between April 1 and September 1, 1915, he performed work, labor, and services for and at the request of defendant at the agreed price and reasonable value of $291.05; that no part of the same has been paid excepting a few small sums amounting to $85.25.

By answer defendant denies an express agreement in regard to the rate or amount to be paid for the services. He admits that plaintiff did perform labor and services for him and at his request, of the reasonable value of $176.16, and no more. He avers payments to the amount of $115. The case was tried by the court and judgment was given in favor of the plaintiff for $208.90. A motion for a new trial was denied. It was made on the ground of newly discovered evidence as disclosed by the affidavits of the defendant himself, Anton Ross, and Andrew Ostlund. The affidavits are of no force or consequence. They do not relate to the merits of the case.

The case was tried on the erroneous theory that plaintiff could not recover on proof showing the reasonable value of his services. That his recovery, if any, must be on proof showing an agreement to pay a fixed rate or compensation. The proposed newly discovered testimony is to the effect that there was no express agreement regarding the compensation. The complaint very properly alleges that the services rendered were worth a definite sum and that defendant promised to pay the same, and under the pleadings the plaintiff had a perfect right to show the reasonable value of his services and also an express agreement to pay the amount claimed and to recover the reasonable value in case he failed to prove an express agreement.

The purport of the affidavits for a new trial is merely that there

was no express contract concerning the rate of wages. There is no testimony given on the trial or in the affidavits that plaintiff did not do the work as alleged and that the work was not reasonably worth the sum claimed. The plaintiff testified to an express agreement to pay a stated compensation. He kept a book showing the days and dates, and the hours of his work, and the express rate or value of his services, and the several amounts paid him. As a mason his work was 50 cents an hour, or $5 a day; as a carpenter the rate was 35 cents an hour; as a common laborer, 30 cents an hour; and from that he paid his own board. He shows that he is by trade a mason and that during ten years he has worked at the trade nearly all the time. His testimony is in every way clear, direct, and convincing, and his charges are modern and reasonable. And hence, the alleged express agreement as testified to by the plaintiff is highly probable. Obviously, there is no merit in the defense or in the alleged newly discovered evidence.

STATE OF NORTH DAKOTA EX REL. CITY OF FARGO, a Municipal Corporation, Plaintiff, v. JOHN WETZ, as Assessor of the City of Fargo, a Municipal Corporation in the State of North Dakota, George E. Wallace, H. H. Steele, and Frank E. Packard, as the State Tax Commission of North Dakota and as Members of such State Tax Commission, Defendants.

(5 A.L.R. 731, 168 N. W. 835.)

Motor vehicles — license tax — or fee — in lieu of other taxes — collection of — authorized by statute.

1. Chapter 156 of the Session Laws of 1917 construed and *held* to provide for the collection of a license tax or fee in lieu of other taxes upon motor vehicles.

Legislature — two bills passed at same session — one for classification and taxation of property generally — other dealing with a single species of property — embraced in the general schedule — conflict — must be resolved in favor of bill relating to specific property.

2. Where, at the same session of the legislature, two bills are passed, one providing for the classification of property generally for purposes of

taxation and the other dealing particularly with a single species of property which is embraced in the general schedules of the classification act, the conflict in the two bills must be resolved in favor of that which deals particularly with the specific property.

Two bills — approved by governor in the inverse order of their passage — conflict — theory of repeal by implication — cannot be so resolved.

3. Where two bills are approved by the governor in the inverse order of their passage, conflicting provisions therein contained cannot be resolved in favor of that which was passed last, on the theory of a repeal by implication.

Taxes — uniformity of — franchises — tax levy — authority to make — public utilities property — equalization — board of — ad valorem basis — taxation of all property on — not required — license fee in lieu of general taxes.

4. Sections 176 and 179 of the Constitution, as amended in 1914, which provide that "taxes shall be uniform upon the same class of property, including franchises within the territorial limits of the authority levying the tax," and for the assessment of certain public utility property by the state board of equalization and other "taxable property . . . , in the county, city, township, village or district . . . " do not require the taxation of all property on an ad valorem basis, and are not violated by a law which provides for the payment of a license fee in lieu of general and local taxes.

Property exempt from taxation — constitutional provision — statute — does not violate — governmental functions — owners of certain classes of property — cost of maintaining — contribution to by such owners.

5. Section 176 of the Constitution, as amended in 1914, which provides that the "legislative assembly shall, by general law, exempt from taxation . . . personal property to any amount not exceeding in value $200 for each individual liable to taxation," is not violated by an enactment according to which the owners of a given class of personal property will be compelled to contribute to the cost of maintaining certain governmental functions an amount which will approximately equal a fair property tax if levied upon an ad valorem basis.

Legislature — plenary control — over taxing power of municipalities.

6. Under § 130 of the Constitution, the legislature is given plenary control over the taxing power of municipalities, and § 179 of the Constitution, as amended in 1914, does not give to local taxing districts the constitutional right to retain upon their tax lists all of the property within such districts.

Legislative assembly — raising revenue for state expenses — constitutional provisions — limitation on power of legislature — to provide state revenues by ad valorem tax on property — revenues from other sources — has no application to.

7. Section 174 of the Constitution, under which the legislative assembly

is directed to provide for the "raising of revenue to defray the expenses of the state, not to exceed in any one year 4 mills on the dollar on the assessed valuation of the taxable property in the state," is a limitation upon the power of the legislature to provide state revenues by the taxation of property upon an ad valorem basis. It has no application to revenues derived from other sources and according to some other method.

Motor vehicle license act — powers of secretary of state — conferring upon — unconstitutional — legislative powers — attempted delegation of powers.

8. Following State ex rel. Rush v. Budge, 14 N. D. 532, and State ex rel. Miller v. Taylor, 27 N. D. 77, it is *held* that § 4 of the Motor Vehicle License Act, in conferring upon the secretary of state unlimited power to employ agents and incur expense, is unconstitutional as involving an attempted delegation of legislative power.

Portion of a law unconstitutional — remainder will stand — where it can reasonably be said legislature would have passed — with objectionable part omitted.

9. Where a portion of a law is unconstitutional, the remainder will stand where the court can reasonably say that the legislature would have passed the act with the invalid portion stricken therefrom.

On Rehearing.

Constitutional law — amending the Constitution.

10. Section 202 of the Constitution of North Dakota, which requires that "if two or more amendments shall be submitted at the same time they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately," is not violated by submitting as one amendment a proposed change which is expressed in two sections, both, however, relating to one general subject and designed to accomplish one main purpose.

It is *held* that the amendments to §§ 176 and 179 of the Constitution, which were submitted to the electors in 1914 as one proposition, relate to the general subject of uniformity of taxation, and that the amendment was legally adopted.

Opinion filed June 14, 1918. On Rehearing August 5, 1918.

Original application for a writ of mandamus.

Writ denied.

William Langer, Attorney General, *E. B. Cox,* Assistant Attorney General, and *F. E. Packard,* for defendants and respondents.

Spalding & Shure and *E. T. Burke,* for plaintiff.

BIRDZELL, J. This is an application for a writ of mandamus which will command the defendant Wetz, as assessor of the city of Fargo, to list, assess, and place upon the tax rolls a certain Packard automobile, number 33,646, owned by one A. L. Moody, a resident and citizen of Fargo, which automobile is kept and used by him in said city; also commanding the assessor to list, assess, and place upon the tax rolls other motor vehicles of other descriptions owned, kept, and used by residents of the city of Fargo, so as to subject the same to taxation for the year 1918 as a part of the taxable personal property subject to the taxing jurisdiction of the city. The order to show cause issued herein is directed to George E. Wallace, H. H. Steele, and F. E. Packard, as members of the State Tax Commission, having supervision of the administration of the tax laws of the state.

In the affidavit and petition, it is made to appear that the city commission of the city of Fargo directed the defendant Wetz to assess the property above referred to, and that Wetz refused to do so, basing his refusal upon chapter 156 of the Session Laws of 1917, the same being an act providing for motor vehicle license fees, registration tax, etc. It is shown that the act contains a provision purporting to make the registration fee (excepting for dealers' licenses) a charge which shall be in lieu of all taxes, general and local. It is further alleged as a part of the petition "on information and belief that the revenue which has been and will be derived from the registration with the secretary of state and the fee charged therefor, in accordance with the terms and provisions of said legislative act, will exceed by several hundred thousand dollars the expense incident and necessary to the carrying out of the provisions of said legislative act in such registration and in the issuance of licenses thereby provided for, and that, by provisions of said act, revenue which, under the Constitution of the state of North Dakota, belongs to the villages, cities, counties, etc., is diverted therefrom and from use for the purposes for which such taxation is provided; that said act was passed with knowledge that the revenue derived from its operation would exceed by hundreds of thousands of dollars the cost of operating the department having charge of such registration and licensing and all the expenses incident thereto, and with and for the purposes of diverting any revenue to which such corporations were entitled under the provisions of the Constitution

to unconstitutional and illegal purposes, to wit, to the repair and construction of roads in various places in the state of North Dakota and under the jurisdiction and control and management of a board not provided for by said Constitution and having no constitutional authority to expend funds so derived."

It is further alleged that the act in question does not provide for assessing motor vehicles in accordance with their value, but that the fees are based upon arbitrary, inequitable, and unjust distinctions, and that the provisions of the legislative act are not uniform in their operation but are wholly arbitrary and unjustified. It is alleged that, under the provisions of the act, the city of Fargo would receive no part of the revenue derived from the registration tax, and that the motor vehicles of dealers are subject to assessment and taxation like other personal property, while similar vehicles belonging to others are not so subject.

The answer does not put in issue any facts material to the determination of the questions raised upon the application for the writ.

Section 1 of chapter 156, Session Laws of 1917, provides for the form of application for a dealer's license to be issued upon the payment to the secretary of state of $15. Among other things, the application is required to contain a statement of "the amount of such motive power stated in figures of horse power, in accordance with the rating established by the Association of Licensed Automobile Manufacturers, . . . " Section 3, which amends § 2976g of the Compiled Laws of 1913, provides a minimum fee for the reregistration of motor vehicles of not less than $6, and, for those having a higher rating than 20-horse power, an additional fee of 50 cents for each additional horse power,—subject to reduction, however, in the case of vehicles which have been previously licensed for three years. In this section it is provided that "the registration fees imposed by this act upon motor vehicles shall be in lieu of all taxes, general or local, to which motor vehicles may be subject, except, that dealers' license fees shall not be in lieu of other taxes." Section 4, which amends § 2976h, Compiled Laws of 1913, provides: ". . . The secretary of state is hereby authorized to employ such agent or agents as may be necessary to enforce the provisions of this act." Section 5, which amends § 2976n, Compiled Laws of 1913, provides that the

moneys derived shall be paid into the state treasury by the secretary of state, and that the state treasurer shall in turn pay to the various county treasurers to the account of the special road maintenance fund, "one third of the moneys received by him from the secretary of state under the provisions of this act, and shall credit the remaining two thirds to the account of the state highway fund. Provided, however, that the state treasurer shall first deduct from all the moneys received by him from the secretary of state the cost of tags, clerk hire, printing, postage, express, and other expenses as estimated by the secretary of state." Section 6 provides that "the state highway fund provided for by this act shall be expended under the direction of the State Highway Commission." Section 8 provides for the expenditure of the license money for repairing and maintaining all highways, and concludes with the following proviso: "Provided, further, that none of this money shall be expended within the limits of any incorporated city or village." An emergency clause is attached, stating as one of the grounds of emergency that, without the act, there would not be sufficient money available in the state treasury to comply with the requirements of the Federal law providing for Federal aid for the construction and maintenance of roads.

In view of the questions raised upon the argument, it will become necessary, also, to consider certain provisions of chapter 59, and, possibly, of chapter 131 of the Session Laws of 1917. Chapter 59 is an act which provides for the classification of property, for assessment at a percentage of its value, and by § 1 of said act, class 2 of the schedule adopted is made to embrace "all live stock, agricultural, and other tools and machinery, gas and other engines and boilers, threshing machines and outfits used therewith, automobiles, motor trucks, and other power-driven cars, vehicles of all kinds, boats and all water craft, etc." This class of property is required to be assessed at 20 per cent of its true and full value.

Chapter 131 of the Session Laws of 1917 provides for the establishment of a state highway commission which is given general control and supervision of the construction, improvement, repair, and maintenance of roads and bridges, under prescribed limitations. Among other powers granted the commission is the power to expend the state highway fund as follows: (§ 2) ". . . it shall

reserve out of the state highway fund hereby created a sufficient sum annually to meet its expenses and to pay the state's portion of the cost of property maintaining all highways and bridges improved in pursuance of the provisions of this act; and the balance of said state highway fund shall be expended by the State Highway Commission in the improvement of highways and bridges in the several counties in the following manner: Ten per cent of said fund shall be spent within the discretion of the State Highway Commission and without regard to the amount of said fund collected in each county, and 90 per cent shall be spent by the said Commission in the several counties in proportion to the amounts collected therein." In this act several sections dealing with the disposition of the auto license moneys are identical with the sections contained in chapter 156 dealing with the same subject.

Counsel for the defendant, in apparent recognition of the constitutional difficulties in the way of sustaining the act in question, have suggested the possibility of harmonizing chapters 156, 59, and 131 by giving to chapter 156 a construction rendering it consistent with that portion of chapter 59 which places automobiles and power-driven vehicles in class 2 of the assessment schedule, and purports to subject them to ad valorem taxation at 20 per cent of their value. Counsel for the plaintiff manifests agreement to this construction, and professes to be interested solely in being able to subject the class of property referred to to taxation for municipal purposes. There is no appearance in this action on behalf of any owner of a vehicle affected by the legislation under consideration, and consequently no question is raised relative to the prejudicial effect of a construction such as that contended for. While the court should be and is reluctant to adopt a construction of chapter 156 that might render the same unconstitutional, we felt it nevertheless incumbent upon us to adopt a reasonable construction of the act, even though in doing so we should be forced to the conclusion that it is unconstitutional. In short, even in the absence of a representation by a numerous class of persons who would be adversely affected by the construction of the law with which counsel for both parties manifest satisfaction, we cannot adopt a construction that does manifest violence to a clearly expressed intention of the legislature, even for the high purpose of saving the constitutionality

of the law. We must, therefore, first construe chapter 156 to determine its meaning in connection with the subject of the general and local taxation of the class of vehicles to which it is applicable.

The language of § 3 of the Motor Vehicle License Act (chapter 156) is free from ambiguity and unmistakable in its literal meaning. The legislature has said: "The registration fees imposed by this act upon all motor vehicles shall be in lieu of all taxes, general or local, to which motor vehicles may be subject, except, that dealers' license fees shall not be in lieu of other taxes." In addition to this unambiguous language, the radical increase in the license fee over that which was previously charged, and the comprehensive plan according to which the large amount of anticipated revenue is required to be expended for governmental purposes, is persuasive evidence of an intention on the part of the legislature to make the so-called license fee take the place of both the pre-existing license fee and the personal property tax upon the vehicles. Such evidences of legislative intent are so clear as not to be capable of being overcome by the consideration of a slight difference in the time of passage of the two apparently conflicting provisions, as disclosed by the legislative journals. It is more reasonable to regard the two chapters (156 and 59) as relating to independent subjects and as involving conflict only to a limited extent. One relates to the classification of the general property of the state for tax purposes, while the other deals particularly with a class of property which, for tax purposes, is intended to be segregated from the general mass and treated according to an entirely different plan. Under well-settled rules of statutory construction, the general statute must yield to that which deals specifically with a part of the subject-matter embraced in both.

Had chapter 156 not been enacted, the intention of the legislature to subject motor vehicles to ad valorem taxation at the scheduled rate of valuation would have been clear and unmistakable, but it would be going beyond the bounds of legitimate inference to say that, by the adoption of both chapter 59 and chapter 156, it was the deliberate design of the legislature to negative an intention which clearly lies at the very basis of the License Act. It is only the fact that the License Act was first in order of passage by the legislature that furnishes occasion for the suggestion that the provision making the license tax a

charge in lieu of all other taxes was repealed by chapter 59. Repeals by implication are not favored, and we are satisfied that the doctrine is not properly invoked in this case. Especially is this true here because the two chapters referred to were approved by the governor in the inverse order of their passage. One act cannot repeal another by implication until it becomes a law.

The conclusion above expressed seems to be fortified by the very language of § 1 of chapter 59. This section purports to make the classification schedule adopted applicable only to "real and personal property *subject to a general property tax,* and not subject to any gross earnings or any *other lieu tax.*" Clearly, it was not intended that personal property which was not subject to a general property tax should be embraced within the classification scheme, nor was it intended that any property should any longer be embraced therein after it had become subject to taxation in some other form, in lieu of a property tax. That is precisely what is provided for in the Motor Vehicle License Act, and hence a motor vehicle comes directly within one of the exceptions to the classification schedule. The fact that motor vehicles are named, however, in class 2 of the schedule is only evidence to our minds that, owing to the imperfections of legislative procedure and to the impossibility of determining in advance the fate of related legislation, it was thought well to make a class broad enough to provide a proper place in the general schedules in case the legislation dealing specifically with one particular kind of property should not be passed.

We are strongly of the conviction that chapter 156 was intended to authorize a license fee in lieu of all other taxes, and that the act will have to stand or fall as so interpreted. This construction accords with the express language of the act, and to attempt to attach a contrary meaning would be nothing short of trifling with a well-understood legislative intention. We are thus compelled to consider the constitutional objections urged against the validity of the Motor Vehicle Tax Law, treating the same as substituting a graduated license fee in lieu of the combined pre-existing license fee and ad valorem tax.

We are, then, confronted with the question of the power of the legislature to effect such a change in the tax laws under the limitations of the Constitution. In approaching the consideration of the constitu-

tional questions presented by the petitioner, we must do so in the light of the rule that, in the exercise of the legislative power, the will of the legislature is supreme, and cannot be set at naught except where it contravenes restrictions upon the legislative authority that can be pointed out in the Constitution. Cooley, Const. Lim. 7th ed. p. 236. The judicial department of the government exercises no function that is more far reaching in its importance than that of passing upon the constitutionality of legislation, nor one that it approaches with a greater sense of delicacy. Realizing this fact, and being duly conscious of the proper relationship of the co-ordinate branches of the government, the most eminent judges have approached such questions with a degree of solemnity that is not usually present in cases which call merely for the application of ordinary principles of law to controversies between suitors. Some of our most highly respected courts and most eminent jurists have been so reluctant to set at naught the will of a co-ordinate branch of the government that the principles according to which they have tested the constitutionality of statutes are indeed extreme in favor of the giving of effect to the legislative will. Said Chief Justice Shaw, in the case of Re Wellington, 16 Pick. 87–95, 26 Am. Dec. 631: "That when called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." See State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583. While the questions involved in the matter under consideration can scarcely be said to be free from doubt, we enter upon their discussion with a due appreciation of their importance; and, entertaining the desire to give effect, first, to the true meaning of the Constitution, and, second, to the will of the legislature in so far as it may be found not to be in contravention of the limitations prescribed by the Constitution.

The provisions of the Constitution with which we are particularly concerned in this connection are found in article 11, §§ 174, 176, and 179, as amended by chapter 103 of the Session Laws of 1913, the

latter being a concurrent resolution which was adopted as a constitutional amendment in November, 1914. Sections 174, 176, and 179, as they stood prior to the 1914 amendment, provided for what is commonly known as the general uniform property tax. By § 174 the legislative assembly was directed to provide for the raising of revenue to defray the expenses of the state not to exceed in any one year 4 mills on the dollar, on the assessed valuation of the taxable property in the state. Section 176 required the passage of laws "taxing by uniform rule all property according to its true value in money." It also provided for certain exemptions to be created by general law, among which was included "personal property to any amount not exceeding in value $200 for each individual liable to taxation." Section 179, as amended by article 4 of the amendments (1905), provided that all property should "be assessed in the county, city, township, village, or district in which" such roads "are located or through which they are operated, as a basis for the taxation of such property. . . . "

By the amendment which was made in 1914, the basic mandate of universal uniform ad valorem assessment was changed. The amendment provided merely that "taxes shall be uniform upon the same class of property, including franchises within the territorial limits of the authority levying the tax." Sess. Laws 1913, chap. 103. The power of the legislature to exempt property from taxation, however, was expressed in practically the same language as that contained in the original § 176, and, so far as applicable to personal property, reads as follows: "And the legislative assembly shall by a general law exempt from taxation . . . personal property to any amount not exceeding in value $200 for each individual liable to taxation." Sess. Laws 1913, chap. 103. Section 179 was amended (chapter 103, Sess. Laws 1913, § 2) by striking therefrom the provisions requiring an apportionment of the assessed valuation of public utility properties to local municipalities.

Being reminded at this point of the effect of the Motor Vehicle License Law to remove from motor vehicles the burden of general and local taxation, we are required to answer the inquiry whether it is competent for the legislature to strike from the tax rolls of local municipalities property not legally exempt, and thus deprive them of

sources of revenue which, it is contended, are secured to them by the Constitution.

Without holding or meaning to intimate that the only source of revenue that would have been open to the state and its governmental subdivisions, under the provisions of article 11 of the Constitution as it originally stood, was a tax derived from property uniformly assessed (State v. Klectzen, 8 N. D. 286, 78 N. W. 984, 11 Am. Crim. Rep. 324), we have no doubt that it was intended that such should be at least the principal source of revenue. The constitutional provisions were mandatory. They required the passage of laws designed to subject all property to taxation according to value. This was an expression of the belief prevalent at the time of the adoption of the Constitution, that the ends of justice were best served where contributions to the support of the government were in proportion to ownership of property, at least in so far as it may be attempted to derive revenues from property taxes. This idea was as applicable to revenues for the support of local government, as for the state government. It was thus made an integral part of the plan that all the property once assessed should be subjected to the property taxes required for the support of the minor municipalities. Any attempt to give property a situs other than its true local situs would of course have interfered with the plan and would have been unconstitutional. Martin v. Burleigh County, 38 N. D. 373, 165 N. W. 520; Rosasco v. Tuolumne County, 143 Cal. 430, 77 Pac. 148. The genius of this scheme of taxation could only be realized if the properties subject to tax, either state or local, were upon the tax list of the district in which the property was located and the taxes levied. It was the *sine qua non* or basic practical requirement that must exist coextensively with the power to tax property by whatever municipality that was made the recipient of the power. Thus, it will be seen that the requirement of localization contained in § 179 was a necessary part of the idea that all contributions to the revenues derived from property taxes should be exacted according to the valuation of the property. It would have been the law of the state by reason of § 176, though § 179 had not been adopted.

Viewed in this light, which we believe reflects its true meaning, the requirement of localization expressed in § 179 was only the expression of a rule that it was necessary to follow if the goal of general uniform-

ity was to be realized, and it may properly be regarded as merely appended to the more important section preceding. (§ 176.)

Apart from the incidental effect of the original § 179, construed in conjunction with § 176, we are of the opinion that there was a most important reason for the adoption of the section. It gave to the state board of equalization the sole power to assess the enumerated public utility properties. This power was doubtless conferred upon a central board in order to obviate conflicts between local taxing authorities, each taxing portions of the same property. It will be noted that the properties affected are those which generally extend into and through a large number of taxing districts. In the light of this fact, it was thought that the best means of securing uniform valuation, and of avoiding complications incident to the attempted exercise of authority by numerous local units, was through the medium of a central assessment. We do not doubt that this affords the strongest, if not the sole, reason, for the adoption of § 179. So important is this consideration that the supreme court of California, in construing a similar constitutional provision, was divided upon the question as to whether or not it should be extended by implication to cover assessments of street railways and interurban lines operating in more than one county. San Francisco & S. M. Electric R. Co. v. Scott, 142 Cal. 222, 75 Pac. 575.

In view of the fact that the constitutional provisions designed to perpetuate the plan of property taxation above discussed have been superseded by amendment, it may not be out of place to refer briefly to the views entertained by economists relative to the efficiency of the scheme as a just method of taxation. While we are not primarily concerned with the economics of the question and express no opinion thereon, reference to the current views of such authorities may conduce to a better understanding of the amendment. It is only reasonable to assume that the amendment was made with a view to correcting inherent defects. A foremost authority on the subject of taxation in the American states condemns the general property tax both from the theoretical and practical standpoints, and, in pointing out wherein it has signally failed as administered, says: "The standard of ability has been shifted from property to product; *the test now is not the extent, but the productivity, of wealth.* . . .

"Practically, the general property tax as actually administered is beyond all doubt one of the worst taxes known in the civilized world.

Because of its attempt to tax intangible as well as tangible things, it sins against the cardinal rules of uniformity, of equality, and of universality of taxation. It puts a premium on dishonesty and debauches the public conscience; it reduces deception to a system and makes a science of knavery; it presses hardest on those least able to pay; it imposes double taxation on one man and grants entire immunity to the next. In short, the general property tax is so flagrantly inequitable that its retention can be explained only through ignorance or inertia. It is the cause of such crying injustice that its alteration or its abolition must become the battle cry of every statesman and reformer." Seligman, Essay in Taxn. p. 61. See also Wells, Theory & Pr. of Taxn. p. 434.

Counsel upon the argument referred to the general property tax as being of comparatively recent origin, and to the amendment as harking back to a period when legislatures were more free than now in the matter of tax legislation. In this, counsel was only partially correct. The general property tax is medieval, not modern. When the organization of society was simple, the general property tax so strongly reflected the semblance of equality that it was quite generally adopted. But it has been so long discarded in continental Europe and in the eastern states of America that it usually receives but passing mention by those who devote attention to public finance. When it is mentioned it is only to be condemned for its utter failure to achieve the desired ends of justice and equality.

To what extent has the original scheme, which in practice has proved so disappointing, been departed from by the adoption of the amendment above referred to, It will be noted first that § 176 no longer commands the legislature to provide for the taxing of all property by uniform rule, according to its true value. On the contrary, the section purports to be only a limitation designed to preclude arbitrary classification, and to require uniformity only within a class and within the territorial limits of a taxing authority. Section 179, as now amended, while retaining the pre-existing requirement of local assessment, except as to enumerated public utilities, entirely does away with the necessity for a distribution of the assessed value of utility properties to the local taxing units. These two sections of the amendment of 1914 are significant of a decided change in the pre-

existing constitutional policy. It is now neither required that all of the taxable property within a district shall be apportioned thereto, nor that the revenues to be raised from property taxes within the territorial jurisdiction of the municipality levying the tax shall be derived from all of the taxable property within the district. For instance, it may now be provided that the state may derive its tax revenue from railroads and express companies to the exclusion of other property; whereas minor municipalities may be authorized to derive their revenues from the general property including such utilities as telephone and telegraph companies, and be denied the right to tax the railroads and express companies. The effect of such a law would, of course, be to exempt the class of property referred to, wholly or in part, from other taxes for the support of other municipalities in which the property may be located; but in reality the property would not be exempt, because it would be bearing that portion of the general burden of taxation which the legislature deemed just. The only limitation upon the power of the legislature to thus classify property is the 14th Amendment to the Federal Constitution, which, by requiring equal protection of the laws, precludes purely arbitrary classification. See Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Citizen's Teleph. Co. v. Fuller, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; State ex rel. St. Paul City R. Co. v. Minnesota Tax Commission, 128 Minn. 384, 150 N. W. 1087. Under such a scheme, property cannot be said to be exempt, provided it is made to bear what the legislature deems to be its just proportion of tax burden. The foregoing propositions based on the amendment are wholly beyond dispute because clearly within its very language.

But does the requirement that all taxable property except that of the enumerated utilities shall be assessed in the county, city, township, etc., in which it is situated, any longer require that all taxable property not excepted be placed upon the tax rolls of the designated local units? If so, the legislature has no authority to effect its withdrawal.

This, in our judgment, is a most serious question, and one that must be solved by a proper construction of the constitutional amendment in the light of the change sought to be effected.

As an aid in determining the meaning of the amended § 179, it should be borne in mind that § 202 of the Constitution requires the separate submission of amendments so that they may be separately voted upon, and that chapter 103 of the Session Laws of 1913, which amends both §§ 176 and 179, was adopted as one amendment. We should assume, therefore, that it was desired to effect but one basic change in the Constitution, and that whatever alterations in other sections were deemed essential to make that change effective were made for that purpose only. The basic change sought is doubtless found in § 176, wherein the rule of general uniformity is changed to that of a permissive classification accompanied by a requirement of territorial uniformity. The change made in § 179 by removing the direction to apportion the assessed valuation of the utilities to the local units but brings it into harmony with § 176. Where a single purpose seems to be dominant in an amendment, we should be reluctant to give to other sections a construction that would tend to defeat it; particularly where the section which is not wholly consistent in its language was but a little more than an appendage to that which was most radically changed.

Under its authority to classify, the legislature may determine that there are subjects of tax within a given locality that may reasonably be made to contribute to the maintenance of one municipality rather than to another, both having jurisdiction over the same territory. Thus, it may be thought more appropriate for a county or for the state, either of which may be charged with the duty of keeping up the public highways, to exact of an automobile stage driver the taxes derived from the instrumentalities that he uses in connection with his business, than it would be to permit the city, where he might sleep half the time and over whose streets he might run but a short distance, to derive a larger benefit from his taxes upon the automobiles he uses than the county or state.

Or the legislature might deem it proper to authorize the creation of a park commission or board, and vest it with authority to levy a tax for the acquisition and improvement of park sites. If it should be of

the opinion that such a tax should be levied only upon the assessed valuation of the real property of a city whose boundaries correspond with the jurisdiction of the board, manifestly it could so provide, under § 176. (Assuming, of course, the constitutionality of the classification involved under the equal protection clause of the Federal Constitution.) If § 179, as now amended, however, were construed to require the placing of all taxable property within the city or park district upon the tax rolls, its presence there could serve no useful purpose because not accompanied by a power to tax. Or would it be contended that there must be a local power to tax it, because it is incompetent for the legislature to so far exempt it? If so, the legislature would be driven to the adoption of indirect means to accomplish its permissible ends. It could provide for an assessment for local purposes on so low a basis as to amount practically to an exemption from local taxation. If such an expedient were resorted to to effect a legitimate object, and it did not amount to arbitrary classification, it would not be for the courts to question the wisdom of the policy or the good faith of the legislature. We should shrink from a construction of the Constitution that can but result in imposing artificial rules so readily capable of being circumvented. Rather we should seek to discover the true aim of each provision and apply it according to its intent and spirit.

The true aim of the original §§ 176 and 179 was to compel an equitable distribution of the tax burden. This they sought to accomplish by requiring a uniform ad valorem assessment of all property and the application of the local and general tax rates thereto. The aim of the amendment is doubtless the same, but we must construe it as made in the light of the universal experience above referred to. It contemplated that the legislature might take cognizance of the economic setting of the various classes of property subject to its taxing authority, and consider this as a factor in legislating regarding the peculiar functions of the different municipalities and the duty of supplying the needed revenues to support them. If this be not the scope of the amendment, why was the requirement of uniformity limited to "the territorial limits of the authority levying the tax," and why was the constitutional form of expression changed from language strongly mandatory to permissive freedom within limited bounds? If, under § 150 of

the Constitution, the legislature is precluded from differentiating between the various classes of property in a way that will reflect a just appreciation of economic and governmental relationships, manifestly the constitutional foundation for reasonable classification is undermined, and there is carried over into the altered scheme so large a part of the pre-existing iron-clad rule of uniformity as to afford a serious impediment to its reasonable and orderly operation.

In its essence, the objection interposed in this case on behalf of the city of Fargo amounts to a complaint that its taxing power is impaired, but, by § 130 of the Constitution, the legislature is given plenary control over municipalities in the matter of the limitations upon their taxing power. In fact, their power to tax is derived from legislative grant. State ex rel. Oliver Iron Min. Co. v. Ely, 129 Minn. 40, 151 N. W. 545, Ann. Cas. 1916B, 189. If, under § 176, a new municipality can be given a limited taxing power, or one that will enable it to tax certain classes of property for certain purposes, wherein can there be any sound basis for objection on the score that the taxing power was not made more extensive? It may be that, under § 176 as it originally stood, all power to tax property must have been so conferred as to operate uniformly as to all property within the district; but without the requirement of such uniformity, can it be reasonably said that every taxing power vested in a municipal government must be accompanied by authority to tax all taxable property according to some rate for the same purpose? A rate which would be nominal merely and wholly artificial might be thought to satisfy the constitutional requirement.

Enough has been said to indicate that constitutional localization of property for purposes of taxation is inherently inconsistent with the legislative power to classify. But, does the language of § 179 require that we should give effect to a meaning so far inconsistent with § 176? We think not. When the entire amendment is read together we think it reasonably clear that the effect of § 179 is simply to provide that property which is required to be taxed for local purposes be given a situs within the district in which it is to be taxed, and that certain properties shall be assessed by the state board of equalization. The word "taxable" qualifies "property" in the amended section, whereas there was no qualifying word in the original section. This would seem

to imply that it was contemplated that some property might be made taxable in one jurisdiction that was not taxable in another. While the addition of this qualifying word may in itself be of slight consequence, yet when we also consider the dropping of the only words expressly requiring the valuation of property to be apportioned to the taxing districts, and read the whole amendment in the light of the meaning of the newer limitation, which displaces a stiff mandatory provision, we are impressed that the localization only applies to property which is required by the legislature to bear a local tax.

Being of the opinion that the complaint of the city of Fargo is unwarranted in so far as it is predicated upon a right to retain the property in question upon its tax rolls, it remains to be determined whether the act so operates as to exempt personal property in violation of § 176 of the Constitution, or to circumvent § 174, limiting the amount of state taxes.

It is incompetent for the legislature to exempt personal property from taxation except to the extent of $200 worth for each individual liable to taxation. This act imposes a charge denominated a license or registration fee. Does it necessarily violate the provision above referred to? It is clear, as hereinbefore pointed out, that the legislature intended that the property in question should bear no other tax burden than that provided in this law. The amount required to be paid entitles the owner to enjoy the right to use the highways and to hold his property free from other tax obligations. Doubtless, it would be competent for the legislature, in imposing a license tax, to take into consideration the uses commonly made of the property affected, together with the additional burdens which such uses place primarily upon the state. The duty of keeping the public roads in condition is a governmental one which, under our Constitution, the state is now authorized to discharge directly. Const. § 185, Sess. Laws 1915, p. 403. Where a fee or tax may fairly be said to be no larger than is reasonably necessary to compensate for the extra burden incident to the common use of the highway by a given class of vehicles, it cannot be said to be so arbitrary as to be unwarranted. There being no provision in the Constitution directly restricting the power of the legislature to impose a license fee or tax, the charge imposed, having been measured accord-

ing to a reasonable standard, seems to meet every requirement of a valid license tax.

But unless it is included in the fee, there cannot be said to be any tax upon the property, and the act cannot stand because of the express provision of § 176, limiting the power of the legislature to exempt property from taxation. Can it be said that the legislature, by determining upon a policy of substituting a license fee for a tax, has, in effect, determined that the property is not exempt? In the absence of constitutional requirements to the contrary, the power of the legislature to provide for an equitable adjustment of tax burden in such a way as to take into consideration other burdens placed upon a given class of property cannot be disputed. If the legislature deems it appropriate to single out a given class of property and to require that the owners of that property who, as a class, derive most benefit from the proper performance of a given governmental duty, must contribute most to the legitimate cost of its maintenance, and that they may be favored by a corresponding reduction of other burdens, it cannot be said that the property subject to the particular burden is exempt from taxation. The most that can be said is that it is singled out for special treatment and taxed according to a method that is thought to be more appropriate for measuring the relative burden than would be the case if it were taxed according to valuation. There is no particular magic in a name, or even in a legislative designation of a particular form of taxation. Though the legislature may call that which is distinctly a tax by some other name, it nevertheless remains a tax. Where the taxing power of the state is limited by the provisions of the Federal Constitution designed to secure the freedom of commerce between the states, the United States Supreme Court has not hesitated to distinguish between license fees and taxes, and the mere fact that a given charge is imposed by the state as a license charge is not conclusive of the legality of the charge. In the case of Harman v. Chicago, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306, the United States Supreme Court held in effect that a charge imposed as a license fee for the use of the Chicago river was in fact not a fee or toll exacted as compensation for specific improvements, but was in fact a tax upon interstate commerce. As a mere license fee or toll the charge would have been valid. Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 Sup.

Ct. Rep. 313. This proposition is equally applicable to this case,—that which is imposed as a license fee may be in reality both a tax upon the property and a fee. Here it was clearly intended as such.

The prohibition of the exemption of personal property could have been designed for no other purpose than to prevent favoritism and to compel a fairly equitable distribution of the tax burden. A law which secures this end meets every requirement of such a provision though the contribution exacted be not designated as a tax. The distinction between a fee and a tax is one that is not always observed with nicety in judicial decisions (see Seligman, Essay in Taxn. p. 281), but any payment exacted by the state or its municipal subdivisions as a contribution towards the cost of maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax. This is such a charge, and it may properly be regarded as a tax.

We have had the gravest doubt as to the propriety of so construing the law in question; but, viewed in the light of the ample powers of classification given to the legislature, of the known limitation upon the right to exempt personal property, of the declared intention to make the tax in question one in lieu of all other taxes, and of the evident attempt to make the new tax one that should approximately equal both the original tax and the license fee, we are impressed that the law in question imposes both a property tax levied according to a permissible standard and a reasonable license fee. The act consequently does not violate § 176 of the Constitution, concerning exemptions.

Here, too, greater assurance is added to our conclusion by the consideration that the legislature, in the exercise of its power to classify, could largely accomplish indirectly that which is accomplished directly by the act in question. If the legislature should see fit to adopt an act licensing automobiles and make the charge one in addition to a property tax upon vehicles, such as is done in a number of states, it would have the right to base the property tax upon a percentage of valuation that would be so low comparatively as to amount practically to an exemption, and its action in so doing would be justified principally by the fact that a larger burden had been placed upon the property by way of a license charge for its use. Again, we are prone to reiterate the thought that a construction of the Constitution which

would compel the accomplishing of legitimate aims by indirection should be avoided, especially where the true ends of a particular constitutional provision are clear and are met by the legislation in question.

Does the act violate § 174 of the Constitution? In considering this question it must be borne in mind that § 174 was originally adopted as a part of the plan that contemplated the raising of the bulk of the revenues required, both for state and local purposes, from the general property tax levied upon an uniform ad valorem assessment. The limitation was one that could readily be applied to any assessment of the general property of the state that might be made for tax purposes, but it cannot so readily be applied, if the legislature should seek to exercise its powers of classification conferred by the amendment to § 176. Under this plan much of the property might be assessed at a small percentage of its value, and the contemplated basis would be entirely changed. Nor could the section ever have been fully applied under the Constitution as it was originally framed, had the state elected to exercise the power to levy a gross earnings tax upon the railroads in accordance with the express authorization contained in § 176. It was there provided that "the legislative assembly may, by law, provide for the payment of a percentum of gross earnings of railroad companies to be paid in lieu of all state, county, township and school taxes on property exclusively used in and about the prosecution of the business of such companies as common carriers, . . . and whenever and so long as such law providing for the payment of a percentum on earnings shall be in force, that part of § 179 of this article relating to assessment of railroad property shall cease to be in force." It is clear that it was originally contemplated that, in the event the legislature should see fit to adopt a gross earnings tax applicable to railroads, this class of property, which from the beginning has made up a substantial part of the total assessed valuation of the property of the state, should not be assessed at all, and it is equally clear that had this power been exercised it would not have been incumbent upon the state to have distributed the gross earnings taxes to the local governmental units. There would then have been no proper assessed valuation basis upon which to apply the 4-mill limitation of state taxes. So, from the beginning § 174 could not have been regarded as establishing an abso-

lute maximum limitation upon the power of the state to levy taxes. It, of course, applied to that portion of the revenues which might have been derived from property made to contribute according to assessed valuation. State ex rel. Lenhart v. Hanna, 28 N. D. 583, 149 N. W. 573.

When § 176 was so amended as to authorize the classification of property within reasonable limits and to require uniformity only within the territorial limits of the authority levying the tax, it is manifest from what has previously been said in this opinion that the legislature became free to adopt any reasonable measure for determining an equitable basis for contributions to the revenues, and it is equally clear that it was no longer contemplated that there should be an annual assessment of property at its true value. Consequently, the very basis upon which the limitation contained in § 174 was originally intended to apply was no longer fixed by a mandatory requirement of uniform ad valorem assessment. Therefore, whenever the legislature sees fit to adopt some other reasonable basis upon which to determine the amount of tax that may be exacted from an individual than the value of the property owned by him, it does so in pursuance of an authority which is expressly recognized by the Constitution as now amended, and it cannot be said to be exceeding the revenue limitations prescribed in § 174. Section 174 means now very much the same as it has meant from the beginning, *viz.*, that the legislature shall be precluded from raising revenues based upon an ad valorem assessment of property which will exceed in any one year 4 mills on the dollar of the assessed valuation of the taxable property in the state. To construe it otherwise would be not only to ascribe a meaning that would have precluded the proper exercise of the legislative power to tax railroad companies according to gross earnings, under § 176, as it originally stood, but would also prevent the proper use of the authority which it clearly has under § 176 as amended to provide for a separation of sources of state and local revenues, and to exact the same according to any fair method of classification that in its judgment is designed to meet the ends of justice. We are of the opinion that the act in question does not violate § 174 of the Constitution.

Much of the argument of counsel for the petitioner seems based upon the hypothesis that the Constitution precludes taxation of any other

character than a property tax levied upon ad valorem assessment. It is doubtless true that, under the Constitution as it stood prior to the amendment, no other tax upon property than one levied upon an ad valorem assessment at a uniform valuation was contemplated. But, under § 176 as amended, the only requirement is one of uniformity within a class. In some of the states, Georgia, for instance, the Constitution provides not only that taxation shall be uniform upon the various classes of subjects within the territorial limits of the authority levying the tax, but in addition contains the express requirement that property taxation shall be ad valorem. Constitution of Georgia, article 7, § 2. Had it been desired to limit the power of the legislature to prescribe property taxes in such a way as to permit no other kind of tax except one levied upon an ad valorem basis, it would seem that such a limitation would have been expressed in § 176. In the absence of such a provision, it cannot be held that the legislature is precluded from laying a property tax upon any basis that will exact contributions according to an equitable standard and one which is free from the vice of arbitrary classification.

Under the law in question, the amount of the fee or tax is dependent upon the horse power of the motor, which is determined according to a rating established by the National Association of Licensed Automobile Manufacturers. It may be true, as contended, that the rating is defective in that it does not take into consideration the length of the stroke of the piston and the valve equipment, but this is a matter for the legislature to determine; and it is not for the courts to review the reasonableness of the method adopted, in the absence of a showing that it is wholly arbitrary.

The owner of the car is required to make an application for the registration of his motor vehicle, which must contain a description of the car to enable the secretary of state to determine the registration and license fee, according to the prescribed rating. There is not involved in this procedure any act of a quasi judicial nature, such as the placing of a valuation upon property. The tax is determined wholly by the fixed rating, which is dependent upon the size and number of cylinders. The only other factor that enters into the determination of the fee is the length of time the vehicle has been in use as a registered car. Inasmuch as these facts are supplied by the owner, there is no

merit in the objection that the secretary of state is made the assessor of this class of property for the entire state.

The act is further assailed as involving an unconstitutional delegation of legislative power upon an administrative or executive officer. This objection appears to be a valid one. In § 4 of the act it is provided: "The secretary of state is hereby authorized to employ such agent or agents as may be necessary to enforce the provisions of this act," and in § 5, the state treasurer, in apportioning the moneys received to the credit of the counties and to the state highway fund, is required to first deduct from the moneys received "the cost of tags, clerk hire, printing, postage, express and other expenses as estimated by the secretary of state." These provisions clearly involve a delegation of legislative power to the secretary of state. There is no limitation upon the number of persons he may employ nor upon the salaries he may pay. Neither is there any limitation placed upon the expendi ture that he may authorize for tags, printing, etc. Nor even any limitation upon the purposes for which "expenses" may be incurred; the act says "other expenses." Nothing need be said upon this question in addition to what has been said by this court in previous decisions which are clearly applicable to the case at hand. State ex rel. Rusk v. Budge, 14 N. D. 532, 105 N. W. 724, and State ex rel. Miller v. Taylor, 27 N. D. 77, 145 N. W. 425. It does not follow, however, that the unconstitutionality of this portion of the law necessarily renders the remainder of the act void.

This identical question was before the supreme court of Illinois in the case of People v. Sargent, 254 Ill. 514–520, 98 N. E. 959; and it was there held both that the provision of the Motor Vehicle Act, which directed the secretary of state to pay into the state treasury the fees received "less the cost of preparing and delivering the registration certificates, registration seals, and number plates," was void because it authorized expenditures without legislative appropriation; and that, though the act was invalid in that respect, the remainder of the Motor Vehicle License Law was not affected. This holding is clearly in accord with the doctrine of partial invalidity as adhered to in this jurisdiction (Malin v. Lamoure County, 27 N. D. 140–153, 50 L.R.A. (N.S.) 997, 145 N. W. 582, Ann. Cas. 1916C, 207), and as expressed

by an eminent authority upon the subject. (Cooley, Const. Lim. 7th ed. 246).

For the reasons assigned in the foregoing opinion, the writ is denied.

ROBINSON, J. (dissenting). This case presents no question arising under the Constitution or laws of the United States or of any other state. Hence, there is no good reason for considering and quoting from all or any of the decisions on the dissimilar laws of other states. This case was brought to compel the assessors of the city of Fargo to list and assess for taxation all automobiles and motor vehicles owned in the city. It challenges the validity of chapter 56, Laws of 1917. This statute imposes on all motor vehicles a license fee or tax of not less than $6, and for each horse power in excess of 20, there is an additional tax of 50 cents. Only half the tax is laid on automobiles registered three years prior to the passage of the act. The same is in lieu of all other taxes, general or local, except that the fee paid by dealers is not in lieu of other taxes.

All taxes are paid to the secretary of state, and he is charged with the supervision and collection of all the taxes. He pays the same to the state treasurer and from the moneys received in each month, the state treasurer deducts the expense of the business, and the balance he divides into three parts. One part, or one third of the balance, he distributes to the several county treasurers, and he credits the remainder to the state highway fund. That fund is all expended and paid out under the direction of the State Highway Commission on vouchers approved by the secretary of the commission, and the money paid to each county is expended for the repairs of highways not within the limits of any city or village. Such is the theory of the law. There is no limit to the expense that may be incurred and paid by the Highway Commission and by the secretary of state. To collect the tax and to enforce the provisions of the act, the secretary of state is authorized to employ such agents and to pay such compensation as he may think proper. On general expense accounts, there is no limit to his discretion. Were it not that the secretary is a strictly honest man, he might easily expend among his friends all the receipts of the business and leave not a dollar for the Highway Commission to expend in the same

manner, and so the Highway Commission are given full power to expend as they may please their share of the money.

In 1917 the tax receipts were $210,000, the expense of collecting was $33,700. In 1918 during the first three months, the receipts were $250,000.

To May 15, 1918, the Highway Commission expends—for engineering and drawing, $50,480.87; road work, $335.21.

1. Every law imposing a tax must state the object of the tax to which only it shall be applied. If the object of a tax was the improvement of a highway, the statute should have directed and limited the manner of making the improvement and of collecting and expending the tax. It should not have been all left to the absolute discretion of the secretary and the Highway Commission. There must be some reasonable limitation on the expense of collecting and on the manner of expending a tax, or there can be no assurance of its application to any particular object. State ex rel. Rusk v. Budge Capitol Commission Case, 14 N. D. 532, 105 N. W. 724; State ex rel. Miller v. Taylor (State Bonding Case) 27 N. D. 84, 145 N. W. 425.

2. The legislature must provide for a tax to defray the expense of the state for each year not to exceed 4 mills on the dollar of the assessed valuation of taxable property, and a sum sufficient to pay interest on the state debt. And—with a few exceptions which do not include motor vehicles—all property must be assessed in the county, city, township, village, or district in which it is situated, and the assessment must be made in the manner prescribed by law. § 179.

Certain it is that under the plain words of the Constitution no tax may be levied on motor vehicles without an assessment of the same in the manner provided by law for the assessment of other personal property. Without an assessment of real and personal property according to its value in money, there can be no basis for the levying of a tax on the assessed valuation and for limiting the total to 4 mills on the dollar.

With a few exceptions, including a poll tax, not to exceed $1.50 a year, all taxes must be levied on property according to an assessed valuation to be made and equalized in manner provided by law. And by the guaranties of due process of law the owner of property must have an opportunity to be heard in regard to the assessment of the same

and the levying of a tax against it. The tax which the statute imposes in lieu of all other taxes it names a registration fee or license. Of course that is a palpable misnomer, and it does not in any way evade the limitations of the Constitution. The motor vehicle, like other personal property, must be assessed for taxation in the county, city, township, village, or district in which it is situated, in the manner prescribed by law, and it may not be specifically exempt from taxation. "The legislature may by general law exempt from taxation personal property of each person to an amount not exceeding $200." § 176.

The exemption must be limited to a certain sum or valuation, and not to any particular kind or class of property. It must have a uniform application. Obviously, the statute in question is in direct conflict with the above provisions of the state Constitution, and hence it is void.

On Rehearing.

BIRDZELL, J. A rehearing was ordered in this case upon two propositions: First, as to whether or not §§ 176 and 179 of the Constitution had been amended in 1914 by the favorable vote of the electors upon the proposition submitted; second, considering the Constitution to have been legally amended, what is the proper meaning of § 174 (the provision limiting the state taxes to 4 mills on the assessed valuation of the taxable property), as applicable to the law in question?

In the concurrent resolution submitting the amendment the legislature referred to the proposed change or changes in the Constitution as "amendments to §§ 176 and 179," and required that "such amendments shall be submitted to the qualified voters of the state at the next general election, for approval or rejection, in accordance with the provision of the Constitution of the state of North Dakota." The amendatory matter has been referred to or set forth at length in the main opinion herein, and need not be reincorporated here. Section 202 of the Constitution outlines the procedure that must be followed in amending the Constitution. The last sentence of the section is, "If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately." It is argued that the amendments to §§ 176 and 179 are separate amendments, and that, not having been so submitted as to enable the electors to vote for or

against each separately, the Constitution has not been legally amended. If this contention is sound it will follow, as a matter of course, that the law in question is unconstitutional; for it is patent that it does not provide for the taxing of automobiles according to their value, thus violating the first requirement of § 176, which, if still a part of the Constitution, requires the taxing by uniform rule of all property according to its true value in money.

Constitutional provisions similar to our own (§ 202) prescribing the requisite formalities to effect an amendment are quite common. In more than half the states there is a requirement of some character which is designed to secure such a submission of constitutional amendments as will enable the electors to vote for or against a single definite proposition. The concurrence of so many constitutional conventions upon the single question of the method of submitting amendments is, in itself, a strong indication of the importance of the question. See Dodd, Revision & Amendment of State Const. p. 179; also, 12 C. J. 690. If the amendment were not properly submitted, it would unquestionably be the duty of the court to declare it not a part of the Constitution. The provisions of our Constitution are mandatory and prohibitory (§ 21), and, as such, the Constitution construes itself in relation to such a matter as that under discussion. State ex rel. Woods v. Tooker, 15 Mont. 8, 25 L.R.A. 560, 37 Pac. 840. Thus, when the Constitution says that "amendments *shall be submitted* . . . in such manner that the electors shall vote for or against each . . . separately," [§ 202] the failure of the proper officials to comply with the direction is necessarily fatal to the attempted amendment. It is the duty of the court to uphold and give effect to every part of the Constitution, and this provision can only be enforced by refusing to recognize as an amendment that which was never legally adopted as such. That this duty has been fully and faithfully discharged by the courts in the past is indicated by the statement of Dodd. After an exhaustive consideration of the experiences of the various states in the submission and adoption of constitutional amendments, he says: "If a required step is omitted, or is not even in substance complied with, no court has ever upheld the amendment, even though it may have been approved by the people. That is, the constitutional requirements are mandatory, not merely directory, and no court will overlook the

entire disregard of even the less important of such requirements." Dodd, Revision & Amendment of State Const. pp. 217, 218.

As to what constitutes a plurality of amendments within a provision such as our § 202, however, the attitude of the courts generally has been to adopt what is, in our judgment, properly termed a liberal and common-sense view.

The views of the supreme court of Wisconsin, as expressed in the case of State ex rel. Hudd v. Timme, 54 Wis. 318, 11 N. W. 785, are generally regarded as a sound expression of the true meaning of such constitutional provisions. In answer to the contention that an amendment was plural which provided for biennial instead of annual legislative sessions and adjusted the legislative terms and salaries to the new biennial system, the court said: "Such a construction would, we think, be so narrow as to render it practically impossible to amend the Constitution; or, if not practically impossible, it would compel the submission of an amendment (which, although having but one object in view, might consist of considerable detail, . . . though all promotive of the same object and necessary to the perfection and practical usefulness thereof, if adopted as a whole) in such form that a defeat of one of its important matters of detail might destroy the usefulness of all the other provisions when adopted. . . . We think amendments to the Constitution, which the section above quoted requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon, or connected with, each other." The parentheses above are not quoted, but are inserted to facilitate the reading.

The following expression from the supreme court of Iowa is to the same effect: "If the amendment has but one object and purpose and all else included therein is incidental thereto, and reasonably necessary to effect the object and purpose contemplated, it is not inimical to the charge of containing more than one amendment." Lobaugh v. Cook, 127 Iowa, 181, 102 N. W. 1121.

The supreme court of Montana has expressed the rule in a concise manner as follows: "If in the light of common sense, the propositions

have to do with different subjects, if they are so essentially unrelated that their association is artificial, they are not one; but if they may be logically viewed as parts or aspects of a single plan, then the constitutional requirement is met in their submission as one amendment." State ex rel. Hay v. Alderson, 49 Mont. 387, 142 Pac. 210.

This and similar questions have been before the courts of last resort in a number of the states, and, while the decisions are not entirely harmonious, the conflict principally turns upon the application to the particular case of a principle which is quite generally adhered to. See People ex rel. Elder v. Sours, 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167; People ex rel. Tate v. Prevost, 55 Colo. 199, 134 Pac. 129; Hammond v. Clark, 136 Ga. 313, 38 L.R.A.(N.S.) 77, 71 S. E. 479; Chicago v. Reeves, 220 Ill. 274, 77 N. E. 237; State ex rel. Morris v. Mason, 43 La. Ann. 590, 9 So. 776; State ex rel. Adams v. Herried, 10 S. D. 109, 72 N. W. 93; Gabbert v. Chicago, R. I. & P. R. Co. 171 Mo. 84, 70 S. W. 891; Hubbard v. St. Louis & M. River R. Co. 173 Mo. 249, 72 S. W. 1073; State ex rel. Teague v. Silver Bow County, 34 Mont. 426, 87 Pac. 450; State ex rel. Hay v. Alderson, supra; State ex rel. McClurg v. Powell, 77 Miss. 543, 48 L.R.A. 652, 27 So. 927, overruled in State ex rel. Collins v. Jones, 106 Miss. 522, 64 So. 241; McBee v. Brady, 15 Idaho, 761, 100 Pac. 97; Lobaugh v. Cook, supra; Jones v. McClaughry, 169 Iowa, 281, 151 N. W. 210; Gottstein v. Lister, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008; State ex rel. Hudd v. Timme, supra; State ex rel. Postel v. Marcus, 160 Wis. 354, 152 N. W. 419; State ex rel. Thompson v. Winnett, 78 Neb. 379, 10 L.R.A.(N.S.) 149, 110 N. W. 1113, 15 Ann. Cas. 781; Bethea v. Dillon, 91 S. C. 413, 74 S. E. 983.

To refer in detail to the variety of circumstances in which the question under discussion has arisen in the foregoing cases would unduly lengthen this opinion. We shall consequently content ourselves with a mere statement of the principle which finds practically unanimous support in the many authorities cited.

Such a constitutional provision is designed to prevent the submission to the voters, as one amendment, of distinct propositions that are so far disconnected and independent of each other as to have no direct relation to a general subject. The vice it is designed to prevent is analogous to the log rolling and joker practices which are so familiar

to students of legislation, and which are generally sought to be prevented by constitutional provisions requiring an expression of the subject of legislation in the title of the bill, and that the legislation shall concern but a single subject. It prevents the linking into one proposition of distinct amendments where there might be an attempt to join them together for the purpose of giving unmerited support to an amendment which might be thought to be unpopular, or for the purpose of defeating a popular measure by burdening it with an unpopular one. It compels each distinct amendment to stand upon its own merits, and relieves the voter of the embarrassment that would be occasioned by his being compelled to vote against a measure he deems desirable, in order to defeat one that he does not favor; or, if he should deem it the lesser evil, to vote for the proposition he favors and at the same time cast his vote in favor of an amendment that is distasteful to him. Reference to the cases cited above will disclose that the courts have differed little, even in the expression of the principles according to which the constitutional provision is enforced. But it will also disclose that, to the extent that there is a lack of harmony in the results arrived at, it is due to differences of opinion as to their application.

A somewhat extreme application of the foregoing principle is found in the case of People ex rel. Elder v. Sours, supra, in which the supreme court of Colorado held that an amendment was single where it provided for the consolidation of the city of Denver and the county of Arapahoe and for the framing of a charter by the new municipal corporation; also, for the framing of home rule charters by all cities of the first and second classes within the state. See Dodd, Revision & Amendment of State Const. p. 180.

The amendatory matter in the instant case relates to the uniformity of taxation, permits the classification of property, and alters the section regulating the assessment and taxation of certain public utility properties. Within the principle stated above and under the authorities cited, there can be no question that a change may be effected by one amendment which would materially alter more than one section of the Constitution. Nor can there be any doubt that this can be accomplished either by implication or by express language. It is also clear that § 202 of the Constitution is not violated where an amendment which is in reality single is expressed in several sections which

are all submitted as one proposition. In fact, the limitation applies only to the substance of the amendment, and not to its form. So, in this case our inquiry is narrowed to this,—Is the whole of the matter so germane to the general subject of the amendment as to have a direct bearing upon the object sought to be accomplished, and is it so closely related to the general subject that it may be considered as within its legitimate scope? If so, it is sufficiently connected with a single subject-matter to be properly embraced within one amendment.

In the original opinion a brief survey was made of various sections of the Constitution embracing limitations upon the taxing power, and it was seen that, at the basis of all of them, lay the mandatory requirement of § 176, that property should be taxed uniformly and according to value. It was also pointed out that for these limitations there was an apparent desire to substitute a provision that would enable the legislature to classify property with reference to its use, its value, its utility, and, in general, its setting in the economic organization of society with reference to the functions of government as exercised by the state and its minor subdivisions. These purposes differ so radically from the purposes evidenced by the original section that the amendment would naturally carry with it, if accomplished, and if legislation were adopted in pursuance of the powers intended to be given, changes in the scheme of public finance that were not in the contemplation of the framers of the original Constitution. These changes were intended to be effective to the extent that legislation within the limitations of § 176, as altered, departs from the requirement of full value ad valorem assessment as originally contemplated. For instance, the sections of article 12, which prescribe limitations upon the debts of various municipalities, take, as a basis, a percentage of the assessed valuation of the taxable property. Those limitations are doubtless still applicable, but the legislature may now give express sanction to assessments at a percentage of value, and executive and administrative officers may no longer be required to perpetuate a legal fiction of sworn full valuation in the face of contrary facts and a quarter-century's universally known administrative practices. In fact, many of the provisions of the Constitution relating to revenue and taxation were framed to fit a system that had no actual existence. It was a mere phantom that had never taken up its abode in the world of things,

prior to the adoption of the Constitution; nor did the hard and fast requirements of the Constitution prove efficacious to convert it into a reality. Under the amendments it may possibly be that there will be a closer proximity between express requirement and limitation and actual practice. To the extent, however, that the original plan stands in the way of attempts to carry out the powers conferred by the amendment, it is, of course, superseded.

The limitations of the original Constitution only acquired vitality as applied to the actual administration of the tax laws; and it is a fact so well known generally as to be properly within our judicial notice that property assessments have never approached full value in this state, and that probably more taxable personal property has been omitted from the tax rolls than has been assessed. It may be that under the amendment in question, laws might be passed under which the aggregate assessed valuation would be radically increased. If so, the tax-levying and debt-limiting provisions of the Constitution might operate quite differently from the way they have in the past, or even from the way it was originally contemplated they would operate. This is but incidental to the change.

It is argued that a law which measures a tax by some characteristic of property, other than its value, destroys the basis of such limitations as those referred to. If this be so, the argument proves nothing, provided the original limitations are still applicable. If still applicable, as we believe they are, they will necessarily preclude the legislature from taxing a great amount of property according to such a method as is employed in the instant case; as, under our construction of the law, it operates to reduce, rather than increase, the power to incur debts. While thus preventing extravagance, the legitimate needs of the local municipalities, which can only be supplied by a proper exercise of their borrowing power, will necessitate the continuance of the practice of taxing the bulk of the property on an ad valorem basis.

As stated in the original opinion, there is an inherent inconsistency between a constitutional provision that requires the taxing according to a uniform valuation and rate of all property lying within a given taxing district and a constitutional provision that requires uniformity only within a class and within the territorial limits of the authority levying the tax. The inconsistency lies in the entire absence of any

semblance of permissive local option in the one case which is present in the other. Thus, under legislative authority, cities may levy at their option, taxes for their own support in accordance with a classification of property that may be deemed appropriate for such purposes. Such a classification might not be adopted by other cities or even applicable to other municipalities at all. So long as the city taxes are uniform within a given city upon the same class of property, and the classification of the property upon which the tax is levied be one that does not violate the state or Federal Constitutions in other respects, the law which would authorize it would provide for a tax that would be uniform upon the same class of property "within the territorial limits of the authority levying the tax," and would be valid within § 176 as amended. The limitation just quoted is the requirement of uniformity. It requires uniformity within a class and within the territorial limits of the particular taxing authority. If it were still intended to require that all property within a tax district be subject to every levy of every municipal and quasi municipal corporation having jurisdiction to tax it, the rate would be uniform by virtue of the enforced localization of the property, and the words last quoted above would be surplusage. In interpreting the Constitution it is well settled that it should not be assumed that words have been used to no purpose. It seems clear to us that it was the aim of § 176 to make such provision for the classification of property for taxing purposes that the state taxes should be uniform throughout the state, county taxes throughout the county, city taxes throughout the city, school taxes throughout the district, et cetera; and, moreover, that each of such taxes should be levied alike upon the same classes of property, but that all need not be levied upon the same basic classification. Nothing could be plainer, we believe, than that by § 176 it was intended to provide that the legislature in its discretion might authorize a separation of the sources of state and local revenues, which can be accomplished only by subjecting some property to taxes for purposes to which all property does not contribute. This follows necessarily from a limitation that requires uniformity within a class only throughout the boundaries of the taxing authority.

If we have correctly sensed the meaning of § 176, it remains to be seen whether its scope is so broad as to embrace subjects so far unrelat-

ed as to require separate submission; for, as will be noted later, the changes made in § 179 are only such as affect the subject-matter clearly embraced in § 176. The general subject of the amendment is uniformity, but situs is also dealt with. May situs be so essentially a part of a particular plan of uniformity as to be embraced in the general subject? The subject of uniformity is broad in its scope and suggests a variety of means for effecting the desired end. Our ideas as to what constitutes uniformity in the abstract will likely be as variant as our opinions concerning the economic phases and incidents of taxation. But it is not our province to seek to ingraft any particular economic dogma into the Constitution. We are properly confined to the narrow question as to whether uniformity may embrace the element of situs. It seems clear to us that it may and does do so. It is one thing to require uniformity throughout the state, another throughout the district. It is one thing to require uniformity as to all property, another as to classes. It is one thing to require uniformity within a class in every taxing district and quite another thing to permit classification for the purposes of a particular taxing authority. It would indeed be a difficult matter to dissociate uniformity and situs for the reason that there must be a common location of property before it could be determined that one species has been unfairly dealt with. The relationship between situs and uniformity, then, is one which, in our opinion, is not remote or artificial, but direct and natural. It was therefore appropriate to link the two to effect the single purpose of substituting a different rule of uniformity in lieu of the one that had hitherto prevailed.

As pointed out in the former opinion, the change that was made in § 179, according to which it was no longer required that the assessed valuation of the public utilities properties be distributed to the local taxing units, was only such change as was necessitated by the evident desire to give effect to the full scope of § 176 and make possible the separation of sources of revenue for the support of the state and its subdivisions.

It should be noted, too, that § 179 as amended, no longer requires the state board of equalization to assess the public utilities properties "at their actual value," as formerly. This change was also doubtless dictated by the desire to render § 179 harmonious with § 176, so that

in any classification that would be attempted it would not be necessary for the legislature to make it conform to an assessment of public utilities properties at 100 per cent of their value. These changes were so essentially a part of the general purpose of § 176 as amended, that they might appropriately have been included in one section, and the fact of their being expressed in two sections renders them none the less connected with the general subject of uniformity of taxation, which is clearly the aim of the amendment. We are entirely convinced that all of the changes sought to be effected by the amendatory matter are so logically and directly connected with one general subject that none of them can be said to relate to a separate and independent subject.

It is argued that there might be many persons who would favor giving the legislature power to classify property for tax purposes, and require that the taxes should be uniform within the territorial limits of the authority levying the tax, who would be unwilling to relinquish, at the will of the legislature, the assessed valuation of the public utility properties as they are apportioned to the various taxing districts by force of § 179. Perhaps this might be true, but amendments to the Constitution are not to be analyzed until each idea that enters into a composite thought or purpose is made to stand out dissevered from every other idea with which it is related. There may be a distasteful clause or a possibly disagreeable minor result attributable directly to an amendment, but yet the amendment must not fail because it might have been possible to couch it in a little different language, or to have defined its scope in such terms as to have eliminated the disagreeable consequence. This is not the test of the singleness of an amendment. The controlling consideration is the singleness of the purpose and the relationship to the general subject.

We are entirely satisfied that the amendment in question was legally adopted and is a part of the Constitution.

We think it proper to note in this connection, though the incident has no force as a legal precedent, that the second article of the amendments to the Constitution, which was adopted in 1898, amended two sections (§§ 121 and 127) relating to the elective franchise. Section 121 was amended by striking from it the provision including in the electorate of the state persons of foreign birth, who had declared their

intention of becoming citizens; and § 127 was amended by adding thereto the requirement that the legislature shall by law establish an educational test as a qualification, and that it might further prescribe penalties for neglecting or refusing to vote at a general election. The amendments to these sections were framed in two sections and were adopted as one amendment to the Constitution in the election of 1898, being voted upon as a single proposition. Yet, there are many reasons why intelligent alien declarants should be allowed to vote, if they can meet the educational test prescribed for citizens. In the present war the government of the United States has held them subject to involuntary military duty. Doubtless there could be found many persons who would vote against depriving such persons of the franchise, who would also vote in favor of a general educational qualification. Yet, it is clear that the amendment related to but a single subject and embraced appropriate safeguards of the elective franchise. Similarly, in our sister state of Minnesota, in 1906, an amendment which is almost identical with § 176 of our Constitution as amended was adopted as a single amendment and took the place of five distinct sections in the Constitution of Minnesota as it originally stood; and though the statutes of Minnesota disclose that much legislation has been adopted in pursuance of the amendment, which would have been constitutionally impossible under the sections superseded, and though Minnesota has a constitutional provision similar to our § 202, our researches have failed to disclose that the validity of the amendment has ever been assailed on the ground of multiplicity of subjects.

As to the meaning of § 174 since the amendment of the Constitution and as applicable to the law in question, nothing need be said in addition to what was said in the original opinion. The rehearing has served to give added assurance of the correctness of the result arrived at, and the order denying the writ is confirmed.

GRACE, J. I concur in confirming the order denying the writ.

ROBINSON, J. (dissenting). The purpose of this suit is to secure the assessment and taxation of motor vehicles in the same manner as other property. In 1917 the legislature passed an act to create a highway commission (chap. 131), and an act imposing on motor vehi-

cles a specific license tax in lieu of all other taxes (chap. 156). By the first act a highway commission is created, with power to construct and improve highways. By the second act, *in lieu of all other taxes,* there is levied on motor vehicles a license tax of $6 on the first 20-horse power, and 50 cents for each additional horse power. The secretary of state is authorized to employ agents and to pay all expenses of collecting the tax. But after making such payments, the balance of the money, if any, is divided into three parts,—one part is apportioned to the several counties, and the rest is put to the credit of the highway commission "to be paid by the state treasurer upon vouchers approved by the secretary of the Commission." Under the statute the money allotted to the Highway Commission is virtually thrown into its lap. It is given the key to the treasury and the right to expend, as it did from March, 1917, to May 15, 1918:

For drawings $50,480.00
For road work .....$ 335.21

For the years 1917 and '18 the motor tax is $722,753.

Those facts are subject to many grave and serious objections. Indeed, they are in direct conflict with several sections of the Constitution and the fundamental principles of law governing taxation. Under the Constitution no act may embrace more than one subject, which must be expressed in its title. § 61. And yet the title to chapter 131 does manifestly embrace several subjects: The title is an act (1) to create a highway commission; (2) to fix the salary of the state engineers; (3) to provide for disposing of fines and penalties; (4) to assent to an act of Congress; (5) to provide state aid in the construction and repairs of roads and bridges; (6) to amend and repel half a dozen sections of the compiled laws. Such a title speaks for itself, and shows beyond question that the act is void and hence in law there is no highway commission.

Now for each year the state tax levy must not exceed 4 mills on the dollar of the assessed valuation of all taxable property, and a sum sufficient to pay interest on the state debt. § 174. But how can that limitation have any force or effect if taxes may be levied on motor vehicles or on other property without any assessment; and if one kind or class of property may be subjected to a tax levy without an assessment, what is there to prevent a similar levy on all kinds or classes

of property? If we may levy on motor vehicles a specific tax of from $6 to $60, what is there to prevent a similar levy on every other kind of property? And if we may levy a tax on city property to make country roads, or to fill the pockets of a commission, why may we not levy a tax on country property to pave city streets? Why may we not levy a tax on one class of people to benefit or enrich another class?

Furthermore, no tax may be levied except in pursuance of law, and every law imposing a tax must state distinctly the object of the same, to which only it shall be applied. § 175. Yet the law imposing a motor vehicle tax to an amount sufficient to pay nearly all the necessary expenses of the state does not state how it shall be applied. Its application is left mainly to the discretion of the secretary of state and the highway commission. Under the statute the bulk of the money should go to a commission that is left entirely free to expend it when and where and as they may please. The only limitation is that 90 per cent shall be spent in the several counties in proportion to the amount collected therein. "Ten per cent of the fund shall be spent according to the discretion of the commission," and "none of the money shall be expended within the limits of any incorporated city or village." The money is to be paid on vouchers approved by the secretary of the Commission; though the Constitution provides no money shall be paid out of the state treasury except upon appropriations made by law, and on a warrant drawn by the proper officer,—the state auditor. § 186.

Of course, the statute does contemplate that the bulk of the tax shall be used for the construction or improvement of country highways, but the people have not by a two-thirds vote authorized the use of the money in that way, and under the Constitution the state may not engage in any work of public improvement unless authorized by a two-thirds vote of the people. § 185.

Moreover, all individual property must be taxed by uniform rule, according to its value in money, and there may be no exemption of personal property in excess of $200 for each individual. § 176. And all property must be assessed in the county, city, town, village, or district in which it is situated, in manner prescribed by law, except railroads and other public utilities, which are assessed by the state board of equalization. § 179.

By vote of the people in 1914 the first sentence of § 176 was amended to read thus: *"Taxes shall be uniform upon the same class of property,* including franchises within the territorial limits of the authority levying the tax." Under this innocent amendment, of course, the legislature may classify property for the purposes of taxation, but it may not dispense with an assessment. The amendment does fairly contemplate a classification of property for assessment and taxation purposes, and under it an act was passed dividing all property into three classes: (1) The real estate class—to be assessed at 30 per cent of its value; the personal property class, at 20 per cent; the nonproductive class of household property, at 5 per cent. Laws 1917, chap. 59. Motor vehicles are in the second class, and they must be assessed at 20 per cent of their true and full value, and they may not be exempt from taxation. Under said last and latest amendment, approved in 1914, every motor vehicle, like other personal property, must be assessed in the county, city, township, village, or district in which it is situated, and in the manner prescribed by law. § 179. When the assessments are made, then taxes may be levied in pursuance of law by the state and by the several municipalities. Aside from the small sum necessary to pay interest on the public debt, the state may levy no tax in any one year in excess of 4 mills on the dollar of the assessed valuation of all the taxable property. § 174. It may not levy taxes for counties, cities, or other municipalities or take the control of their affairs; because their existence and rights are imbedded in, and guaranteed by, the Constitution. True, the state may, by general law, provide for the organization of municipal corporations and restrict their power to levy taxes and assessments and to borrow money and contract debts. § 130. But that is not a power to destroy the municipalities, to manage their affairs, or to levy and disburse their taxes; and most assuredly it is not a power to levy taxes on one municipality or locality for the special benefit of another.

In the majority opinion it is said of those limitations of the Constitution: "If still applicable, as we believe they are, they will necessarily preclude the legislature from taxing a great amount of property according to such a method as is employed in the instant case." This is an admission that the tax is illegal and void, with a hope that the legislature may not do it again to any great extent. For if this method

of taxation may not be applied to all other property, it must be in conflict with the uniform method of the Constitution. Indeed, it is in no way possible to sustain the motor vehicle tax by a single point of law or logic. For under the plain words of the Constitution there can be no tax without an assessment.

Finally, if the state may levy a specific tax on motor vehicles or on one class of property, "to be in lieu of all other taxes, general or special," then it may in like manner levy a similar tax on any other class of property, and in that way deny to every municipality the power to levy any tax. It may virtually destroy every municipality by depriving it of any resources, collecting all its taxes and giving the same to a Commission to be used according to its discretion, *but not* in *any city or village*. As the argument shows, the specific motor vehicle tax, which the statute imposes without any assessment, is in direct conflict with all the fundamental principles of taxation, as guaranteed by the Constitution. Hence, the tax and the statute are illegal and void. That is all as clear and as certain as it is that twice two is four.

A. M. NEER, Appellant, v. STATE LIVE STOCK SANITARY BOARD, Respondent.

(168 N. W. 601.)

Federal Constitution — amendments of — state constitutions — no new rights given by — permanence of those existing guaranteed.

1. The 5th and 14th Amendments of the Federal Constitution, and their counterparts in the Constitutions of the several states, gave no new rights, but merely guaranteed the permanence of those already existing.

Due process of law — meaning of term — depends upon circumstances and constitutional provisions — preliminary court procedure — police power — of state.

2. What is, and what is not, due process of law depends upon the circumstances, and the constitutional provisions which provide for a preliminary court procedure are often held to have no application to statutes which are passed in the exercise of the so-called police power of the state

Nuisances — abatement of — summary procedure — judicial procedure — may be without — common law — constitutions.

3. Sometimes summary proceedings are necessary, and the summary abatement of nuisances without judicial procedure was well known to the common law prior to the adoption of the state and Federal Constitutions.

Nuisance — property right — none in — public weal — things harmful to.

4. There is no property right in that which is a nuisance and no right of liberty in that which is harmful to the public weal.

Private industry — state may interfere with — when public welfare requires — legislature — discretion — what interests are public — determination of — measures necessary — procedure.

5. The state may interfere with private industry whenever the public welfare demands, and in this particular a large measure of discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of these interests.

Administrative board — powers of — delegated to — by state — reasonable regulations — tests deemed necessary — may adopt — to ascertain existence of disease — law's execution — a mere procedure in.

6. The state may delegate to an administrative board the power to adopt reasonable regulations and to adopt what tests it deems necessary in order to ascertain the existence of a disease. This is not a delegation of legislative power. It merely relates to a procedure in the law's execution.

Live Stock Sanitary Board — finding or adjudication of — not conclusive upon owner — that nuisance exists — terms of statute — owner of stock — trial by jury — right of — damages preserved.

7. The finding or adjudication of a live stock sanitary board cannot generally be made conclusive upon the owner as to the fact and existence of the nuisance, or that it comes within the terms of the statute prohibiting it, so as to deny the owner the right to a trial by jury and the recovery of damages, if the property so destroyed is not, in fact, a nuisance, or does not, in fact, come within the terms of the statute. Summary proceedings, however, may be authorized by the legislature against the thing declared to be a nuisance, and such property may be destroyed without a hearing before a jury provided that the right to the action for damages remains. Due process of law is not violated by such a procedure.

Quarantine — by public board — statute — authorizing — killing of animals — nuisance — to abate — discretion of board — courts cannot interfere — in absence of fraud — or palpable mistake of fact.

8. Where a statute authorizes a public board to quarantine or kill disease-infected animals, the determination of which of the two remedies shall be adopted lies within the discretion of the board, and such discretion cannot be reviewed by the courts in the absence of fraud or palpable mistake of fact.

In all of such matters the only question in which the courts or the juries are concerned is the ultimate question whether the animal was diseased or not, or came within the provisions of the statute.

Complement fixation test — for detection of disease — dourine — live stock association — discretion of — courts will not interfere.

9. The so-called complement-fixation test for the detection of the disease known as dourine appears to meet with the approval of the scientists of both the United States and Canada; and the courts will not interfere with the discretion of the Live Stock Sanitary Board in adopting the same, and in ordering horses to be killed, which react thereto, even though it is a chemical test merely and the horses show no physical symptoms of the disease.

Live stock association — discretion of — horses infected with dourine — killed or isolated — determination of board — final as to action taken.

10. Section 2686 of the Compiled Laws of 1913 leaves it to the discretion of the Live Stock Sanitary Board whether horses which are infected with the disease known as dourine shall be killed or isolated, and the courts will not interfere with or seek to control such discretion.

Animals — destruction of diseased animals.

11. The fact that the disease known as dourine can only be communicated in the act of breeding, and that the owners of diseased mares offer to isolate the same and give bonds that they shall not be bred, do not prevent the Live Stock Sanitary Board from ordering their destruction.

On Petition for Rehearing.

Legislature — police power — may exercise — diseased animals — quarantine — destruction of — may provide for.

12. The legislature may, in the exercise of the police power, provide for the quarantine of diseased or suspected animals and for the destruction of animals actually infected with contagious diseases.

Board may quarantine animals infected — contagious or infectious — animals in fact so infected — may kill.

13. Under the laws of this state the Live Stock Sanitary Board is empowered to quarantine any domestic animal which is infected with a contagious or infectious disease, or which may have been exposed to infection therefrom; but it has no power to kill an animal unless it is in fact infected with a contagious or infectious disease.

Animals — killing or placing in quarantine — determination of question — lies with sanitary board.

14. Whether it is necessary to kill an animal infected with dourine, or whether a quarantine is sufficient, are questions to be determined by the Live Stock Sanitary Board. And it is *held* that if the mare involved in this litigation is in

fact infected with dourine, the defendant board has power to order her destruction; but if she is in fact free from contagious or infectious disease, the defendant board has no power or jurisdiction to order such destruction.

Dourine — animal suspected of being infected with — apparent good health of — lapse of time — clinical symptoms of disease not manifest — animal free from disease — probability.

15. In the case at bar where more than three years have elapsed since the defendant board ordered the mare killed, and it appears that she has been in the past and is at the present time in apparent good health, and has at no time manifested any clinical symptoms of dourine, conditions so unusual are presented as to indicate a strong probability that the mare is in fact free from such disease, and it is ordered that the case be remanded for a new trial upon the question of whether the mare is in fact infected with dourine.

Opinion filed May 4, 1918. Rehearing denied August 6, 1918.

Action to restrain the killing of a diseased horse.

Appeal from the District Court of McKenzie County, Honorable *Frank Fisk,* Judge.

Judgment for defendant. Plaintiff appeals.

Affirmed.

Burdick & Converse, for appellant.

To permit the destruction of the property here in question would amount to the taking of property without due process of law, and that the legislative act so authorizing is unconstitutional. Martin v. Tyler, 4 N. D. 278, 25 L. R. A. 838, 60 N. W. 392; Comp. Laws 1913, §§ 2687, 2688.

The board created by the selection of three experts to examine animals suspected of disease does not constitute a tribunal nor a court, in the sense that the requirements of due process of law are met. The constitutions are framed upon the principle that the courts are the guardians of the personal and property rights of the citizen. Any statute which seeks to deprive citizens of the right to look to the courts for protection is in conflict with the Constitution. 6 R. C. L. 434, 456, 460–462.

To justify an interference with the personal liberty of a man who was quarantined on account of the prevalence of smallpox, there must be a necessity for such action in his particular case. Re Smith, 146 N. Y. 68, 28 L.R.A. 820, 40 N. E. 497; Murst v. Warner, 102 Mich.

238, 26 L.R.A. 484, 60 N. W. 440; Wilson v. Alabama G. S. R. Co. 77 Miss. 714, 52 L.R.A. 357; Pierce v. Dillingham, 203 Ill. 148, 62 L.R.A. 888.

There must be an equally clear necessity to justify the invasion of one's property rights. State ex rel. Adams v. Burdge, 95 Wis. 390, 37 L.R.A. 157, 70 N. W. 347; State v. Duckworth, 5 Idaho, 642, 51 Pac. 456; Morton v. New York, 140 N. Y. 207, 22 L.R.A. 241, 95 Am. St. Rep. 199; People v. Bieseker, 169 N. Y. 53, 88 Am. St. Rep. 534, 61 N. E. 990; Lawton v. Steele, 119 N. Y. 226, 16 Am. St. Rep. 813, 819; Pierce v. Dillingham, 203 Ill. 148, 62 L.R.A. 888; Toledo Wabash & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. St. Rep. 611.

"Where rights are infringed, where sound principles are overthrown, where the general system of law is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." 2 Cranch, 390, 2 L. ed. 314.

Under the statutes in question it is immaterial that the board acted in good faith and in accordance with the law, in the destruction of supposedly diseased animals. The fact as to whether or not the animals had the disease is still open to investigation in court. Miller v. Horton, 10 L.R.A. 116; Pearson v. Zehr, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854.

Due process of law requires a hearing and full trial upon the merits. Greensboro v. Ehrenreich, 80 Ala. 579, 60 Am. Rep. 130; Kosciusco v. Slomberg, 68 Miss. 469, 12 L.R.A. 528, 9 So. 297.

William Langer, Attorney General, and *Edward B. Cox* and *George F. Shafer,* Assistant Attorneys General, for respondent.

Due process, as guaranteed by the Federal and state Constitutions and as interpreted by the courts in instances of this kind, is accorded the appellant by the laws and procedure provided in the Code. Comp. Laws 1913, §§ 2686, 2687.

That which is "due process" is necessarily dependent upon different circumstances. Sometimes summary proceedings are sufficient to meet all its requirements. The summary abatement of nuisances without judicial proceedings was well known to the common law prior to the adoption of the Constitution, and the provisions of the 14th Amendment were not intended to prevent such action. Such actions

are in the nature of a protection to the health, morals, and safety of the community. It is not necessary, in such cases, that the state make compensation. Lawton v. Steele, 152 U. S. 133; New Orleans v. N. Charouleau, 18 L.R.A.(N.S.) 368, 46 So. 911.

Defendant was not entitled to a judicial hearing before his property was condemned. If a nuisance existed, it was within the power of the board to abate it, in the manner prescribed by law. Houston v. State, 98 Wis. 481, 42 L.R.A. 39, 74 N. W. 111; Bittenhaus v. Johnston, 92 Wis. 596, 32 L.R.A. 380; Mugler v. Kansas, 123 U. S. 623; Kidd v. Pearson, 128 U. S. 1.

"The constitutional provisions declaring that property shall not be taken without due process of law have no application to statutes enacted in the exercise of the police power." Comp. Laws 1913, § 2687; Deems v. Baltimore, 80 Md. 164, 26 L.R.A. 541; People v. Vandecarr, 175 N. Y. 440, 67 N. E. 913, affirmed in 199 U. S. 352; State ex rel. Dakota Trust Co. v. Stutsman, 24 N. D. 80, 6 Dak. 501; 3 C. J. 51 and note 87; 6 R. C. L. 174, 175, 448, 454.

In taking lawful steps to prevent the spreading of an infectious or contagious disease, among live stock, the Sanitary Board exercises its own discretion, and the courts have no voice in or control over such matter. Courts cannot substitute their judgment for that of such board unless it be made to clearly appear that the board arbitrarily exceeded its authority or abused its discretion. State ex rel. Dak. Trust Co. v. Stutsman, 24 N. D. 80; Shipman v. Live Stock Sanitary Commission (Mich.) 73 N. W. 817; Maynard v. Freeman, 27 L.R.A.(N.S.) 1188 and note (Tex.) 60 S. W. 334; Lewis v. Shelby Co. (Tenn.) 43 L.R.A.(N.S.) 1076 and note; 22 Cyc. 404, 405, 23 L.R.A. 1188 and note.

The courts recognize the validity of statutes empowering boards of health and other governmental agencies to make use of scientific methods or tests in determining the presence of dangerous and infectious diseases, when such methods or tests have disclosed the fact that the disease was present in an animal, even though the symptoms thereof were not otherwise determined or open and apparent to the naked eye. Adams v. Milwaukee (Wis.) 129 N. W. 518; 43 L.R.A.(N.S.) 1067 and note; State v. Nelson, 34 L.R.A. 318, 68 N. W. 1066; New Orleans v. Charouleau, 18 L.R.A.(N.S.) 368, 46 So. 911.

BRUCE, Ch. J. This is an appeal from an order dissolving a temporary restraining order, and from a judgment dismissing the action. The plaintiff sought to permanently restrain the State Live Stock Sanitary Board from destroying a certain mare, which the said board had determined to be "infected with a dangerous, contagious, and infectious disease known as dourine."

The statutes [Comp. Laws 1913] under which the board acted are as follows:

"Section 2678: A board is hereby established to be known as the 'State Live Stock Sanitary Board.' This board shall consist of five members to be appointed by the governor. . . . Each member of said board shall be a qualified elector of the state of North Dakota. Three members of said board shall be persons who are financially interested in the breeding and maintenance of live stock in the state of North Dakota and the other two members of said board shall be competent veterinarians who are graduates of some regularly organized and recognized veterinary college or university."

"Section 2686. Authority is hereby given to said State Live Stock Sanitary Board to take all steps it may deem necessary to control, suppress and eradicate any and all contagious and infectious diseases among any of the domestic animals of the state, and to that end said board is hereby empowered to quarantine any domestic animal which is infected with any such disease or which has been exposed to infection therefrom, and to kill any animal so infected; to regulate or prohibit the arrival in or departure from the state, or any portion of the state, of any such exposed or infected animal, and at the cost of the owner thereof to detain any domestic animal found in violation of any such regulation or prohibition."

"Section 2687. Whenever a domestic animal has been adjudged to be affected with a contagious or infectious disease and has been ordered killed by said State Live Stock Sanitary Board or by an accredited agent thereof, the owner or keeper of said animal shall be notified thereof, and within twenty-four hours thereafter its owner or keeper may file a protest against the killing thereof with said board or its accredited agent who has ordered such animal killed. Such notice shall state under oath that to the best of the knowledge and belief of the person making such protest, such animal is not infected

with any contagious or infectious disease; whereupon an examination of the animal involved shall be made by three experts, one of said experts to be appointed by said State Live Stock Sanitary Board, one to be appointed by the person making such protest and the two thus appointed to choose a third, but all experts shall be persons learned in veterinary medicine and surgery and graduates of a regularly organized and recognized veterinary college."

"Section 2688. In case all three experts or any two of them declare that such animal is free from any contagious or infectious disease, then the expense of the consultation shall be paid by the State Live Stock Sanitary Board out of the funds appropriated for the carrying into effect of this act [§ 2696], and in case the three experts or any two of them declare the animal to be affected with a contagious or infectious disease then the expenses incurred in the consultation shall be paid by the person making the protest, and said expenses may be collected the same as in case of appeal in civil action."

The board also acted under the following rules and regulations which had been regularly adopted by it.

"The State Live Stock Sanitary Board having determined that dourine existing in horses in this state can only be eradicated by adopting rigid measures, therefore by authority granted in §§ 2 and 9 of chapter 169, Sess. Laws 1907, the following regulations for the eradication of dourine are hereby established.

"Section 1. Any owner or person in charge of any mares, stallions, or jackasses, shall when ordered by an unauthorized agent of the Live Stock Sanitary Board, round up or gather and submit said animals to such inspection as the agent of the Live Stock Sanitary Board shall direct, or be subjected to arrest, as provided for in § 15, chapter 169, Sess. Laws 1907.

"Section 2. Whenever it has been determined by the application of the complement fixation test that any mare, stallion, jack or gelding is infected with dourine said infected animal shall be appraised by the agent of the Live Stock Sanitary Board as hereinafter provided, and said animal shall be immediately destroyed.

"Section 3. The value of any stallion, jack, mare or gelding, infected with dourine shall be determined by the actual market selling price, and the appraisement made accordingly.

"Section 4. Owners will be indemnified for animals destroyed on account of being infected with dourine as hereinafter provided.

"Section 5. The United States Department of Agriculture will pay one half the indemnity on mares, grade stallions, jacks and geldings destroyed for dourine, and the state will assume the payment of one half the indemnity subject to an appropriation being created by the next legislature to provide for said indemnity provided in no instance shall the full indemnity to be paid on said animals exceed $100. Provided in the instance of pure bred registered stallions and mares as determined by pedigree of registration in a recognized horse registry association, the maximum indemnity shall be $150. The state shall assume the payment of one half of said maximum indemnity as hereinbefore provided and the United States Department of Agriculture will pay the balance."

The trial court found the following facts:

1. Plaintiff is the owner of a certain mare which the defendant board has ordered destroyed on account of being infected, as the defendant board claims, with dourine.

2. The defendants acted and are acting pursuant to rules adopted by the State Live Stock Board, which provide that animals infected with dourine shall be destroyed.

3. In the administration of the law, the defendant board has elected that its agents shall base their diagnosis, as to dourine, upon the complement fixation test, that is to say, even if an animal exhibits symptoms of dourine they do not destroy it unless it reacts positively to this test. On the other hand, if it has no symptoms of dourine at all they, nevertheless, order it destroyed if it shows a positive reaction to this test.

4. The defendant board and its agents have in all things acted in strict compliance with rules regularly adopted by the State Live Stock Sanitary Board.

5. Dourine is an infectious disease caused by a miscrosopic germ which exists in the blood of the diseased animals.

6. The complement fixation test is a blood test conducted by sending blood from the animal to be tested, to the Bureau of Animal Industry of the Department of Agriculture at Washington, where the test is performed by a man in the employ of the United States govern-

ment. It is not a bacteriological test, but is a chemical test. That is to say, the experts do not examine the blood under a microscope to discover the germ which causes dourine, which is very difficult to find, but subject it to a chemical test which is extremely technical, so technical that it is impossible for a layman to understand it and the ordinary veterinarian makes no pretense of understanding it. It was not shown to have been performed by more than one man in the United States.

7. The blood is taken from the animal to be tested, and prepared by the field veterinarians before it is sent to Washington. If the Bureau at Washington reports a positive reaction, the animal is ordered killed.

8. The disease of dourine has been known to the veterinary profession for many years, but the Complement Fixation Test is a new device which has not been used in the United States until the present campaign of eradication was begun in 1914 and 1915. It is also used in Canada.

9. The animals thus slaughtered frequently show no symptoms of the disease either while alive or upon post mortem examination.

10. Dourine is primarily a disease of the genital organs. It is not extremely contagious, being communicated only by actual contact and only through the act of breeding. Even breeding does not always result in communicating the disease. It is not hereditary.

11. After being infected, an animal usually develops symptoms of the disease in from three weeks to six months, the disease usually terminating fatally in from six months to two years. The disease is incurable.

12. The symptoms, when they develop, are to the physician plainly discernible to the naked eye. There are eruptions and ulcerations of the affected membranes, followed, as the disease progresses, by a constitutional breakdown, the animal becoming emaciated and the hind legs paralyzed, this condition being followed by death.

13. The mare in question is a valuable work animal worth about $250. So far as can be discerned by an examination by a veterinary surgeon, she is entirely sound and free from disease. This has been her condition at all times since she was ordered destroyed in the spring or summer of 1915. The blood test was made in the spring or

summer of 1915, at which time the Bureau at Washington reported a positive reaction. She has not been bred since the spring of 1915, and, so far as can be learned, she has never been bred to a diseased stallion. She, nevertheless, was apparently entirely sound in the winter of 1917.

14. The plaintiff did not avail himself of the statute providing for examination by a board of three experts.

15. The owner is a farmer and is keeping the mare under farm conditions, where he has complete control of her, and not permitting her to run with other horses, as would be the case under range conditions.

16. Former outbreaks of the disease in other parts of the United States have been readily stamped out under farm conditions without the slaughtering of animals not showing clinical symptoms of the disease.

17. In the opinion of the trial court, in view of the apparent healthfulness of the mare so long after the test was made, and in view of the fact that symptoms ordinarily develop soon after infection, it is very doubtful whether the mare in question is infected with dourine or ever has been, and the court therefore neither finds that the mare is or is not infected with dourine.

18. The plaintiff offers to observe quarantine regulations if imposed, and agrees to furnish a satisfactory bond conditioned that the mare in question shall not be bred.

19. In the opinion of the trial court, the public can effectively be protected by suitable quarantine regulations, and the court therefore finds that, until the mare in question develops clinical symptoms of dourine, it is not necessary, for the protection of the public, that she be slaughtered, and her slaughter would therefore constitute an unnecessary and unwarranted invasion of plaintiff's property rights.

In spite of the finding, however, that in his opinion the public could be effectively protected by suitable quarantine regulations, and that the mare in question had shown no clinical symptoms of the disease, the learned trial judge dissolved the injunction on the grounds that:

"1. The legislature has invested the State Live Stock Sanitary Board with full power to determine what infectious diseases are such

as to require that animals affected with such disease shall be destroyed in order to protect the public.

"2. The legislature has invested the State Live Stock Sanitary Board with full power to determine what test shall be applied in determining whether a particular animal is infected with an infectious disease."

"3. The courts have no power to interfere with the discretion which the legislature has conferred upon the State Live Stock Sanitary Board."

He also held that the only provision for a review of the board's determination is to be found in § 2687 of the Compiled Laws of 1913, which provides for a protest and an examination by three experts, and that since plaintiff had not demanded such a review he was controlled by the determination of the board, and could not afterwards dispute it.

The plaintiff, on the other hand, contends that, since the mares are now, from all appearances, in a healthy and sound condition, and the disease can only be communicated by breeding, to permit their destruction would be taking property without due process of law, and in conflict with the 14th Amendment to the Constitution of the United States, and also in conflict with the following provisions of article 1 of the Declaration of Rights:

Sec. 14, art. 1 of Declaration of Rights: "Private property shall not be taken or damaged for public use without just compensation having first been made to or paid into court."

Sec. 22, art. 1: "All courts shall be open, and every man for any injury done him in his lands, goods, person, or reputation shall have remedy by due process of law and right, etc."

On the first proposition he contends that §§ 2687 and 2688, which provide for an appeal to a board of experts, do not establish a tribunal the proceedings of which can be classed as due process of law. He contends that the three experts provided for are not elective officers nor are they appointive officers provided for by the Constitution. One of them, he states, is chosen by the two already selected. He cites Ruling Case Law to the effect that "the general rule that due process of law implies a hearing before condemnation or the reaching of a judgment through what is ordinarily understood to be judicial process,

is subject to an exception only in extreme cases or emergencies, as when the preservation and repose of society or the protection of the property rights of a large class of the community absolutely require a departure from the usual course of procedure." See 6 R. C. L. 457.

We think there is no merit in either of counsel's contentions. We have no particular fault to find with his statement of general legal principles, unless the word "absolute" is too comprehensive. The question, however, is whether or not the rights of the community reasonably require a departure from the usual course of procedure, and who is to be the judge as to the necessity of that departure. The question also may be considered, though the matter would not strictly be involved if the failure to appeal to the board of experts is controlling, whether the adoption of the so-called Complement Fixation Test was a purely arbitrary and unreasonable procedure on the part of the board so that such test cannot be made conclusive and generally applicable.

What is, and what is not, due process, depends upon the circumstances; and the constitutional provisions which provide for a preliminary court procedure are often held to have no application to statutes which are passed in the exercise of the so-called police power of the state. Sometimes summary proceedings are necessary, and the summary abatement of nuisances without judicial procedure was well known to the common law prior to the adoption of the state and Federal Constitutions. It has been repeatedly stated and held that neither the 5th nor 14th Amendments to the Federal Constitution, nor their counterparts in the constitutions of the several states, gave any new rights, but that they merely guaranteed the permanence of those already existing. It cannot, therefore, be supposed that the provisions referred to were intended to prevent the summary destruction of property which was a nuisance or liable to become a nuisance.

The case is not one of taking property for a public use, but of destroying a nuisance or of preventing one from using his personal and property rights in a manner injurious to the public welfare.

There is no property right in that which is a nuisance, and there is no right of liberty in that which is harmful to the public weal.

Neither the 14th Amendment to the Federal Constitution nor any provision of the Constitution of North Dakota "was designed to interfere with the power of the state, sometimes termed its police power, to

prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Bittenhaus v. Johnston, 92 Wis. 596, 32 L.R.A. 380, 66 N. W. 805; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

It is everywhere conceded that the state may interfere with private industry wherever the public welfare demands, and that in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of these interests. Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Bittenhaus v. Johnston, 92 Wis. 596, 32 L.R.A. 380, 66 N. W. 805; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924.

There can be no question that the disease of dourine is one which needs to be guarded against. At any rate, there can be no question that the legislative provisions in relation thereto were adopted for the purpose of protecting and promoting the industries of the state.

Nor can there be any question that the legislature had the power to delegate to the Live Stock Sanitary Board the power to adopt reasonable regulations and to adopt what tests it deemed necessary. This is not a delegation of legislative power. It merely commits "to a body of learned and scientific experts the duty of preparing such rules and prescribing such tests as may from time to time in the enforcement of the law be found necessary. . . . It merely relates to a procedure in the law's execution." Thornton, Pure Food & Drugs, § 13; Isenhour v. State, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40; State ex rel. Gaulke v. Turner, supra.

Nor was there a denial of due process of law. Due process of law, as we have before pointed out, does not everywhere involve a trial by jury nor in a regularly established court. There was an opportunity to be heard before the Sanitary Board and before the board of experts provided for by §§ 2687 and 2688.

"While under ordinary circumstances the constitutional guaranty as to due process of law implies a formal judicial proceeding, it is

nevertheless well settled that this does not invariably require such a proceeding, and accordingly questions may arise which may be best determined otherwise than by ordinary process of judicial investigation without violating the constitutional provision as to due process of law." 6 R. C. L. § 454; Deems v. Baltimore, 80 Md. 164, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; People ex rel. Lieberman v. Vandecarr, 175 N. Y. 440, 108 Am. St. Rep. 781, 67 N. E. 913, affirmed in 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; State ex rel. Dakota Trust Co. v. Stutsman, 24 N. D. 80, 139 N. W. 83, Ann. Cas. 1914D, 776.

It would be absurd, too, to contend that this power was vested in persons ignorant or uninterested in the stock raising industry. The statute expressly provides that three members of the Sanitary Board shall be persons who are financially interested in the breeding and maintenance of live stock, and that the other two shall be competent veterinarians; and as far as the board of experts is concerned, the statute also provides that they "shall be persons learned in veterinary, medicine, and surgery," one of whom "shall be appointed by petitioner, one by the Sanitary Board, and the other shall be elected by the two already chosen."

We realize that it seems to be generally held by the courts that the question whether the property sought to be destroyed is infected with the disease, and therefore comes within the provision of the law providing for its destruction, is ultimately a question of fact, and that due process of law requires the ultimate submission of this question of fact to a jury. See 1 R. C. L. 1159; note in 26 L.R.A. 638; Miller v. Horton, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; Newark & S. O. Horse Car R. Co. v. Hunt, 50 N. J. L. 308, 12 Atl. 697; Parker & W. Public Health & Safety, § 167, p. 183; Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 103; note in 43 L.R.A.(N.S.) p. 1076.

All that the Constitutions provide, however, is that no person shall be deprived of life, liberty, or property without due process of law, and that no property shall be taken for a public use without compensation. It is clear that, if the property is in fact a nuisance, it is not taken for a public use and to that extent it is not property at all. It is also clear that in the case of contagious diseases, which may be dis-

astrous in their consequences if not summarily rooted out, due process of law is afforded, if there is an ultimate appeal to the courts on the question of damages and if the property, in fact, is not a nuisance. There is a wide difference, however, between the right to summarily destroy and the right to destroy without liability to damages in case the property does not come within the prohibition of the statute. There is a wide distinction between a suit for an injunction to restrain the destruction of an animal for being diseased, and a suit for damages; and, even if the defendants are entitled to a jury or other trial before their right to damages can be taken away, it must certainly be the law that they must first take the steps necessary thereto, and must in the case at bar have submitted the controversy to the board of experts, which was provided by law.

Much more must this be the case where an injunction is sought to prevent the destruction. The legislature evidently realized that, in the case of dourine, summary action was often necessary. This was evidenced by the fact that they not only gave to the board the power to destroy, but gave a limited time in which an appeal could be taken to the board of experts. There can be no question of the power of the legislature to pass such statutes and to summarily order the destruction of nuisances, in the discretion of the Sanitary Board after a hearing and an appeal to the board of experts, if demanded, and though leaving to the owner the right to damages and to a resort to the courts for relief, if in fact the property is not a nuisance and its destruction is not necessary, to leave this as his only method of relief and to condition it on first appearing before the board of experts.

Any other rule would render all health and sanitary laws absolutely inoperative, and leave all boards of health powerless to prevent the spread of contagious diseases.

In the case of New Orleans v. Charouleau, 121 La. 890, 18 L.R.A. (N.S.) 368, 126 Am. St. Rep. 332, 46 So. 911, 15 Ann. Cas. 46, the court said: "Defendant next argues that he must be afforded a judicial hearing before his property can be condemned. Here, again, the question is more one of fact than of law. Would it be practical in a large city to institute a judicial inquiry in the case of every diseased cow in every dairy? Impure food, decayed fish, meats, and vegetables, are subjected to the doom of the inspector, without appeal. We see no

reason why, in a large city, the same should not be done with dairy cows which, by a test recognized to be practically infallible, are found to be a serious menace to the public health."

In the case of United States v. Ju Toy, 198 U. S. 258, 49 L. ed. 1042, 25 Sup. Ct. Rep. 644, the court held that "due process of law is not infringed by the provision of the Act of August 18, 1894 (28 Stat. at L. 372, 390, chap. 301, Comp. Stat. § 4325), § 1, making the decision of the appropriate department on the right of a person of Chinese descent to enter the United States conclusive on the Federal courts in habeas corpus proceedings in the absence of any abuse of authority, even where citizenship is the ground on which the right of entry is claimed." In § 167 of Parker & Worthington on Public Health and Safety, we also find the following: "The finding or adjudication of any municipal authorities or local board of health will be no protection, if made *ex parte,* without notice to the party charged with the nuisance, and opportunity afforded him to be heard; and if the statute attempts to make such finding or adjudication final and conclusive against the party, it will be unconstitutional, unless it has secured to him such right of appeal, or such right to a hearing before judgment passes against him, or such right to a revision of the findings by a jury in the ordinary judicial tribunals, as will constitute what is recognized as 'due process of law.' But it can never be necessary to construe the statute in a way that will render it unconstitutional for denying the right to a hearing or to a trial by jury; if it authorizes summary proceedings, without notice, against the thing declared to be a nuisance, the hearing and the trial, upon all the facts, may be had in an action subsequently brought by the owner for alleged trespass."

The rule, if rule it be, that members of a sanitary board or board of health are liable in damages if they destroy that which in fact is not a nuisance or that which in fact does not come within the terms of the statute, is exceedingly drastic, and if pushed to its limit would result in making such boards neglectful of their duty for fear of monetary consequences. Having such a possible responsibility and being subject to such a possible liability, a statute surely is not unreasonable or unconstitutional which provides in all cases for a speedy submission to a board of experts, so that the members of the Live Stock

Sanitary Board may have the speedy means of determining the facts in the case, and may know if they may safely proceed. It surely affords an opportunity to the owner of the stock to be heard, and the contention of my brother Robinson that such a hearing would be useless as the members of the board of experts, would be corrupt; and that there is only one person in Washington who is acquainted with the Complement Fixation Test is, of course, not merely unjudicial, but absurd. The only finding in the case by the trial judge is that it was not shown that anyone but the chemist in Washington was capable of making the test. We know, however, that it is a test which is generally used in Canada, and we do know that there are tens of thousands of capable chemists in the United States. The board of experts also could apply any test they chose, and were not even controlled by the Complement Fixation Test, which had been adopted merely by the board. They could have sent samples of the blood not merely to Washington, but to Canada, and to chemists throughout the United States. The fact that only a few men are in the business of making such tests does not in any way prove that there are not thousands of chemists who could make it. As we said before, the experts were not even bound by that test.

The statute which provides for the board of experts is surely a reasonable one. It furnishes a preliminary procedure for the protection of both parties, and surely no right of recovery should exist where the defendant choses not to resort to this remedy. The statute, indeed, is not different from those which require notice to a municipality before a suit of damages may be brought, or notice to a railroad company in the case of injury to stock which has been transported, so that a proper investigation may be had. These statutes have been everywhere upheld.

As far, too, as the efficacy of the Complement Fixation Test is concerned, we do not feel that this court has any right to interfere with the determination of the board. This determination was clearly not arbitrary. It is the test now generally recognized by the scientific world, and both in Canada and the United States; and, with our limited knowledge, we are not prepared to controvert the findings and conclusions of the scientific world. See "Diagnosis of Dourine by Complement Fixation," by John R. Mohler, Adolph Ericborn, and John

M. Buck of the Pathological Division of the United States Bureau of Animal Industry, vol. 1, No. 2, Journal of Agriculture Research; Report of the Veterinary Director General of Canada for year ending March 31, 1914.

It may also be noticed that the finding of the trial court, though expressing the opinion that the slaughter of the horses was unnecessary and that quarantine would furnish a sufficient protection to the public, nowhere held that the horses were not, in fact, diseased. Whether destruction as opposed to quarantine was the proper remedy was, however, and subject to an appeal to the board of experts, left by the legislature to the Live Stock Sanitary Board to determine. Neither the trial court nor this court has any right to interfere with that discretion. As far, too, as the existence of the disease is concerned, it is well established that where one fails to appear before such a board, the judgment of the board will be conclusive upon it. It is also as equally clear that where an appeal to a board of experts is provided and he refuses to take it, he waives the appeal and the right to question the judgment of the first board. Parker & W. Public Health & Safety, § 174.

Generally speaking, and in all of such matters, the only question in which the courts or the juries are concerned is the ultimate question whether the animal was diseased or not; that is to say, whether the board acted outside of its jurisdiction or outside of the statute. There are no such findings. We have no satisfactory proof that such is the case, and the board of experts has not been appealed to. The finding of the board, therefore, must be conclusive upon us. Parker & W. Public Health & Safety, § 168; Metropolitan Bd. of Health v. Heister, 37 N. Y. 661; Van Wormer v. Albany, 15 Wend. 262; 18 Wend. 169; Reynolds v. Schultz, 34 How. Pr. 147, 156.

In the case of State v. Nelson, 66 Minn. 166, 34 L.R.A. 318, 61 Am. St. Rep. 399, 68 N. W. 1066, in upholding an ordinance requiring a license to sell milk within the city, and fixing as a condition precedent to obtaining a license that the cattle from which milk is obtained must be inspected by the city veterinarian, and providing that, "for the purpose of detecting . . . tuberculosis or any other contagious or infectious disease . . . the said veterinarian . . . in making such inspection, is hereby authorized to use what is known

as the 'tuberculin test' as a diagnostic agency for the detection of tuberculosis in such animal," the court said: "The objection is urged that the ordinance is oppressive and unreasonable in that it requires every dairy herd whose milk is desired to be sold within the city to be subjected to the 'tuberculin test,' which it is claimed is uncertain in its results and deleterious to the health of the animals. At the present stage of scientific research on this subject, it may be a debatable question whether this test has been fully proven, or how far it is as yet merely experimental. There is ample evidence in this case that it is now the generally accepted theory that the presence of consumption or tuberculosis in animals can be detected by this test, also that this is what is called a 'germ disease,' which may be contracted by eating the flesh or drinking the milk of a tuberculous animal. Upon the evidence we could not say that this provision of the ordinance is oppressive or that it has not a reasonable tendency to prevent the sale of unwholesome milk within the city."

Nor do we feel authorized to interfere with the discretion of the board in requiring all horses which react to the chemical Complement Fixation Test to be destroyed even though they exhibit no physical symptoms of the disease. In the first place an appeal to a board of experts was provided by the statute, and no appeal was taken; in the second, the opinion of the scientific world appears to be that such a course is necessary, and the statute expressly gives to the board the power "to take all steps it may deem necessary to control, suppress, and eradicate any and all contagious and infectious diseases among any of the domestic animals of the state, and to that end said board is hereby empowered to quarantine any domestic animal which is infected with any such disease, or which has been exposed to infection therefrom, and *to kill any animal so infected.*"

This statute clearly left it to the discretion of the board subject to appeal to the board of experts on the question of the existence of the disease, to determine whether the animals should be killed or quarantined, and that killing was contemplated in the case of dourine is also clearly evidenced by the appropriations made by chapter 29 of the Laws of 1915 for the "glandered horse and dourine fund," and by §§ 2, 3, and 5 of chapter 164 of the Laws of 1915, which provide that:

2. "All moneys now in or hereafter deposited in the glandered horse

fund shall be placed in the glanders and dourine horse fund and shall be preserved inviolate for the payment of claims for indemnity allowed for animals destroyed for either glanders or dourine.

3. "Whenever the State Live Stock Sanitary Board, or its authorized agent shall deem the slaughter of a stallion, gelding, mare or jackass necessary for being infected with dourine, the value of such animals shall be determined by the actual market selling-price and the appraisement made accordingly by an agent of the State Live Stock Sanitary Board. Provided, that the maximum appraisement for any grade stallion, gelding, mare or jackass shall be one hundred ($100) dollars, and the maximum appraisement for any purebred registered stallion, mare or jackass shall be one hundred fifty ($150) dollars. Provided, that the indemnity paid by the state shall be a sum equal to the indemnity paid in each case by the Federal government."

5. "When the animal or animals at the time of their destruction have been in the state less than six months."

Nor is there any merit in the contention that horses so infected may be quarantined or isolated and a bond given that they shall not be used in breeding; and that, since breeding is the only means of communicating the disease, the destruction of the animal is unnecessary. This method would leave the prevention of the spread of the disease largely to the care and honesty of the owners, and the straying and misuse of the horses and their sale or exchange to others, who were ignorant of their condition or careless and dishonest, could only be prevented by the employment of a large force of inspectors.

The disease, indeed, spreads so rapidly and is so disastrous in its consequences that the experience of the past has shown that the most drastic measures must be taken.

The judgment of the District Court is affirmed.

CHRISTIANSON, J. (concurring specially). In 1884 Congress created the Bureau of Animal Industry. 23 Stat. at L. 31, chap. 60, Comp. Stat. § 850, 1 Fed. Stat. Anno. 2d ed. p. 406. "Three distinct subjects are embraced by that act. One is the ascertainment through the Agricultural Department of the condition of the domestic animals of the United States, the causes of contagious, infectious or communicable diseases affecting them, the best methods for treating, transport-

ing and caring for animals, *the means to be adopted for the suppression and extirpation of such diseases,* . . . and to collect such information on those subjects as will be valuable to the agricultural and commercial interests of the country." Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506. The act made it the duty of the Commissioner of Agriculture (this was subsequently made to apply to the Secretary of Agriculture) to prepare such rules and regulations as he might "deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each state and territory, and invite said authorities to co-operate in the execution and enforcement of the act." The act further authorized the Commissioner of Agriculture, on the acceptance of his plans and methods for the suppression and extirpation of such contagious, infectious, or communicable diseases by any state or territory wherein any such disease was declared to exist, or on the acceptance by him of plans adopted by any such state or territory, to expend so much of the moneys appropriated by the act as might be necessary to prevent the spread of the disease from one state or territory into another. Congress has consistently adhered to the legislative policy announced in and put into effect by the act referred to. And during the course of time it has recognized the importance of the work performed by the Bureau of Animal Industry. In 1902 Congress authorized the Secretary of the Interior to establish a laboratory for the Bureau of Animal Industry, and appropriated the necessary moneys for the purpose. See Agricultural Appropriations, June 3, 1902, chap. 985, 32 Stat. at L. 290.

Following the example set by Congress, the different states and territories enacted legislation relating to the subject. The legislature of the territory of Dakota in 1887 enacted a law entitled "An Act to Suppress and Prevent the Spread of Contagious and Infectious Diseases in Animals." Laws 1887, chap. 32. The act authorized the appointment by the governor of an officer to be known as the "veterinary surgeon," and made it the duty of such state veterinary surgeon to investigate any and all cases of contagious or infectious diseases, among the animals of the territory, of which he had knowledge or which was brought to his attention; to establish quarantine of infected

premises, and in case of epidemic diseases to order the slaughter of any and all diseased animals upon the premises and of all animals that had been exposed to contagion or infection.

This legislation was in force when our state Constitution was framed and adopted. Some of the members of the legislative body which enacted it were also members of the constitutional convention and of the first legislative assembly of the state, which legislative assembly enacted legislation quite similar to the territorial enactment. Laws 1890, chap. 185. And while the matter has been considered by many of the subsequent legislative assemblies, the main purpose announced in the original enactment has been constantly and consistently adhered to. In 1907 the North Dakota legislature created the Live Stock Sanitary Board and thereby abolished the former statutes relating to district veterinarians. The statutory provisions relative to the Live Stock Sanitary Board are fully set forth in the opinion written by Chief Justice Bruce. See Laws 1907, chap. 169.

I am not informed as to what time dourine became recognized by the Bureau of Animal Industry as a disease requiring suppression or extirpation. But by the rules and regulations adopted (to become operative April 15, 1907), the bureau specifically provided for the condemnation and destruction of all horses and asses affected with the disease, and offered a reward of $25 for authentic information leading to ownership and location of a female animal affected with the disease. (See Regulations Nos. 38 to 41 inc., B. A. I., Order No. 143, issued by the Secretary of Agriculture.) In Regulation 39 it is provided that if stallions or jacks are allowed to run at large in an area quarantined by the Secretary of Agriculture for dourine, or if there is any breeding of horses or asses in a herd in an area quarantined by the Secretary of Agriculture for dourine in which there is a horse or ass which has been exposed to the infection of dourine within eighteen months after said exposure, a rule will be issued forbidding absolutely the interstate movement of any horses or asses from said area. B. A. I. Order No. 210, issued by the Secretary of Agriculture on June 18, 1914, provides that "when it is necessary in order to prevent the spread of the disease and to aid in its extermination, and an appropriation is available therefor, the Department of Agriculture

will co-operate with the various states in the purchase of diseased animals in the following manner:

"(a) The fact of infection with this disease shall be determined by the Complement Fixation Test applied in the laboratory of the Bureau of Animal Industry.

"(b) The animal shall be appraised at its actual value by an inspector of the Bureau of Animal Industry and the state veterinarian or an assistant state veterinarian of the state in which the animal is located, or, when provided by state law, assessed value as shown by the assessor's books will be accepted in lieu of appraisal.

"(c) The department will pay one half the appraised or assessed value, provided such share shall in no case exceed $100 and the owner signs an agreement to accept such sum as compensation in full for the discharge of all claims he may have against the United States Department of Agriculture on account of the destruction of the animal in question." See § 3, Regulation 6, B. A. I. Order 210. These regulations speak for themselves.

The Complement Fixation Test has been utilized by the Bureau of Animal Industry and the defendant board in diagnosis of dourine for some years. It has also been adopted and utilized for some time by the Department of Agriculture of the Dominion of Canada. See Report of the Veterinary Director General of Canada for 1914. That this test is deemed the best, and in fact an infallible, method of diagnosis by these different boards and by veterinarians in general, is not denied. That the mare involved in this litigation was properly subjected to this test and found thereby to be affected with dourine is undisputed. That dourine is an incurable disease is conceded.

The authority of the legislature to enact laws for the protection of domestic animals, and to prevent the spread of infectious or contagious diseases among them, is everywhere recognized as a valid exercise of the police power of the state. 3 C. J. p. 50, § 145. It is well settled that under such police power the state may confer authority on designated officers or specially created commissions to destroy animals affected with contagious or infectious diseases (3 C. J. p. 54, § 151), and also confer upon such officers or commissions authority to execute the law and to adopt reasonable needful regulations to that end. 3 C. J. p. 51, § 147.

Whether the judgment of the officers or boards as to the diseased condition of a condemned animal is conclusive, is a question upon which the courts have differed. Some courts hold that such judgment is conclusive. 3 C. J. p. 54. Other courts have held that the *ex parte* decisions of such officers or boards for the destruction of an animal is not conclusive upon the question that the animal was diseased. Miller v. Horton, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; Pearson v. Zehr, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854; Asbell v. Edwards, 63 Kan. 610, 66 Pac. 641; Crane v. State, 5 Okla. Crim. Rep. 560, 115 Pac. 622; Richter v. State, 16 Wyo. 437, 95 Pac. 51.

These latter cases are based upon the theory that, while the legislature has the power to declare domestic animals affected with certain contagious or infectious diseases to be nuisances and order their summary destruction, even without compensation, it has no power to declare all domestic animals, those free from disease as well as those diseased or exposed, to be nuisances and order their summary destruction without compensation to the owners. It is therefore concluded that inasmuch as the legislature cannot itself order the destruction of domestic animals unless they are actually affected with, or have been exposed to, a contagious or infectious disease so as to constitute an actual or potential menace to the health of other domestic animals or to human beings, it cannot authorize officers or commissions to do so; that the jurisdiction and power of such officers or boards to destroy is limited to animals of the latter class: and that when they order the destruction of animals free from, or not carriers of, disease, they exceed their powers and act outside of their jurisdiction.

The question referred to is one of great importance. But in my opinion it is not necessarily involved in this case, and I therefore express no opinion thereon. Neither do I express any opinion as to whether the members of the defendant board would be liable personally for damages resulting from an error of judgment on their part in condemning and destroying animals free from disease. For even though the findings of the board are not conclusive, they are nevertheless presumed to be correct and must be so accepted, unless it is shown that they are erroneous or fraudulent or collusive, or that the board acted outside, or in excess, of the power conferred upon it by the statute.

It is undisputed that the defendant board proceeded in all things in accordance with the rules and regulations established by it under the statute, and in accordance with the regulations and practices of the Bureau of Animal Industry. The findings that the mare is affected with dourine was based primarily upon the blood test—the Complement Fixation Test—made in the laboratory of the Bureau of Animal Industry at Washington. The test, as already stated, is the one adopted by that bureau and by a similar board in the Dominion of Canada for the diagnosis of dourine. The test is recognized by these governmental agencies and by veterinarians in general as the surest and most infallible method of diagnosis. It has not been shown in this case that the diagnosis was erroneous, or that the findings of the defendant board were incorrect. While it appears that the mare was in an apparently healthy condition and exhibited no clinical symptoms of the disease, this does not necessarily prove that she was free from dourine. Apparently, the disease may exist in an animal which has all appearance of being in perfect health. It would appear from the rules of the Bureau of Animal Industry hereinabove set forth, that an animal may be affected with the disease for a considerable length of time before any clinical symptoms appear. It is possible that in this case a quarantine regulation might have been established and the owner permitted to use the animal for some time. This was, however, primarily a question for the defendant board; and even conceding that power exists in the courts to review the findings and determinations of the board, both as to the diseased condition of animals ordered to be destroyed and the necessity for their destruction, clearly the board's determination should not be interfered with, unless shown to be erroneous or unreasonable. And in view of the conceded incurable and virulent character of the disease, and the necessity to destroy the animals affected therewith, as recognized by the Federal and Canadian authorities, I am not prepared to say that the order of the defendant board was so unreasonable or arbitrary as to justify judicial interference, even conceding that the courts have the power to review the findings and determinations of the board. On the contrary, the action of the defendant board seems to be in harmony with the regulations adopted and the practices established by the Federal Bureau of Ani-

mal Industry and the Canadian authorities in dealing with, and in attempting to extirpate and suppress, dourine.

ROBINSON, J. (dissenting). This case relates to the right and power of the Sanitary Board to kill two splendid work horses on a mere suspicion that the animals are affected with the disease of dourine. It also relates to the right and duty of the courts to protect personal property against needless destruction. To sustain the killing and deny the right of the courts to interfere, a long opinion has been written. It is said: "The courts cannot review the discretion of the Live Stock Sanitary Board in ordering the mares to be killed under the provisions of the statute." If that is true then the board may order the killing of every horse in the state, and the courts are powerless to restrain them. If the courts may not review the orders of a sanitary board in ordering a horse to be killed, then the board must have absolute power to order the killing of all the horses in the state.

It is said: "There is no property in that which is a nuisance." If that is true, still a party may not be deprived of his property by calling it a nuisance. The proof that it is a nuisance must be clear and satisfactory. It is said the board has adopted a test of dourine which is approved by scientific men in the United States and in Canada. But that is not true. The test adopted is new and it is not known to science. If it were known and approved by such scientific men as Professor Ladd it would not be necessary to doctor the blood of the animals and to send it to a bureau in Washington for a supposed chemical test known to only one man in the United States.

There is only a mere suspicion that the mares are affected with any disease and there is good reason to believe that the suspicion is ill founded. Indeed the chances are ten to one against the disease. The appeal record contains not a word of evidence. It presents only the findings and conclusions of the trial court. The court finds: Each mare is a valuable work horse and may be worth about $250. She is entirely free from disease so far as can be discerned by an examination of a veterinary surgeon. This has been her condition since she was ordered destroyed in the summer of 1915. So far as can be ascertained she has never been bred to a diseased stallion. Hence, the court finds that it is not necessary for the protection of the public that the

mares should be slaughtered, and that the slaughter would constitute an unnecessary and unwarranted invasion of plaintiff's property rights. The court finds that the board and its agents base their diagnosis of dourine on a blood test conducted by sending the blood from the animal to the Bureau of Animal Industry at Washington. The experts do not examine the blood under a miscroscope, but subject it to a chemical test which is so extremely technical that it is impossible for any layman to understand it, and the ordinary veterinarian makes no pretense to understand it. It was not shown to have been performed by more than one man in the United States."

"The blood is taken from the animal to be tested and prepared by the field veterinarian before it is sent to Washington. If the bureau at Washington reports a reaction, the animal is ordered killed. The test is a new device which was not used in the United States until 1914. Animals slaughtered frequently show no symptoms of the disease either while alive or on post mortem examination. It is a disease of the genital organs, and is communicated only by actual contact in the act of breeding. After infection an animal usually developed symptoms of the disease in from three weeks to six months, and the disease usually terminates fatally in from six months to two years."

Such are the findings. From the official reports of the board it appears that during the four years commencing with 1914, 31,406 horses were bled for the fixing test and there was a killing of 700 horses. Regardless of any protest every animal is killed on a mere report that its blood yields to the new fixing test. Of course, in such reports there are chances of error or mistake. Indeed, the chances are that most of the horses killed, showing no symptoms of disease, were perfectly sound and healthy. And surely it should not be necessary for a board of scientists to show its zeal or skill by bleeding 31,406 horses to kill 700. For all this there must be some motive besides pure patriotism. There must be some money in the business. The killing of animals has prevailed quite extensively, and, as I think, there is good reason to believe that many sound and healthy animals have been killed. The result is a great loss to those whose good animals are killed and loss to those who bear the expense and pay the taxes. And yet it profits the board and the agents who do the killing. In 1917, this amount was paid the board manager, his clerk, and agents $11,845.17; in 1916, $12,934;

and for animals killed there was paid $36,466. I wish it were so that every man in all the world had to live or die by his own honest toil.

Under the statute when an order is made for the killing of an animal within twenty-four hours, the owner may protest by making and serving an affidavit that he verily believes the animal is free from any disease. Then to determine the question the board or its agents appoint a veterinarian. The animal owner appoints one, and the two appoint a third, but the proceeding is a mere farce and a mockery. The board or its field agent secures a killing decree every time. That is shown by its own reports. It is shown that numerous protests have been made and that no killing has ever been prevented only by an injunction; and yet it is contended that such a hasty mock appeal to bleeders and killers does constitute due process of law, and that the courts are powerless to protect a person against the destruction of his sound and healthy animals. But the Constitution is that the courts shall be open, and that every man for any injury done him in his person or property shall have a remedy by due process of law, and right and justice administered without sale, denial, or delay. Now this due process of law means the law as administered by the courts in the regular course of judicial procedure. In a country of law every person has a right to an appeal to the courts, and, except in cases of the most imperative and manifest necessity, no man can be legally deprived of life or property except pursuant to the judgment of a court of competent jurisdiction.

In this case the trial judge has found that the animals are not a nuisance, and that to kill them would unjustly deprive the owner of his property. On the findings of fact it is clear that the court was taken in its conclusions of law, but that is no reason for this court to do likewise. On such facts and findings there is no justification, either in law or in morals, for the killing of two splendid work horses. The judgment should be reversed.

GRACE, J. I dissent from the result reached by my associates in the majority opinion of the court in this case.

On Petition for Rehearing.

PER CURIAM: Plaintiff has filed a petition for rehearing. On such petition he presents two propositions:

(1) He first contends that the legislature may not, even in the exercise of the police power, authorize the destruction of any animal, even though infected with dourine, unless such destruction is essential to protect the health or promote the collective welfare of the public.

(2) He next contends that the mare involved in this action is not, in fact, infected with dourine, but is wholly free therefrom, and that the defendant board had no authority to order her destruction.

We will consider the proposition in the order stated.

(1) "The police power" is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society. Such power, as pointed out by Mr. Justice Holmes, speaking for the Supreme Court of the United States, in 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, may be said, in a general way, to extend to all the great public needs, and "it may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." As applied to the powers of one of the states of the Union, the term "police power" is also used to denote those inherent governmental powers which, under the system established by the Constitution of the United States, are reserved to the several states. 12 C. J. 905. Of course, there is no such thing as a police power which is above the Constitution, or which justifies any violation of express or manifestly implied constitutional prohibitions. State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500. And, "however broad the scope of the police power, it is always subject to the rule that the legislature may not exercise any power that is expressly or impliedly forbidden to it by the state Constitution." 12 C. J. 929. But where a subject is within the police power, it is for the legislature to say what the remedy shall be, and a police enactment will be upheld unless it contravenes some constitutional restriction. American Lin-

seed Oil Co. v. Wheaton, 25 S. D. 60, 41 L.R.A.(N.S.) 149, 125 N. W. 127.

That a state legislature may, in the exercise of the police power, provide for the quarantine of diseased or suspected animals and for the destruction of animals infected with contagious or infectious diseases, is no longer an open question. Legislative enactments making such provisions have been almost universally upheld. And in enacting such regulatory measures the legislature may require precautions within the whole range of possible danger. But the regulations adopted must have some reasonable or probable connection with the public object sought to be accomplished. In other words, the legislature itself cannot, nor can any board created by it, adopt such means or prescribe such methods as are clearly unreasonable and arbitrary. This is especially true where it is sought to destroy property, as such extreme measures are only justified within the limits of necessity. Herlihy v. Donohue, 52 Mont. 601, L.R.A.1917B, 702, 161 Pac. 164, 166, Ann. Cas. 1917C, 29, 14 N. C. C. A. 1022; Freund, Pol. Power, § 521. And it will be noted that the statute under consideration authorizes the destruction only of animals which are actually *infected* with a contagious or infectious disease. Hence, leaving constitutional considerations on one side, it is clear that under the statute the defendant board has no power or jurisdiction to order the destruction of animals which are free from such diseases. Asbell v. Edwards, 63 Kan. 610, 66 Pac. 641; Crane v. State, 5 Okla. Crim. Rep. 560, 115 Pac. 622; see also State v. Speyer, 67 Vt. 502, 29 L.R.A. 573, 48 Am. St. Rep. 832, 32 Atl. 476.

The legislature created the Live Stock Sanitary Board and conferred upon it authority "to take all steps it may deem necessary to control, suppress, and eradicate any and all contagious and infectious diseases among any of the domestic animals of the state; and to that end said board is hereby empowered to quarantine any domestic animal which is infected with any such disease, or which may have been exposed to infection therefrom *and to kill any animal so infected.*" Comp. Laws, § 2686.

Under the statute the defendant board adopted a rule providing for the destruction of all animals infected with dourine. In adopting such rule the defendant board merely put into operation the practice

established and followed by the Bureau of Animal Industry and by similar boards in the Dominion of Canada and several states of the Union. Upon the first proposition presented on the petition for rehearing a majority of this court are still of the opinion:

1. That the legislature, in order to suppress or eradicate contagious or infectious diseases among domestic animals, may provide for the destruction of infected animals in all cases where such destruction is reasonably necessary, and to that end had the power to create and confer upon the State Live Stock Sanitary Commission authority to execute the law and adopt such regulations as are reasonably necessary to accomplish the desired end.

2. That under our statute it is for the Live Stock Sanitary Board to determine whether it is necessary to kill an animal infected with dourine in order to suppress or eradicate the disease, or whether a quarantine of the infected animal or animals would be sufficient.

3. That the Live Stock Sanitary Board did not exceed its authority in adopting the regulation providing for the destruction of all animals infected with dourine.

(2) Upon the second proposition plaintiff has filed several affidavits with respect to the present condition of health of the mare involved in this litigation, accompanied by photographs of the mare. And it appears that though this litigation has continued for more than three years, the mare is still in apparent good health and has manifested no clinical symptoms of dourine. This condition is totally at variance with what the reports of the Bureau of Animal Industry and other literature on the subject of dourine would lead one to expect would have been true if the mare had actually been infected with dourine at the time of the commencement of this action. In fact, the showing made, while unusual and not altogether proper upon a petition for rehearing, is nevertheless such as to indicate a strong possibility, and almost a probability, that some error must have been made in the application of the Complement Fixation Test, or that the blood taken from the mare involved in this action might have become confused with that taken from some other animal. And this, of course, is not altogether impossible, or even improbable, when we consider the large number of specimens of blood taken and sent to Washington for examination.

The efficiency of many police regulations depends upon their prompt and summary execution. Delay until a judicial determination could be had often would defeat the very purpose for which the regulation was enacted. In such cases it is indeed very proper for the courts to refuse to interfere with the carrying out of the order of the boards or officers intrusted with executing the law. The present action, however, has been pending for more than three years. The reason for the rule requiring judicial noninterference can hardly be said to exist. The parties to the litigation are here, and all the matters in controversy ought to be determined, if possible. This court should not send the parties out of court and compel either of them to come in by another door. Star Land Co. v. Olson, — Iowa, —, 168 N. W. 111. If the mare in question is, in fact, infected with the disease of dourine, it is within the power of the defendant board either to cause her to be destroyed or placed in quarantine, and their judgment upon this matter is not subject to review by the courts. But if the mare is not, in fact, infected with dourine, but is free from such contagious or infectious disease, the board has no power or jurisdiction to order the mare destroyed.

The evidence in the case was not transmitted to this court, and the district court expressly refrained from making any findings upon the question of whether the mare was, in fact, infected with dourine. Under all the circumstances, we do not feel justified in affirming the judgment unconditionally, as this might result in irreparable injury, but deem that the course most consonant with the principles of right and justice is to give the parties an opportunity to submit further evidence upon the question whether the mare is, in fact, infected with the disease of dourine. The case is, therefore, *remanded for a new trial in accordance with this opinion, and the trial court directed to take evidence and make findings, upon the question of whether the mare is, in fact, infected with the disease of dourine.*

In the foregoing per curiam denying the petition for rehearing all of the judges concur.

In that portion, however, remanding the cause with directions, Chief Justice Bruce and Judge Birdzell do not concur. While it is their opinion that it is proper under the state of facts presented to attempt to guard against a mistake passing beyond the bounds of remedy, they

feel that the remittitur should be held in this court for a period of sixty days to enable the Live Stock Sanitary Board to again apply the Complement Fixation Test and report the results thereof to this court. In their judgment this procedure, while unusual, would be more consistent with the main opinion than that which is ordered in this remittitur, and they see no reason to recede from the position taken in the original opinion.

W. A. BEARDSLEY, Respondent, v. JOHN EWING and Fred Ewing, Copartners as Ewing & Ewing, Appellants.

(168 N. W. 791.)

Malpractice — damages — action to recover — negligence — evidence held to present question — one of fact — for jury.

1. In an action for the recovery of damages for malpractice, the evidence is examined and *held* to present a question of negligence as one of fact for the determination of a jury.

Size of an abscess — observable to naked eye — laymen — competent to testify as to.

2. It is *held* that a layman is competent to testify to the size of an abscess which can be observed with the naked eye.

Malpractice suit — defendants in — insured against consequences of their practice — improper questions as to — objections to sustained — prejudicial effect of such questions — matter in first instance for court — circumstances disclosed by record.

3. Where improper questions are asked for the purpose of showing that the defendants in a malpractice suit are insured against the consequences of the action to which objections are sustained, the prejudicial effect of the asking

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NOTE.—That a physician or surgeon must exercise such reasonable skill and diligence as are ordinarily exercised in his profession and which is ordinarily required by the community, and must exercise his best judgment in the application of his skill and the application of his diligence, will be seen by an examination of authorities collated in notes in 37 L.R.A. 830, and L.R.A.1915C, 598, on degree of care and skill which a physician or surgeon must exercise.

See also note in 38 Am. St. Rep. 30, on degree of skill and care required of physician or surgeon.

of the questions is a matter, in the first instance, for the consideration of the trial court. It is *held* that the improper suggestions of the liability insurance under the circumstances disclosed by the record are not reversible errors.

Opinion filed August 10, 1918.

Appeal from judgment and from an order of the District Court of Ward County, North Dakota, Honorable *K. E. Leighton,* Judge.

Affirmed.

Bosard & Twiford, Greenleaf, Wooledge, & Lesk, and *Murphy & Toner,* for appellants.

A physician is answerable for any injury resulting from the failure to perform his implied contract, and for failure to exercise his best judgment. Langdon v. Humphrey, 9 Conn. 209, 23 Am. Dec. 333; Barnes v. Means, 82 Ill. 379; Beck v. Klinik (Iowa) 7 L.R.A. 566, 43 N. W. 617; Moratsky v. Wirth (Minn.) 69 N. W. 480, 76 N. W. 1032; Boldt v. Murray (N. Y.) 2 N. Y. S. 232, 21 N. E. 1116; Allen v. Voje (Wis.) 89 N. W. 924.

A physician, in the absence of special contract, is not obliged to use the highest degree of care and skill, but only that ordinarily used by physicians and surgeons in the same general line of practice in the same or similar locality. Burke v. Foster (Ky.) 59 L.R.A. 277, 69 S. W. 1096; Howard v. Grover, 15 Me. 97, 48 Am. Dec. 478; Patten v. Wiggin, 51 Me. 594, 31 Am. Dec. 893; Pekly v. Palmer (Mich.) 67 N. W. 561; Small v. Howard, 128 Mass. 131, 35 Am. Rep. 363; Barney v. Pinkham, 26 Am. St. Rep. 389 and note (Neb.) 45 N. W. 694; Baker v. Hancock (Ind.) 63 N. E. 323; Thomas v. Dabblemont (Ind.) 67 N. E. 463; Whitesell v. Hill (Iowa) 37 L.R.A. 830; Dunvauld v. Thompson (Iowa) 80 N. W. 324; McCracken v. Smathers (N. C.) 29 S. E. 354; Dorris v. Warford (Ky.) 9 L.R.A.(N.S.) 1090.

The burden of proof is on the plaintiff to show that the physician is guilty of negligence in that he did not use the required care and skill according to his implied contract. Ballou v. Prescott, 64 Me. 305; Chase v. Nelson, 39 Ill. App. 53; Craig v. Chambers, 17 Ohio 253; Holtzman v. Hoy (Ill.) 59 Am. Rep. 390, 8 N. E. 832; Martin v. Courtenay (Minn.) 91 N. W. 487; Stanley v. Taylor (Iowa) 142 N. W. 81; State v. Housekeer (Md.) 2 L.R.A. 587, 4 Am. St. Rep.

340, 16 Atl. 382; Whitesell v. Hill (Iowa) 37 L.R.A. 830, 66 N. W. 894.

The mere failure to cure, or any unsuccessful treatment, does not raise the presumption of negligence. Jackson v. Burnham (Cal.) 39 Pac. 577; Sims v. Parker, 41 Ill. 284; Lawson v. Conoway (W. Va.) 18 L.R.A. 627, 38 Am. St. Rep. 17, 16 S. E. 564; Tomer v. Aiken (Iowa) 101 N. W. 769.

The doctrine of *res ipsa loquitur*, that is, that the injury itself is evidence of negligence, does not apply in a suit against a physician for civil malpractice.

The injury, failure to cure, bad results, failure to recover, deformity, failure of diagnosis, death, or any other circumstances showing lack of success, is not evidence of negligence, and negligence cannot be inferred from the same. Bonnett v. Foote (Colo.) 28 L.R.A.(N.S.) 136, 107 Pac. 252; Brown v. Marshall (Mich.) 41 Am. Rep. 728, 11 N. W. 392; Ewing v. Goode, 78 Fed. 442; Feeney v. Spalding (Me.) 35 Atl. 1027; Staloch v. Holm (Minn.) 9 L.R.A.(N.S.) 712, 111 N. W. 264; Tomer v. Aiken (Iowa) 101 N. W. 769.

A physician is not liable for mere errors of judgment, such judgment being based upon the exercise of the required care and skill. Bonnett v. Foote (Col.) 28 L.R.A.(N.S.) 136, 107 Pac. 252; Hills v. Shaw (Or.) 137 Pac. 229; Luka v. Lowrie (Mich.) 136 N. W. 1106; Wells v. Dispensary (N. Y.) 24 N. E. 276.

A physician is not liable for a mere error or mistake in making a diagnosis, provided he uses that degree of care, skill, and judgment which is required of him to perform his implied contract. The same rule applies for failure to discover malady or ailment. Bonnett v. Foote (Colo.) 28 L.R.A.(N.S.) 136, 107 Pac. 252; Ely v. Wilbur (N. J.) 60 Am. Rep. 668, 10 Atl. 358; Pike v. Honsinger (N. Y.) 32 N. Y. S. 1149, 63 Am. St. Rep. 655, 49 N. E. 760.

A physician's negligence can only be predicated upon his failure to do what he should have done, or in doing what he should not have done, in a negligent manner. Whether or not the conditions of which complaint is made were the result of a physician's negligence is a question which can only be determined by witnesses *qualified to speak*,—that is, by physicians and surgeons acquainted with the methods and treatments adopted and applied, and not by mere laymen. Hence unless

there is testimony of physicians showing negligence, no judgment can be sustained. Staloch v. Holm (Minn.) 9 L.R.A.(N.S.) 712, 111 N. W. 264; Ball v. Skinner (Iowa) 111 N. W. 1022; Farrel v. Haze (Mich.) 122 N. W. 197; Booth v. Andrus (Neb.) 137 N. W. 884; Williams v. Nally (Ky.) 45 S. W. 874; O'Hare v. Wells (Neb.) 15 N. W. 722; Robinson v. Crotwell (Ala.) 57 So. 231, 2 N. C. C. A. 386; James v. Robertson, 117 Pac. 1068; Shelton v. Hacklip, 167 Ala. 217; Ewing v. Goode, 78 Fed. 444; Woodward v. Hancock, 52 N. C. 384.

Defendants were not bound by testimony which, in itself, would hold them to a higher degree of care and skill than they were by law required to render, or to possess, under the circumstances. Pike v. Hunsinger (N. Y.) 63 Am. St. Rep. 655; Gale v. Fleischer (Wis.) 30 N. W. 674; Walhort v. Seibert, 22 Pa. Super. Ct. 213; Burke v. Foster (Ky.) 59 L.R.A. 277, 65 S. W. 1096; Barney v. Pinkham (Neb.) 26 Am. St. Rep. 389, 45 N. W. 694; Getchell v. Hill, 21 Minn. 464; Small v. Howard (Mass.) 35 Am. Rep. 363.

The admission of evidence to prove that defendants carried insurance indemnifying them against loss is prejudicial error. No such testimony bears on the question of negligence, the only real issue, and its admission was highly prejudicial before the jury. Lawset v. Seattle Lumber Co. (Wash.) 80 Pac. 431.

We think that to allow juries in cases of this kind to take into consideration the fact that an employer was insured against accidents would do more harm than good, and would increase the already strong tendency of juries to be influenced in cases of personal injury, especially where a corporation is defendant, by sympathy and prejudice. Sawyer v. J. M. Arnold Shoe Co. (Me.) 38 Atl. 33; Walters v. Appalachian Power Co. (W. Va.) 84 S. E. 617; N. W. Fuel Co. v. Minneapolis St. R. Co. (Minn.) 159 N. W. 832; Levinski v. Cooper (Tex.) 142 S. W. 959; Hersford v. Carolina Glass Co. (S. C.) 75 S. E. 533; Inland Steel Co. v. Gillespie, 104 N. E. 76.

In an action by a servant for damages for personal injuries, repetition by plaintiff's counsel as to whether defendant was not insured in an employer's liability company is sufficient to reverse the verdict. Westby v. Washington Brick Lime & Mfg. Co. (Wash.) 82 Pac. 271; Iverson v. McDonnell (Wash.) 78 Pac. 202.

"Where questions touching insurance are improperly asked, with the intent to get before the jury a fact not material to the case, the court should penalize the party guilty of such misconduct, by discharging the jury." Marrigold v. Black River Traction Co. 80 N. Y. Supp. 861; Tuohy v. Columbia Steel Co. (Or.) 122 Pac. 36; Mithen v. Jeffrey (Ill.) 102 N. E. 778; Rodzborski v. Am. Sugar Ref. Co. 210 N. Y. 262; Trembly v. Hamden, (Mass.) 38 N. E. 972; Chicago, etc., R. Co. v. Mines (Ill.) 77 N. E. 898.

Such matters are prejudicial if brought to the attention of the jury in any form. Hocks v. Sprangers (Wis.) 87 N. W. 1101; Rudd v. Rounds (Vt.) 25 Atl. 438; Cargill v. Com. (Ky.) 13 S. W. 916.

Bradford & Nash, for respondent.

Courts have frequently held that the doctor is not required to have and use a greater degree of skill than is usually and ordinarily had and used in similar localities, and we suppose this may be regarded as the general rule. But the court should bear in mind that when this rule was adopted the practice of medicine was, to a large extent, local in its nature, and surgery, when viewed from the modern standard, was unknown.

The rule should now be applied with the advancement made in professional learning always in mind. Hitchock v. Bergett, 38 Mich. 501.

In every case cited by counsel where a reversal was had because of evidence showing that defendants were insured against loss, or where reference in the examination of witnesses was made thereto, it appeared to the court that counsel had proceeded and persisted on this course from wrongful and improper motives. No such claim was here made, nor could it be made. Tuohy v. Columbia Steel Co. (Or.) 122 Pac. 36.

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 entered in the district court of Ward county in an action to recover damages for negligence in the treatment of an injured eye. The facts are as follows:

The plaintiff, while engaged at his occupation as an engineer, on December 19, 1914, got a cinder in one of his eyes. After complet-

ing his run and just before going to bed at about 11 o'clock on the same evening, he endeavored to remove the cinder by taking an ordinary match, burning the head off, and attempting to brush the cinder out with the charred end of the match stick. It was so deeply embedded in the eyeball, however, that he could not remove it. Next morning he went to the offices of the defendants in Kenmare, where the cinder was removed by Drs. John Ewing and Grogan. His eye was not bandaged and when the defendants offered the plaintiff a prescription for a boric-acid solution, he replied, in substance, that he could get it himself without a prescription. At 2 o'clock in the morning of the following day, he was called to go to work, and as his eye was causing him considerable pain he refused to go to work and later went again to the offices of Drs. Ewing & Ewing. He saw Dr. John Ewing at about 11 o'clock, Dr. Fred Ewing, who was the local physician for the Soo Road, having gone to the country. In treating the eye at this time the doctor applied a bandage and gave to the plaintiff a prescription for a solution of argyrol. The plaintiff went again to the offices of the defendants on the morning of the 22d of December at 8 o'clock. Upon this visit he was seen by Dr. Fred Ewing, who told him that he should go at once to the head eye surgeon of the Soo Railway Company in Minneapolis. Transportation was secured for the plaintiff and for Dr. Grogan who was to accompany him on the trip. They took a train for Minneapolis at about noon on December 22d, and upon arrival the eye was promptly treated by Dr. Benson. The scar resulting from the operation which was rendered necessary by the infection was located directly over the pupil and resulted in total blindness in the affected eye. In the trial of the action the plaintiff recovered a judgment for $7,933.50.

The principal error relied upon for a reversal of the judgment is the refusal of the trial court to direct a verdict for the defendant on the ground of the insufficiency of the evidence to establish the negligence of the defendants. There is considerable conflict in the testimony relative to the time when the infection upon the plaintiff's eyeball first became visible; also as to whether or not the plaintiff had been advised early in the progress of the treatment that he should go to Minot to Dr. McCannel, a specialist, for attention. In so far, however, as the evidence upon these matters may be regarded as having

a bearing upon the verdict of the jury, we must, upon this appeal, regard the plaintiff's version as being true. Moreover, it should be observed that the circumstances strongly support the plaintiff's version as to the early appearance of the infection. Both the plaintiff and his wife testified that there was a small yellowish spot on the eyeball on the morning of the 21st of December, and both also testify that Dr. John Ewing stated on that morning that the eye was infected. In addition to this, it appears that some five or six months after the plaintiff was treated by the Ewings, Dr. John Ewing wrote a letter on behalf of the plaintiff to one Borene, of Thief River Falls, Minnesota, purporting to state the facts relative to the plaintiff's injury, in which he said that the eye was infected at the time he first treated it. The letter is as follows:

"Kenmare, N. Dak., 5/8, 1915.

M. A. Borene, Sec.
Thief River Falls, Minn.

Dear Sir:—

This is to state that one M. A. Beardsley came to me on December 20th with a foreign body deeply embedded in the right eye, which was removed. The eye showed some infection at the time, which was very bad in a day or two, when he was sent to Minneapolis for further care.

Yours truly,
John Ewing, M. D.

In explaining the above letter, Dr. Ewing testified that he wrote it for the purpose of helping the plaintiff out in an insurance matter. In the state of the testimony as to the first appearance of the infection, the jury could well have found, as it probably did find, that the eye bore appearance of infection at least as early as the morning of December 21st. As to advising the plaintiff to go to Minot for treatment with a specialist there, the jury could well have believed the plaintiff's testimony when he denied that any such suggestion was made to him or direction given.

The issue on this phase of the case is thus narrowed down to the question of negligence in the treatment. The evidence offered by the

plaintiff on this subject is the testimony of Dr. George E. Benson, of Minneapolis, who treated the plaintiff and who had for some time practised as a specialist in the diseases of the eye, ear, nose, and throat. He testified that, at the time the plaintiff came to him for treatment, which was on December 23, 1914, the eye was in such condition that it was his first duty to endeavor to save the eyeball from being destroyed by the infection, and, if successful to this extent, he should next do as much as could be done toward saving the sight of the eye. He testified, further, that the infection from which the plaintiff was suffering was in the nature of a hypopian ulcer or one which forms pus in the anterior chamber of the eye; that the development of an ulcer of the particular class to which this belonged is ordinarily very rapid; and that the proper course for a general practitioner, after infection has been discovered, is to send the patient to a specialist unless the practitioner has confidence enough in himself to take care of it. He stated that, while the proper course would be to send the patient to a specialist, if the practitioner is determined to treat the case himself, the first proper thing to do is to cauterize the ulcer; but that, if the ulcer has reached the stage when it shows infiltration underneath the layers of the cornea, the cautery will not do any good and it is then necessary to make the Saemisch incision.

He testified, further, that one important fact bearing upon the indication of cautery is the location of the ulcer with reference to the pupil of the eye. To state it in his own words:

There is a line there that you can't draw, there is a time when there is a balance, when it is very hard to say whether I shall use hot or cold applications on this eye or shall I cauterize it. If you cauterize, you have to make up your mind to one thing; that is, there is going to be a scar. If that ulcer is on the center of the eyeball and a man comes in with that ulcer, shall I cauterize it or will it get well without? It might get well without it. Waiting until to-morrow morning or a few hours might not make much difference, but if it showed any sign of spreading you would then have to cauterize and take the scar as it comes.

Q. You have referred to hot or cold applications. Would that

be proper practice in the treatment of this ulcer before infiltration started, in case the ulcer was in the center of the eye?

A. Before infiltration, no. If you use anything at all, your cold application would be best, but, as a rule, we don't need anything when we take a cinder out of an eye.

Q. Just to get this matter as clear as we can, by infiltration just what do you mean?

A. Infiltration is when this yellow matter begins to show on the eye, a yellow point begins to show as you have referred to.

Q. When the yellow point begins to show on the cornea at the point where the cinder or foreign substance has been removed, assuming that that point is not over the pupil of the eye, what is the proper practice?

A. We usually wait to see what the developments are. We don't want to cauterize unless it is necessary because we surely will have a scar. On the other hand, we don't want to neglect it if it needs some treatment, and about all we can do is to watch the eye at that stage of the game.

Q. After the infection is apparent?

A. Yes, it is possible that one can have a yellow point on the cornea and have it remain, and not spread, but we get worried if we see it; we tell him to come to-morrow morning early, we want to see him the first thing; and when he goes home to-night if he has pain to use hot applications on the eye if it keeps him awake. If it doesn't keep him awake but bothers some, keep it covered, but do not rub it. That is a very hard question that cannot be answered by any particular rule that can be laid down for treatment.

Q. After the removal of a cinder from the cornea, having used cocaine to deaden the sensation, what is the usual, ordinary, and proper practice relative to covering the eye by a bandage or other appliance?

A. In most cases we cover the eye.

As bearing further upon the nature of the infection and the proper practice in such a case as the one at bar, the witness testified as follows:

Q. Is it, in any event, proper practice to allow an ulcer such as the

one in this case, to spread from a mere pin point until the entire cornea is involved, or nearly so, before either sending the patient to a specialist or performing a cautery?

A. They spread so rapidly sometimes that over night you can have an ulcer involve almost the whole cornea. It depends upon how much infection there is. It just simply lifts the layers of the cornea right up and pushes everything in front of it. It may be very rapid, so rapid that there are no other ulcers that we see that worry us more than these.

Q. Assuming that at the initial visit to the physician, the physician discovered that there was infection in the wound, caused by the cinder in the cornea, is it usual, ordinary, or proper practice, having discovered the infection and knowing it to be there, to allow the patient to go out with his eye unbandaged and with no instructions other than if it bothered him to wash it out with boric acid?

A. The eye should be covered if the infection has already started.

Q. And is it not proper when an ulcer is discovered to wait until there is sign of it spreading, before cauterizing, and take the chance that it may recover without any progression at all?

A. We cauterize an ulcer just as soon as we see it, providing it is in a location where we think it is not going to interfere with vision. We don't take any chances. Sometimes we have to take a chance, and we tell the patient that they have an ulcer that we may have to cauterize, but we don't like to do it unless a case of absolute necessity, and we will order them in the next day and tell them to be very careful, tell them all the consequences, and as a rule when you tell them all the dangers, with only a little foreign body as they think, they go to the other fellow; because they have had lots of cinders in their eyes before and this fellow is absolutely crazy.

He also testified that a general practitioner would be treading on pretty dangerous ground in taking chances on the spread of an infection after an ulcer of the cornea has developed. When the above testimony is considered in the light of the facts above mentioned and the further fact that the infection first appeared not over the pupil of the eye, but a little below, we are satisfied that there was evidence

from which the jury was warranted in finding the defendants negligent in not using the proper treatment at the proper time.

The defendants, however, rely upon the rule that a physician is held only to the exercise of the skill and learning of the profession generally in the community in which he practises, and that there is no evidence going to show that the defendants did not conform to such a standard of skill in the instant case. As we view the case, however, the defendants do not properly invoke the rule here. According to their own testimony, the defendants recognized the necessity of more expert treatment than general practitioners are capable of giving. It must be borne in mind that it was at the suggestion of Doctor Fred Ewing that the plaintiff ultimately went to Minneapolis for treatment by specialists, and according to the pathological conditions described by the witness and mentioned above, this direction should have been forthcoming from the defendants at least twenty-four hours before it was given. Furthermore, the testimony of the defendants Ewing themselves indicated that they were aware of the dangers incident to the spread of an infection of the character of that in question, and knew of the inefficiency of the ordinary so-called disinfectant eye-washes in the treatment of such cases. Yet, boric acid and argyrol were all that were prescribed by them, according to their own testimony. In this state of the record, the jury was justified in finding that the proper degree of care was not exercised in the instant case.

The appellants argue that error was committed in allowing the plaintiff to testify to the size of the abscess on the eye on the 22d of December, when Dr. Ewing looked at it, in comparison with the size of the scar as it appeared at the time of the trial. The objection was that the testimony was in the nature of a conclusion, inasmuch as the fact is one which called for expert testimony. This objection is clearly without merit, as it was competent for the plaintiff as a layman to give to the jury the benefit of his own observation. The abscess could, of course, be observed by him, as could also the scar with which he was asked to compare the same.

It is contended that the court erred in permitting the plaintiff to testify that the railway company would no longer employ him as an engineer. This testimony was clearly competent, as the plaintiff would be in a position to know whether he would be permitted to con-

tinue in his employment after he had lost the sight of one eye. If his answer was too broad, the correct situation could doubtless have been disclosed by a proper cross-examination or by other evidence.

The specifications of error based upon the refusal of the trial court to sustain objections to questions asked of the witness Dr. Benson are so obviously without merit that they require no discussion. The same is also true of the specifications relative to the sustaining of objections to certain questions asked of the defendants' witness Dr. Kermott.

It is next insisted that errors were committed in getting before the jury suggestions bearing upon the interest and credibility of certain witnesses, which were improper by reason of their prejudicial tendency. These suggestions were presented in three different ways: First, by a question directed to one of the defendants, Dr. Ewing, upon cross-examination, asking whether or not he was insured against loss in malpractice cases, and in also asking the same witness whether his brother was insured. The questions were objected to and the answers not given. The next alleged improper suggestion is contained in some questions asked of the witness Dr. Grogan, relative to whether or not his expenses were met by the Northwestern Medical Association, and as to whether or not counsel for defendants were employed by the Northwestern Medical Association. Objections were also sustained to these questions. The third alleged improper suggestion complained of is a statement made by plaintiff's counsel in his argument to the jury, wherein he said that "the manner in which these physicians stand together is disgraceful." As the question of the prejudicial effect of the above suggestions is presented upon this appeal, this court is confronted with the alternative of reversing a judgment in favor of the plaintiff wholly on account of the improper conduct of his attorney or of affirming the judgment entered upon a verdict which might have been more or less tainted with prejudice by reason of the alleged improper conduct. In determining this matter, we do not wish to be understood as in any way countenancing as proper, beyond the point herein indicated, any of the suggestions pointed out by the appellant. It is true that counsel for the respondent in his brief explained the reasons that led him to ask the questions and to make the statement to the jury; but this court is not inclined to consider the propriety of the questions upon any other basis than that consid-

ered below, or in the light of any explanation that was not presented to the trial court at the time. The inherent vice of the objectionable questions lies in their probable effect upon the minds of the jury. The consideration as to whether or not the defendants are insured is entirely foreign to the question of negligence; but the fact must be conceded to have a bearing upon the interest of the defendants in the outcome, and to belong to that class of matter which it is proper ordinarily for the jury to consider in weighing the testimony of witnesses. Yet the disadvantage due to its prejudicial tendency is supposed to outweigh the value of the evidence as affecting the credibility, and it is for this reason excluded. Wigmore, Ev. § 969. See also Iverson v. McDonnell, 36 Wash. 73, 78 Pac. 202; Stratton v. C. H. Nichols Lumber Co. 39 Wash. 323, 109 Am. St. Rep. 881, 81 Pac. 831; Lowsit v. Seattle Lumber Co. 38 Wash. 290, 80 Pac. 431; Wildrick v. Moore, 66 Hun, 630, 49 N. Y. S. R. 919, 22 N. Y. Supp. 1119. In fact, the rule of exclusion is so well understood in the profession that there seems but little excuse for even asking such questions. It is passing strange, too, that an attorney cross-examining hostile witnesses should undertake to establish their lack of interest in the outcome when ordinarily it would be to his interest to establish exactly the opposite. This gives rise to the current suspicion, which is the philosophy of the rule of exclusion, that the testimony is really offered for its prejudicial effect upon the jury.

Where a fair trial of the issues in a damage suit is likely to be prejudiced by questions such as those pointed out, we are of the opinion that their correction lies largely in the discretion of the trial court. The trial judge, who has the advantage of the atmosphere of the trial, can best determine the extent of the threatened prejudice, and can take the necessary precautionary measures to insure a proper determination of the issues,—even to the extent of granting a new trial. Then, too, the defendant should not be given a free rein to speculate upon the verdict. If it is thought that the jury is prejudiced by reason of improper suggestions made during the trial, steps should be taken at once to secure another trial before another jury. That the interjection of such improper matter during the course of the trial is not, under all circumstances, reversible error, see Edwards v. Burke, 36 Wash. 107, 78 Pac. 610, 17 Am. Neg. Rep. 384; Shoe-

maker v. Bryant Lumber & Shingle Mill Co. 27 Wash. 637, 68 Pac. 380; Hammer v. Janowitz, 131 Iowa, 20, 108 N. W. 109, 20 Am. Neg. Rep. 324; Johnson v. Devoe Snuff Co. 62 N. J. L. 417, 41 Atl. 936, 5 Am. Neg. Rep. 191; Demars v. Glen Mfg. Co. 67 N. H. 404, 40 Atl. 902.

The statement made during the argument to the jury, though a rather vigorous characterization of defendants' witnesses, did not, in our opinion, pass beyond the bounds of legitimate argument. The jury could observe the extent to which the physicians who testified appeared to "stand together," and it was perfectly proper that they should take this matter into consideration in deciding upon the weight to be given their testimony.

On the whole record, viewed in the light of the foregoing observations, we are constrained to hold that the conduct referred to does not amount to reversible error. The judgment of the trial court is in all things affirmed.

GRACE, J. I concur in the result.

ROBINSON, J. (dissenting). On December 19, 1914, at 3 o'clock P. M., the plaintiff, a locomotive engineer on a Soo train, got a cinder in his eye when nearing Minot. Though he stopped about an hour in Minot he did not have it removed. He went right on to Kenmare, where he resided, and before retiring tried to remove it with the burnt end of a match. Next morning at 10 or 11 A. M., he went to the defendants, and they quickly removed the cinder in a satisfactory manner. The next morning, December 21st, he went to the doctor's office, got a prescription and used it. On the morning of December 23d, he saw Dr. Fred Ewing, who advised him to go to an eye specialist. He decided to go to the specialist of the company at Minneapolis though Dr. Ewing advised him to go to the eye specialist at Minot.

Dr. Grogan went with him to Minneapolis to care for him on the way. On arriving at Minneapolis, the eye was promptly operated on by Dr. Benson, the eye specialist of the company. The eyeball was saved, but the sight was lost. There is no claim that Dr. Benson is not a skilful and competent eye specialist, yet who can say that nature might not have saved the sight if there had been no operation on the

eye. Surgery is not an exact science. It is largely experimental, and often the most skilful doctors must take the chance of doing more harm than good. The result was an action against the defendants for malpractice and a verdict and judgment for about $8,000, from which they appeal.

It is claimed that after the removal of the cinder the doctors were negligent in not bandaging the eye, and in not cauterizing the wound, and in not giving the plaintiff better advice. But the plaintiff was a locomotive engineer in the meridian of life, a person of years and experience, and presumably of good common sense and common knowledge, and the defendants could not be expected to treat him as if he were a child. Indeed, it seems he had a mind of his own, and when they advised him to go to the specialist at Minot, he insisted on going to Minneapolis. When the rush of infection set in, the plaintiff might have gained time and possibly saved his sight by going to the specialist at Minot or at Fargo; but it seems he was set on going to Minneapolis, to the best specialist, and in doing so of course he took the chances.

The witnesses called by the plaintiff were himself, his wife, each of the defendants, and Dr. Benson. They really gave no proof of negligence or malpractice, while the testimony of eight expert witnesses called by defendants show that the practice of the defendants was entirely proper. Perhaps the most important testimony was that of the specialist, Dr. Benson, who was called by the plaintiff. It clearly shows the uncertain results of even skilful eye surgery and treatment, and that the defendants were not to blame for failure to cauterize the eye.

Questions by counsel for plaintiff:

Q. Doctor, before infiltration has started, but after infection has been discovered, the only proper practice is cauterization?

A. There is a line there that you can't draw, there is a time when there is a balance, when it is very hard to say whether I shall use hot or cold applications on the eye, or shall I cauterize it, or will it get well without? If you cauterize you have to make up your mind to one thing; that is, there is going to be a scar.

Then in regard to hot or cold applications he says:

As a rule we do not need anything when we take a cinder out of the eye.

Q. When a yellow point or infiltration begins to show on the cornea where the cinder has been removed, was it proper practice?

A. We usually wait to see what the developments are. We don't want to cauterize unless it is necessary, because we are sure to leave a scar. About all we can do is to watch the eye. This is a very hard question for me to answer without seeing a case. It is a question that cannot be answered by any particular rule that can be laid down for treatment.

Q. Infection from a wound is caused by direct contact with an infective agent? I don't suppose we could examine the tears of any person that we do not find them full of germs. In the tears of a normal patient I suppose I would find many germs, any of which might set up an infection. That is why we all dread the operation for cataract; not because we are afraid of infection from our own hands or from the bandages that we use, but because we have that one source of infection, the tears from the tear sack.

Q. Hence, to prevent infection, is it not proper in operations to prescribe an eyewash?

A. We very seldom do it, because patients will use a dropper, stick it into their vest pocket, later draw some medicine, drop it into the eye, and get infection in that way. We give drops only to relieve irritation, not to prevent infection.

Q. In any event, is it proper practice to allow an ulcer—as in this case—to spread from a mere pinhead point until the entire cornea is enveloped before performing a cautery?

A. They spread so rapidly sometimes, that over night you can have an ulcer involve nearly the whole cornea. It may be very rapid, so rapid that there are no other ulcers that we see that worry us more than these. There is a line you cannot draw as to when you should cover the eye and when you should not cover it. My experience with engineers is that they have so many cinders in their eyes and someone has taken them out with a tooth pick, it is pretty hard to persuade them to cover their eyes.

I have one ulcer that has just gotten well, where the ulcer came two

weeks after I took out a little cinder. Why this should have been I don't know, but the party was laid up for two months with it. The antiseptics that can be used in the eye are practically worthless as far as killing any germs are concerned. So far as using a germ killer, you cannot do it, because you irritate the eye when you do it. An ulcer may recover spontaneously.

It is needless to cite the testimony of the eight expert witnesses called by defendants. They all concur in testifying to the effect that the treatment of the eye was entirely proper. In regard to the manner of sterlizing the eye spud used to remove the cinder, Dr. John Emery and Dr. Grogan both testified positively that before using the spud, it was put into carbolic acid from three to five minutes and into alcohol and left to evaporate.

Dr. Benson clearly shows that wounds in the eye may not safely be cauterized or disinfected like wounds in other parts of the body, and that cauterization of the eye is sure to leave a scar, and that it should be resorted to only as a last resource. He shows the extreme difficulty in drawing the line and determining when it is proper to cauterize. It is certain that his testimony was disappointing to the counsel who called him as a witness for plaintiff, and the expert medical testimony was all against them. Hence, they argued to the jury in effect that the doctors were a bad lot; that they all stood together and contributed to an insurance against loss from malpractice. And, of course, that was gross error.

Clearly the judgment should be reversed and the action dismissed, because from the record it appears that there can be no evidence to sustain a verdict for the plaintiff.

BERNARD COFMAN, Petitioner and Appellant, v. J. J. OUSTERHOUS, Dairy Commissioner for the State of North Dakota, and J. N. Hagan, Commissioner of Agriculture and Labor for the State of North Dakota, Respondents.

(— A.L.R. —, 168 N. W. 826.)

Cream stations — operating — license for — Dairy Commissioner — violation of license — evidence of — may be revoked — statute — constitutionality of — due process of law.

1. Chapter 284, Compiled Laws 1913, which requires the owners or operators of cream stations within the state of North Dakota to take out a license, and provides that the dairy commissioner may at any time revoke such license on evidence that the licensee has violated any of the existing dairy statutes of the state, is constitutional, and does not deprive such licenses of liberty or property without due process of law.

Creamery business — affected with public interest.

2. The creamery business in North Dakota is a business which is affected with a public interest.

Licenses — purposes for which given — public good.

3. Licenses may be imposed not merely for the purpose of acting as temporary permissions to engage in harmful occupations, but in order to so control those that are useful that their operation may be harmless and that they may really subserve the public good.

Licenses exacted — public regulation — business — public welfare — enforcement of regulations.

4. Licenses may be exacted for the purpose of regulation, so that a business which intimately affects the public welfare may be brought within the supervision of the authorities, and that the regulations which are made concerning it may be more easily and certainly enforced.

Dairy commissioner — independent officer — commissioner of agriculture and labor — not subordinate to.

5. The dairy commissioner of the state of North Dakota, whose office is created by §§ 2835 and 2836, Compiled Laws 1913, is an independent officer, and, as far as his duties as dairy commissioner are concerned, is not subordinate to the commissioner of agriculture and labor.

NOTE.—The question of the right to revoke a license from the public without a hearing is discussed in a note in 13 L.R.A.(N.S.) 894.

Forum — once chosen — party cannot complain of jurisdiction.

6. Where one chooses his forum in which his rights shall be determined or adjudicated he cannot complain of lack of jurisdiction.

State — police power of — good order — public health not limited to — extends to fraud — deceit — cheating — unfair competition — prevention of.

7. The police power of the state is not limited to regulations necessary for the preservation of good order, or the public health or safety. The prevention of fraud and deceit, cheating and imposition and unfair competition, are equally within its province.

Licenses — regulation of — revocation of — on violation of — Constitution — due process of law — orders of dairy commissioner — appeal from — cannot be had — mandamus — redress from wrongs — resulting from arbitrary or unreasonable action.

8. The fact that chapter 105 of the Laws of 1917, which provides for the revocation of the licenses of the owners of cream stations by the dairy commissioner on evidence that statutes of the state have been violated, is not unconstitutional, and does not deprive the owners of due process of law for the reason that no appeal from the order of the dairy commissioners is provided for by the statute, it being clear that mandamus will lie to redress any wrong which is suffered through any arbitrary, tyrannical, or unreasonable action on the part of the officer, or which is based on false information.

Certiorari — writ of — not one of right — discretion of court — granted on — in each case.

9. The writ of certiorari is not a writ of right, but will be granted or denied in the discretion of the court and according to the circumstances of each particular case as justice may require.

Writ of certiorari — when used — inferior boards or tribunals — jurisdiction exceeded — no appeal — lack of other speedy or adequate remedy — merits of case — reviewing — cannot be used for.

10. The writ of certiorari, which is provided for in § 8445 of the Compiled Laws of 1913, can only be used "when inferior courts, officers, boards or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy and adequate remedy." It cannot be used for the purpose of reviewing the merits of a case and of weighing evidence.

License — seeking and obtaining — benefits derived from — person so acting — cannot question constitutionality of law — when license is revoked.

11. A person who obtains a license under a law and seeks for a time to enjoy the benefits thereof cannot afterwards and when the license is sought to be revoked, question the constitutionality of the act.

Opinion filed August 12, 1918.

Certiorari to review the action of the District Court in revoking a creamery license.

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

Judgment for respondents. Petitioner appeals.

Affirmed.

F. E. McCurdy, for appellant.

Regulations and licenses under the police power of the state can only be exercised where it has a real substantial relation to the public health, public safety, and public morals, and unnecessary or unreasonable restrictions upon the use of private property should not be imposed. Only an imperative necessity should prompt or warrant the revocation of a license issued for a lawful business. 17 R. C. L. 530; People v. Ringer, 27 L.R.A.(N.S.) 528 and note.

The regulations of the Dairy Commissioner on the modes and manner of handling cream by a licensee must be reasonable, fair, and just, and he cannot arbitrarily revoke a license, without substantial evidence of an intentional and material violation of the license. Tiedeman, Pol. Power, 273, 35 L.R.A.(N.S.) 717.

If the statute is given the construction placed upon it by the respondents, then it is unconstitutional and void in that it permits of the taking of property without due process of law. 6 R. C. L. § 44, p. 49.

William Langer, Attorney General, and *Edward B. Cox,* Assistant Attorney General, for respondents.

Where a license is issued to the owner of a cream station by the Dairy Commissioner of the state, he may revoke same at any time, upon substantial evidence being submitted to him, showing a violation of such license, and of the rights and privileges accruing thereunder. Comp. Laws 1913, § 2654.

Where it affirmatively appears that the inferior court, officer, or tribunal of whose acts complaint is made, has not exceeded its jurisdiction, the writ of certiorari will not lie to review the discretionery action of such body, officer, or tribunal. St. M. & Man. R. R. Co. v. Blakemore, 17 N. D. 67; State ex rel. Noggle v. Crawford, 24 N. D. 8, 40 Am. St. Rep. 34.

"A party to an action who has actually appeared may not question the validity of the statute on which the action is brought because of its

failure to provide for a sufficient notice of the proceedings." 12 C. J. 773; Quinn v. State, 82 Miss. 75, 33 So. 839; Tennessee Fertilizer Co. v. McFall, 163 S. W. 806; 19 Ann. Cas. 181; C. B. & Q. R. Co. v. Neb. (U. S.) 42 L. ed. 948; Security Trust & S. V. Co. v. Lexington, 51 L. ed. 204.

Neither is appellant in a position to question the constitutionality of the statute. A person who invoked the benefits of an unconstitutional law, and actually receives them, cannot in subsequent litigation deny its constitutionality. Appellant voluntarily applied for and obtained the license; he accepted and retained the benefits resulting from the possession and use of such license. He cannot now question the validity of the law. M. etc. R. R. Co. v. Nester, 3 N. D. 480, 57 N. W. 510; State v. Seebold, 192 Mo. 720, 91 S. W. 491; 19 Ann. Cas. 183.

The power of the legislature to enact a law for the purpose of state regulation, and requiring that the obtaining of a license shall be a condition precedent to carrying on a certain business, trade, calling, or occupation, is unrestricted except as to limitations found in the state or Federal Constitutions. 6 R. C. L. 217; 17 R. C. L. 501.

To the extent that property or business is devoted to the public use, or is affected with a public interest, it is subject to regulation under the police power. 12 C. J. 922; 17 R. C. L. 541; 6 R. C. L. 202, 210, 217, 220; 51 L.R.A. 151; 17 R. C. L. p. 503, §§ 28, 213; 12 C. J. 922, 924, § 432, and cases cited in note 67 thereunder.

Such a law is not enacted solely for the public good or public health or morals, or for sanitary purposes, but it extends to fair dealing, and is intended to prevent fraud and cheating in connection with the particular calling, business, or occupation for which the license is issued and where public interest is affected. 17 R. C. L. 542; State v. Robinson, 6 L.R.A. 339, 43 N. W. 833; State v. Armour & Co. 27 N. D. 177, 145 N. W. 1033; 6 R. C. L. 207; Runge v. Glerum (N. D.) 164 N. W. 284.

The power to revoke such a license as is here under consideration is conferred upon the Dairy Commissioner of the state, and the law is a valid enactment. Sess. Laws 1917, chap. 105; Christ Church v. Philadelphia County, 16 L. ed. 602; Tomlinson v. Jessup, 24 L. ed. 204; Humphrey v. Pegues, 21 L. ed. 326; Doyle v. Continental Ins. Co. 24 L. ed. 148; Gray v. Connecticut, 41 L. ed. 80.

Such a licensee takes his license subject to such conditions as the legislature deems proper to impose, and one of the conditions is that it may be revoked by the officer named. Such a license is not a contract, and a revocation of it does not deprive the owner of any property, immunity, or privilege. Com. v. Kinsley, 133 Mass. 578; 15 R. C. L. 474; 17 R. C. L. 476, 554, 556; 25 Cyc. 625.

BRUCE, Ch. J. This is an appeal from an order of the district court of the sixth judicial district denying the petition of the appellant for a writ of certiorari to review the action of the dairy commissioner, J. J. Ousterhous, in revoking a license of the appellant to conduct a cream station at Hazen, North Dakota, and to review the action of the commissioner of agriculture and labor, J. N. Hagen, in sustaining the said revocation.

The statutes under which the action sought to be reviewed was taken are as follows:

Section 2835, Compiled Laws 1913: "There is hereby created a bureau of the department of agriculture and labor to be known as the dairy department, which is hereby created for the purpose of promoting, improving and regulating the dairy products of the state and to establish and enforce proper rules and regulations pertaining thereto."

Section 2836, Compiled Laws 1913: "The commissioner of agriculture and labor is hereby authorized and directed to appoint a deputy in his department who shall be known as the dairy commissioner, and shall be the official head of the dairy department."

Chapter 103, Laws 1917:

Sec. 1. "It shall be unlawful for any person to sample or test milk, cream, or any other dairy product excepting merchants dealing in manufactured butter for the purpose of determining the commercial value of such product when bought or sold, without first having secured a license from the state dairy department and such license shall be conspicuously displayed in his place of business. Provided that in case of sickness or necessary absence, said person may appoint a substitute for six days and for a longer period subject to approval of the dairy commissioner, but said person shall be responsible for the acts of said substitute. This license shall be granted to those who shall have completed a course in milk and cream testing in any recognized college or

dairy school, or to those who shall pass an examination under the direction of the state dairy department and satisfactorily demonstrate that they are properly qualified and competent to use such test.

"The dairy commissioner shall have the authority to revoke any license issued under the provisions of this act if the holder is convicted of a failure to comply with the State Dairy Laws. Said license shall be granted for a period of one year by the dairy department upon payment of a fee of two dollars ($2) of which shall be returned in case of failure to pass said examination. In the case of renewal of a license, a fee of one dollar ($1) shall be paid.

"The fees collected under the provisions of this act shall be paid into the state treasury, monthly, by the dairy commissioner to be credited to the dairy department and to be used for conducting said examinations."

Section 2854, Compiled Laws 1913: "It shall be unlawful for the owner, manager, agent or employee of any creamery or cheese factory to manipulate, underread or overread the Babcock test, or any other contrivance used for determining the quality or value of milk."

Chapter 105, Laws of 1917: "Section 284 of the Compiled Laws of 1913 is hereby amended and re-enacted so as to read as follows:

"Every person, firm or corporation owning or operating a creamery, cheese factory, renovating or process butter factory, or cream station in this state, shall be required before beginning business, or within thirty days thereafter, to obtain from the dairy commissioner a license for each and every creamery, cheese factory, renovating or process butter factory or cream station owned or operated by said person, firm or corporation, which shall be good for one year. The fee for such license shall be ten dollars, and no license shall be transferable. Each license shall record the name of the person, firm or corporation owning or operating the creamery, cheese factory, renovating or process butter factory, or cream station license, its place of business, the location thereof, the name of the manager thereof and the number of the same. Each license so issued shall constitute a license to the manager or agent of the place of business named therein.

"It shall be the duty of every person, partnership, firm or corporation, or association holding a license to operate in any plant which dairy products are handled commercially, to post in a conspicuous place such

license under which they are operating, together with a summary of the dairy laws which shall be prepared and sent out from the office of the dairy commissioner.

"The dairy commissioner may withhold a license from any applicant who has previously violated or refused to comply with any of the existing dairy laws or lawful requests issued by said dairy commissioner, or his authorized assistants. The dairy commissioner, may, at any time, revoke a license on evidence that licensee has violated any of the existing dairy statutes, or has refused to comply with all lawful requests of the dairy commissioner or his authorized agents."

The first order canceling the license was in the form of a letter and was as follows:

Bismarck, N. Dak., August 3d, 1918.

Mr. B. Cofman,
Hazen, North Dakota.

Dear Sir:

Sometime ago one of our deputy inspectors spent several days in your community with the intention of determining the truth of some of the reports that have been coming into this office. After making quite thorough examination from the evidence which our inspector obtained, we find that it becomes the duty of this department to revoke your license. Our inspector weighed, sampled and tested several cans of cream which were delivered to you at your station, and we hold the check which you issued in payment of same, as evidence, that you overread the test on one can of cream as much as 4 per cent and that on another can you credited the producer with 21 lbs less than he had delivered.

You have been long enough in this business to know how to test the cream correctly and no doubt you are also aware that to overread and underread the Babcock test is a violation of our State Dairy Laws.

You will also note that the last legislative session made it the duty of this department to revoke the license of parties who violate our dairy laws and who do not comply with the requirements of this department.

You will kindly give proper attention to this notice and make all the necessary arrangements to have your cream station closed by August 15, 1917. We are sorry that such an action as this has been necessary. We

are also convinced that a firm stand must be taken in enforcing the dairy laws.

Very truly yours,
[Signed] J. J. Ousterhous,
Dairy Commissioner.

Although it is clear from the provisions of §§ 2835 and 2836 of the Compiled Laws of 1913, that no appeal to the commissioner of agriculture and labor is provided for, and the dairy commissioner is an independent officer, the appellant and relator, Bernard Cofman, after the sending of the order in question, made an application to the commissioner of agriculture and labor for a hearing, and in response to this application the dairy commissioner, J. J. Ousterhous, to whom the application must have been referred, telegraphed said Cofman:

"Your license will be extended for a period of ten days for arranging a hearing within that time. Will see your attorney to-morrow."

Thereafter and on the 21st day of August, 1917, with the consent of all parties a hearing was had before the said commissioner of agriculture and labor, John T. Hagan, the relator personally appearing and offering testimony and the dairy commissioner being represented by Assistant Attorney General Edward B. Cox.

After this hearing the following order was issued by the said commissioner of agriculture and labor:

State of North Dakota
Before Commissioner of Agriculture and Labor
In the Matter of the License of Bernard Cofman
To Buy Cream at Hazen, North Dak.

Order Sustaining Revocation of License.

The above-entitled matter coming on to be heard on the 21st day of August, 1917, on petition of Bernard Cofman of Hazen, North Dakota, the petitioner herein being present in person and by his attorney, F. E. McCurdy, and the state dairy commissioner, J. J. Ousterhous, being present in person and represented by Edward B. Cox, Assistant Attorney General. The Commissioner having heard the testimony, the argument of counsel, and being fully advised in the premises.

It is ordered and decreed by the commissioner that the order of the

dairy commissioner revoking the license of Bernard Cofman, petitioner herein, to conduct a creamery station at Hazen, North Dakota, be in all things sustained and upheld.

Dated this 15th day of Sept. 1917.

J. N. Hagen,

Commissioner of Agriculture and Labor.

Although the petition does not allege that this order was recognized and reaffirmed by the dairy commissioner, it seems to proceed on the assumption that this was done, and the certiorari is asked on the grounds that:

"The evidence in this case shows that on the particular cream which the dairy commissioner charges was overread in the test for butter fat, it appears that three tests were made,—one by the Hazen creamery, which test was 39 per cent, one by the public health laboratory at Bismarck, North Dakota, which tested 41 per cent, and the one by the relator at 43 per cent. It further appears from the evidence that the Hazen creamery is in direct business competition with the relator, and that the inspector worked with the Hazen creamery in attempting to catch Mr. Cofman, and that at that time he made no effort to catch the Hazen creamery. That the evidence shows that the cream had been hauled over rough country roads, and that it is possible for a partial churning to have taken place and small particles of the butter fat to have become joined together in small lumps, and that the amount of cream selected for making this test is a very small amount, 18 grams, and that should one of these small particles of butter fat have been found in the 18 grams that the test would be greater and there might be a variation in the test, after being subject to such process. Furthermore, it appears it would be possible for high variation of the reading of the test because of the fact that cream is placed in a tube of a small diameter for test reading, and that due to the capillary attraction the cream has a tendency to be uneven, leaving a depression in the center and that the test would be difficult to read without using what is known to the trade as a red reader.

"Referring to the weight proposition, there appears from the evidence that, instead of there being one can of cream there were two cans of cream in the single test, and the two cans were weighed back and

considered as one can of cream. These cans of cream were weighed at the same old Hazen creamery, and taken to Cofman's cream station and sold to him, and the empty cans taken back to the general merchandise store and weighed. The evidence doesn't show whether the scales were tested or not, and there is no evidence that the Hazen creamery scales had been tested, and it is correct; that since the hearing a test has been made of the scales of the general merchandise store, and it has been found defective. That the plaintiff and the merchant, one named Jake Krause, weighed this particular can on the same scale and also on another scale, and found the scale of the general merchandise store defective. This was done since the hearings, as the matter only developed in evidence at the hearing because no information whatever had been furnished to the plaintiff as to what cans of cream were tested, or any particulars concerning the matter. That the state dairy commissioner having made a ruling as stated in the letter dated August 3d, 1917, and set out in this petition, it appears that this was not a regular cream can from the evidence submitted, and that it had been covered with a cloth tied over the top and when weighed back the cloth was weighed with it, but it appears from the evidence that the cloth was not weighed back with it at the time it was weighed in the store. That a transcript of the evidence taken at the hearing is hereto annexed and referred to and made a part of this application. That no opportunity was given the plaintiff to offer rebuttal testimony on this particular question, and for that reason these statements are incorporated in this petition.

"There is no competent evidence in the record to show that any false reading was made. In other words, there must be a false reading or manipulation of the Babcock test to be a violation of the law. There is absolutely no evidence of any false reading or manipulation. In other words, as far as the evidence shows this may have been an exact record of the test which this man read. It may have been an exact reading of the Babcock test, also it may have been an exact reading of a correctly balanced scale which this man read, and in canceling this license the dairy commissioner presumed and the commissioner of agriculture and labor presumed things not in evidence, and arbitrarily without jurisdiction canceled this man's license.

"Further that the dairy commissioner and the commissioner of agriculture and labor had no jurisdiction to revoke the license of this man,

for the reason that, that portion of the amendment above set out is unconstitutional and void in violation of § 13 of the Constitution of the state of North Dakota, which provision provides that no man shall be deprived of his property without due process of law, and also article 5 of the Amendment of the Constitution of the United States reads to the same effect.

"There being no provision on the Constitution for any hearing or for any trial by any tribunal, and no opportunity for a day in court by which the licensee may protect his rights to pursue a lawful business, if this license is revoked it will have the effect of depriving him of his means of livelihood, absolutely ruining his business, and rendering a considerable investment in property valueless; destroy the good will of the business he has worked up in that community, and inflict upon him irreparable financial loss. That the relator has no other adequate means at law or otherwise, and that the said state dairy commissioner and the commissioner of agriculture and labor had exceeded their jurisdiction in canceling the license."

There is no merit in these contentions. The creamery business is essentially a business which is affected with a public interest, and as such is generally subject to governmental regulation. The police power of the state is not limited to regulations necessary "for the preservation of good order or the public health or safety. The prevention of fraud and deceit, cheating and imposition, is equally within the power, and a state may prescribe all such regulations as in its judgment will secure or tend to secure the people against the consequences of fraud." 6 R. C. L. p. 208; State v. Armour & Co. 27 N. D. 177, L.R.A.1916E, 381, 145 N. W. 1033, Ann. Cas. 1916B, 1149, 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924; Munn v. Illinois, 94 U. S. 124, 24 L. ed. 83.

The purpose of the statute, indeed, is well known, and is to build and to develop the dairying and stock raising industries of the state. It is to prevent the unfair competition by which the financially stronger foreign creameries and butter and cheese and ice cream factories may destroy those of this state by overgrading or overmeasuring until the local creameries are driven to bankruptcy, and then control the grades and the prices. It is in line with the general laws of the state against unfair

competition. Though the state may not interfere with interstate commerce, it may prevent fraud of this kind.

It is not historically true, as contended by counsel for appellant, that a person has a natural right to engage in any useful and lawful business, free from legislative interference and control, and that such a business cannot be the subject of a legislative license. A business may be useful, yet the method of conducting it may, unless regulated, be conducive of harm, and in the same way there may be inducements to and avenues of fraud in a perfectly legitimate business, or cases in which danger of fraud should be minimized, even though the business may be useful and harmless, and even a useful business may be so affected with a public interest that it may be properly regulated.

Licenses, indeed, may be imposed not merely for the purpose of acting as temporary permissions to engage in harmful occupations, but in order to so control those that are useful that their operation may be harmless, and that they may really subserve the public good, which after all is the basis of all property rights.

It has never been the law that the state may not exact a license for the purpose of regulation, so that a business which intimately affects the public welfare may be brought within the supervision of the authorities, and that the regulations which are made concerning it may be more easily and certainly enforced. Parker & Worthington, Public Health & Safety, § 276; People ex rel. Lodes v. Health Dept. 189 N. Y. 187, 13 L.R.A.(N.S.) 894, 82 N. E. 187; 17 R. C. L. 556.

Nor does the fact that chapter 105 of the Laws of 1917, which authorizes the dairy commissioner to revoke the licenses in question, does not in terms provide for a hearing or for an appeal, render the statute invalid or the action of the dairy commissioner nugatory. Even if a hearing was necessary, and on this we express no opinion, such a hearing was accorded to the petitioner, and even if not before the dairy commissioner, who as we view the statute is an independent officer, and not subordinate in such cases to the secretary of agriculture and labor, yet before the very person (the secretary of agriculture and labor) whom the petitioner designated and before whom he desired it to be had. Even where a hearing is required by the Constitution to be had before an administrative officer, is authorized to cancel licenses, or is looked upon as due process of law, it is not always necessary that it shall be provided

for by the statute, but is merely a constitutional guaranty to which the authority conferred by the statute is subject.

Nor does the fact that no appeal to the courts is provided for nullify the act, for, without any such provision, it is clear that mandamus will lie in such a case to redress any wrong which is suffered through any arbitrary, tyrannical, or unreasonable action on the part of the officer or which is based upon false information. People ex rel. Lodes v. Health Dept. supra.

We are satisfied, indeed, that the trial court did not err in denying the writ of certiorari in the case which is before us. The writ is not a writ of right, but will be granted or denied in the discretion of the court and according to the circumstances of each particular case as justice may require. 4 Enc. Pl. & Pr. 32. In North Dakota it can only be used "when inferior courts, officers, boards or tribunals have exceeded their jurisdiction and there is no appeal, nor in the judgment of the court any other plain, speedy and adequate remedy." See Comp. Laws 1913, § 8445.

It is clear that we cannot go into the merits of the case and cannot determine whether the relator was in fact guilty of fraud in the conduct of his business, in reading of the weights or in the tests which he applied. These matters are matters of defense at bar, and do not go into the jurisdiction. St. Paul, M. & M. R. Co. v. Blakemore, 17 N. D. 67, 114 N. W. 730; State ex rel. Noggle v. Crawford, 24 N. D. 8, 138 N. W. 2, 40 Am. St. Rep. 34, note.

The remedy, if any, was by mandamus, 17 R. C. L. 557; People ex rel. Lodes v. Health Dept. supra.

Nor in any event can the relator question the right of the dairy commissioner to cancel the license on the ground of the unconstitutionality of the act, and that his business was such that could not be constitutionally licensed. It is clear, indeed, that a person who obtains a license under a law and seeks for a time to enjoy the benefits thereof cannot afterwards question the constitutionality of the act when the license is sought to be revoked. Minneapolis, St. P. & S. Ste. M. R. Co. v. Nester, 3 N. D. 480, 57 N. W. 510; Hart v. Folsom, 70 N. H. 213, 47 Atl. 603; State v. Seebold, 192 Mo. 720, 91 S. W. 491, Note in 19 Ann. Cas. 183.

Nor, indeed, do we believe that there is any merit in the contention

that the license, when once issued, can only be revoked after a conviction in a criminal prosecution. It is true that chapter 103 of the Laws of 1917, in conferring the authority to revoke licenses issued to persons who are authorized *to sample or test milk,* uses the term "convicted."

It is also true that, although the word "convicted" has not always and in the case of licenses been held to imply a conviction before a court of law (see 1 Words & Phrases, 2d Series, 1045; Sawicki v. Keron, 79 N. J. L. 382, 75 Atl. 478), it seems to be generally so construed by the law dictionaries. The revocation in the case at bar, however, is not sought to be had under the provisions of chapter 103, but under those of chapter 105 of the Laws of 1917, which relate not to those who sample or test milk, but to "every person, firm, or corporation, owning or operating a creamery, cheese factory, . . . butter factory, or cream station in this state," and which act was approved on the day after the approval of chapter 103, and contains the clause: "The dairy commissioner may withhold a license from any applicant who has previously violated, or refused to comply with any of the existing dairy laws or lawful requests issued by said dairy commissioner, or his authorized assistant. The dairy commissioner, may, at any time, revoke a license *on evidence* that licensee has violated any of the existing dairy statutes, or has refused to comply with all lawful requests of the dairy commissioner or his authorized agents."

The judgment of the District Court is affirmed.

CHRISTIANSON, J. (dissenting). I am unable to agree with the reasoning or the conclusion reached by my associates in this case. And in view of the importance of the questions involved, I deem it my duty to indicate the reasons for my dissent. It should be noted at the outset that the object of the license statute involved in this action is regulation, and not revenue. The power to tax is exercised to raise revenue; the police power is exercised to promote the order, safety, health, morals, and general welfare of society. While the police power is not susceptible of exact definition or limitation, the real object of such power, "and that indeed which in its broad sense includes every instance of its exercise, is the securing of the general welfare, comfort, and convenience of the people" (12 C. J. 920); and to that end it may be exercised

to meet the changing conditions of society, and "put forth in aid of what is sanctioned by usage or held by prevailing morality or strong preponderant opinion to be greatly and immediately necessary to the public welfare." 9 Enc. U. S. Sup. Ct. Rep. 523; 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. Where a subject is within the police power it is for the legislature, within constitutional limits, to determine what the remedy shall be. The police power, however, is not above the Constitution, but "is always subject to the rule that the legislature may not exercise any power that is expressly or impliedly forbidden to it by the state Constitution." 12 C. J. 929. The object of a police measure must be the public good. And the business sought to be regulated must, in some measure, be affected with public interest. For "no general power resides in the legislature to regulate private business, or prescribe the conditions under which it shall be conducted so long as the business is not affected with public interest. The merchant, manufacturer, artisan and laborer under our system of government are left to pursue and provide for their own interest in their own way, untrammeled by burdensome and restrictive regulations, which however common in rude and irregular times are inconsistent with constitutional liberty." 9 Enc. U. S. Sup. Ct. Rep. 521, 522. And "the legislature may not, under guise of protecting the public interest, deny to any person the equal protection of laws, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." 9 Enc. U. S. Sup. Ct. Rep. 523. See also 6 R. C. L. pp. 226–228. But "to justify the state in interposing its authority in behalf of the public, it must appear that the interests of the public generally, as distinguished from those of a particular class, require such interference." 9 Enc. U. S. Sup. Ct. Rep. 523.

While the legislature, in the exercise of the police power, may regulate all professions, trades, occupations, and business enterprises that are of a quasi public nature by providing such rules or restrictions as to safeguard the general welfare of the public, such legislative power has its limits, and "is subject to the qualification that the measures adopted for the purpose of regulating the exercise of the rights of liberty and the use and enjoyment of property must be designed to effect some public object which government may legally

accomplish, that they must be reasonable and have some direct, real, and substantial relation to the public object sought to be accomplished, and that the governmental power is not to be arbitrarily or colorably exercised or used as a subterfuge, for oppressing some individual or class of individuals. In short, the exercise of the police power is subject to judicial review, and personal and property rights cannot be wrongfully destroyed by arbitrary enactment. If the means employed have no real or substantial relation to the public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case,—the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action." 5 Enc. U. S. Sup. Ct. Rep. 556, 557.

"The police power of the state extends only to such measures as are reasonable, and the general rule is that all police regulations must be reasonable under all circumstances. In every case it must appear that the means adopted are reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power. A statute to be within this power must be reasonable in its operation upon the persons whom it affects, and not unduly oppressive. The validity of a police regulation therefore primarily depends on whether under all the existing circumstances the regulation is reasonable and whether it is really designed to accomplish a purpose properly falling within the scope of the police power." 6 R. C. L. p. 236.

"All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public. . . . Regulation which impairs or destroys rather than preserves . . . is within the condemnation of constitutional guaranties." 6 R. C. L. p. 239. See also 12 C. J. 934.

While it is true, a license is generally held to be neither a contract nor property, within the technical definitions of those terms, it is nevertheless a personal right or franchise, which in many instances has great value. In the case at bar, for instance, the revocation of plaintiff's license (if sustained) deprives him of the right to pursue the vocation whereby he earns his livelihood, destroys an established business, and casts upon him the odium of having committed illegal acts, and being unworthy of permission to continue in his business.

Manifestly few determinations can in a greater degree affect the rights to acquire, possess, and protect property and reputation, and to pursue and obtain happiness (which are guaranteed to all men by § 1 of the state Constitution), than the determination of the dairy commissioner to revoke petitioner's license.

While the legislature may doubtless confer discretionary powers upon administrative boards or officers to grant or withhold or revoke licenses or permits to carry on trades or occupations, or perform acts, which are properly the subject of police regulation (although it has been held in some of the state courts "to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual," see Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; Re Frazee, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; State v. Fiske, 9 R. I. 94; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Sioux Falls v. Kirby, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156), the regulations must be reasonable and the power conferred exercised in a lawful and constitutional manner. 17 R. C. L. pp. 538–542.

"In such cases the doctrine is, in the absence of anything upon the face of the law to the contrary, that the discretion vested in such tribunal, board, or official, is a judicial or legal discretion, and it will not be presumed, in absence of proof to the contrary, that it has been, or is being, used in an unreasonable, arbitrary, or oppressive manner." But when the law vests absolute and arbitrary discretion in a board or official, without right of appeal therefrom, to grant or refuse or revoke a license for conducting a legitimate business; or when the power granted to such administrative board or officer is shown to have been arbitrarily exercised under sanction of state authority, the party thus unlawfully oppressed may secure redress in the courts. 4 Enc. U. S. Sup. Ct. Rep. 368, 369, 372. See also 17 R. C. L. p. 539, note 20.

And even in cases involving revocation of licenses in the exercise of official discretion, the courts have not refrained from inquiring into the facts far enough to ascertain whether the facts presented a case for the exercise of reasonable discretion, or whether the power of revocation had been, or was attempted to be, exercised capriciously, arbitrarily, or oppressively. William Fox Amusement Co. v. McClellan, 62 Misc. 100, 114 N. Y. Supp. 594; Edelstein v. Bell, 91 Misc.

620, 155 N. Y. Supp. 590; Bainbridge v. Minneapolis, 131 Minn. 195, L.R.A.1916C, 224, 154 N. W. 964.

It should be remembered that the business sought to be regulated by the statutes under consideration is one inherently lawful and beneficial to society. In dealing with licenses for the conduct of business of this nature, the courts have not hesitated to set aside measures vesting arbitrary powers in boards (or especially in a single individual) to issue or revoke licenses, or to set aside the arbitrary acts of such board or individual, when acting under a law fair on its face. In Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, the Supreme Court of the United States held an ordinance of the city and county of San Francisco, providing that it should be unlawful for any person to engage in the laundry business within the corporate limits "without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone," to be violative of the 14th Amendment to the Federal Constitution.

In determining the reasonableness of a license statute, the nature of the business sought to be regulated must be considered. For it is self-evident that there is a vast distinction between a license granted for the conduct of a business which is inherently lawful and harmless and relating to a subject which is useful to the community, and one granted for the conduct of a business which is inherently dangerous, or "which ministers to and feeds upon human weakness and passions." Manifestly, conditions and restrictions placed upon licenses of the latter kind, and entirely reasonable as applied to such licenses, might be entirely unreasonable as applied to licenses of the former kind. This distinction was expressly recognized and pointed out by the Supreme Court of the United States in Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13. That case involved a retail liquor dealer's license. The validity of the ordinance and the action of the police commissioners in refusing to issue a license were assailed. It was asserted that the ordinance was invalid under the principle announced in Yick Wo v. Hopkins, supra, as a delegation of arbitrary discretion to the police commissioners. In distinguishing the two cases, the Supreme Court of the United States, said: "It will thus be seen that that case [Yick Wo v. Hopkins] was essentially different

from the one now under consideration, the ordinance there held invalid vesting uncontrolled discretion in the board of supervisors *with reference to a business harmless in itself and useful to the community; and the discretion appearing to have been exercised for the* express purpose of depriving the petitioner of a privilege that was extended to others. *In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe."* 137 U. S. 94, 95.

One of the most effective safeguards against the arbitrary acts of public officials is an opportunity to be heard. And the weight of judicial authority seems to support the doctrine that a person engaged in a business inherently lawful and useful to society may not be deprived of the license to conduct it, without opportunity to defend his right to maintain it. The right to a full and fair hearing by an applicant for a license was recognized and upheld in Hart v. Folsom, 70 N. H. 213, 47 Atl. 603. Cited in the majority opinion. And it has been said that the theory that a person may be deprived of a license without an opportunity to be heard in his own defense "is so opposed to the principles of the common law that any fact affecting the rights of an individual shall be investigated and determined *ex parte,* and without opportunity being afforded to the party to be affected thereby to be heard," that a law ought not to be construed as contemplating such procedure unless that purpose is expressed in the plainest terms. State ex rel. Powell v. State Medical Examining Bd. 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238.

In considering the question of revocation of a license to practise law, the Supreme Court of the United States said: "Before a judgment disbarring an attorney is rendered, *he should have notice of the grounds of complaint against him, and ample opportunity of explanation and defense. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practise his profession, as when they are taken to reach his real or personal property.* . . . The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression where-

ever power may be lodged." Ex parte Robinson, 19 Wall. 512, 22 L. ed. 208. See also People use of State Bd. of Health v. McCoy, 125 Ill. 289, 17 N. E. 786; State v. Schultz, 11 Mont. 429, 28 Pac. 643.

Leaving constitutional consideration on one side, the idea that an individual appointive, administrative official may revoke a license for the conduct of a lawful business, without affording the licensee a full opportunity to be heard, is so contrary to the spirit of our institutions, that it ought not be presumed that the legislature intended to confer such power or prescribe such procedure unless it has said so in express terms.

The power to issue and revoke licenses is vested in the dairy commissioner, and no provision is made for an appeal from his decision. The dairy commissioner is appointed by the commissioner of agriculture and labor. Comp. Laws 1913, § 2836. Chapter 103, Laws 1917, empowers the dairy commissioner "to revoke any license issued under the provision of this act *if the holder is convicted of a failure to comply with the State Dairy Laws.*" And chapter 105, Laws 1917, authorizes the dairy commissioner "to revoke a license *on evidence that licensee has violated any of the existing dairy statutes, or has refused to comply with all lawful requests of the dairy commissioner or his authorized agents.*" There are many statutory provisions relating to the business of operating creameries and cream stations. The test for milk and cream is carefully and minutely prescribed by the statute. Comp. Laws 1913, § 2853. And it is made a misdemeanor "to use any other means of determining the amount of butter fat in milk or cream than the Babcock test, or to use any other size of milk measure, weight, test tubes, or bottles" than those described in the statute, or "to manipulate, underread, or overread the Babcock test." Comp. Laws 1913, §§ 2853, 2854, 2861.

The words "convicted" and "evidence" have well-settled, legal meanings. Manifestly, under our laws no one can be "convicted" without being afforded an opportunity to be heard in his defense, and mere rumors and hearsay statements, not made matters of record, but whispered in secret to a public officer, do not constitute evidence which may form the basis for an official act, requiring the exercise of judgment and discretion. Yet, in the case at bar, the dairy commissioner attempted to revoke a valuable franchise, held by the petitioner, for

the avowed reason that the petitioner had committed criminal acts,—and this adjudication was made solely upon rumors or hearsay statements, and without the petitioner being afforded an opportunity to be heard.

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws, and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The majority members hold that, inasmich as the petitioner requested and obtained a hearing before the commissioner of agriculture and labor, he is bound by the decision rendered by such official. I believe this conclusion to be erroneous. The commissioner of agriculture and labor is an administrative officer. He has such powers only as are conferred upon him by law. N. D. Const. § 83. It is conceded by the majority members that the commissioner of agriculture and labor has no authority under our statutes to review the actions of the dairy commissioner with respect to the revocation of licenses issued under the Dairy Statutes. This being so, how can a hearing before him be of any consequence? If such hearing constitutes due process, and the parties become bound by the determination, then by similar process of reasoning it should be held that parties who go before a justice of peace and litigate title to realty, or some other question outside of the justice's jurisdiction, become bound by, and estopped to question to validity of, the decision; or that parties by submitting a controversy

to a person selected by them clothes the person selected with authority to render a binding decision upon the questions submitted.

It is also suggested in the majority opinion that a party who accepts a license under the provisions of a statute is precluded from assailing the validity of any of the conditions imposed by the statute. Under the view I have taken of the case, the question is not necessarily involved, as in my opinion the statutes contemplate that the licensee shall have notice, and full opportunity to be heard, before his license is canceled; and that whatever discretion the dairy commissioner has with respect to the issuance or revocation of licenses must be exercised fairly and impartially, in harmony with the fundamental principles of American institutions.

In this connection, however, I deem it proper to observe that while it is true that a person may, under certain circumstances, waive the right to question the constitutionality of a statute, and may (with certain exceptions) even waive constitutional provisions intended for his benefit, it does not follow that a person who accepts a license will be deemed to have assented to conditions or restrictions sought to be imposed in violation of his constitutional rights.

In considering this question the Supreme Court of the United States said: "The defendant, however, insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the same words of the statute) 'thereby to have agreed to comply with the same' § 1. The answer to this question is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the State Railroad and Warehouse Commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the *valid* laws of the state and the *valid* rules and regulations prescribed by the Commission. If the Commission refused to grant a license, or if it sought to revoke one granted, because . . . the licensee in the other refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by

appropriate judicial proceedings." W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423. See also San Francisco v. Liverpool & L. & G. Ins. Co. 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380; Hibbard v. State, 65 Ohio St. 574, 58 L.R.A. 654, 64 N. E. 109.

The majority members also hold that petitioner has mistaken his remedy. It is stated that his remedy, if any, is mandamus, and not certiorari.

Under our statute "the writ of mandamus may be issued . . . to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person." Comp. Laws 1913, § 8457.

And, "a writ of certiorari may be granted . . . when inferior courts, officers, boards or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy and adequate remedy." Comp. Laws 1913, § 8445.

Mandamus lies to compel action to be taken by the inferior body or officer. Certiorari lies to review action which has been taken by an inferior body or officer. 11 C. J. 90; 26 Cyc. 142. While mandamus may be invoked to compel the exercise of official discretion, it cannot compel such discretion to be exercised in a particular way (26 Cyc. 159). Nor can such discretion be controlled or reviewed by mandamus, when it has once been exercised. State ex rel. Dakota Hail Asso. v. Carey, 2 N. D. 36, 49 N. W. 164; Sawyer v. Mayhew, 10 S. D. 18, 71 N. W. 141.

The rule generally prevailing is that only acts judicial or quasi judicial in their nature are reviewable by certiorari. But under the laws of this state the writ is not confined to a review of judicial or quasi judicial proceedings, but extends to every case where the inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no writ of error, appeal, nor, in the judgment of the court, any other plain, speedy and adequate remedy. State ex rel. Johnson v. Clark, 21 N. D. 517, 131 N. W. 715. See also 11 C. J. 121.

And "it is a general rule of the common law that when a new juris-

diction is created by statute, and the court or officer exercising it proceeds in a summary way or in a course not according to the common law, and a remedy for the revision of its exercise is not given by the statute creating it, certiorari will lie." 4 Enc. Pl. & Pr. 73.

In State ex rel. Johnson v. Clark, supra, this court reviewed the action of the city council of the city of Minot in annexing certain territory to such city, and held that the claim "on the part of the petitioner that the city council did not have jurisdiction to act by reason of the failure to post and print notices" of the annexation proceeding, constituted such attack upon the jurisdiction of the city council as to make it a proper question for review by certiorari. And it seems that the authorities generally hold that action taken without legal notice constitutes an "excess" of jurisdiction and is reviewable by certiorari. 11 C. J. 105; 4 Enc. Pl. & Pr. 93.

It seems to me that under the rule laid down in State ex rel. Johnson v. Clark, supra, the question raised by the petitioner that the dairy commissioner exceeded his jurisdiction in revoking the license without giving the petitioner notice and an opportunity to be heard, is one properly reviewable by certiorari. There is no question of fact presented. The questions presented are purely questions of law, with respect to the powers and jurisdiction of the dairy commissioner. It is conceded that he revoked petitioner's license without notice, and without affording him an opportunity to be heard; and that the dairy commissioner based his action upon rumors or hearsay statements submitted to him in the absence, and without the knowledge, of the petitioner. In my opinion such action was wholly unwarranted under the statutes, and contrary to the principles of natural justice.

The view I have taken of the statutes involved in this proceeding renders it unnecessary to determine to what extent the legislature may regulate the business of purchasing milk and cream, and I therefore express no opinion as to whether the license regulations contained in chapters 103 and 105, Laws 1917, are reasonable or unreasonable.

ROBINSON, J. (dissenting). In this case it appears that in August, 1917, at Hazen, North Dakota, Cofman, the appellant, was conducting a cream station under a license from the dairy commissioner, issued in May, 1917. On August 3d, the commissioner wrote a letter to Cof-

man, purporting to revoke his license, and directed him to close his cream station by August 15th. This revoking letter was written without any prior notice to Cofman and without giving him any hearing or any opportunity to refute the charges made against him. That charge, as stated in the letter, was that he had "overread the cream tester on one can of cream as much as 4 per cent, and that on two cans the weight was 2 pounds short."

Cofman appealed to the Commissioner of agriculture and labor, and though the statute does not provide for any such appeal, yet as a matter of courtesy Cofman was given a chance to prove his innocence. He claimed that, until specific charges were made against him and until proven guilty by competent testimony, his innocence should be presumed; but the commissioners held that the license was not a property right, and that it was merely a gratuitous permission which might be revoked without a hearing and without cause. However, without making any formal charge against Cofman and without any findings of fact, the commissioner of agriculture heard evidence and made a grandiloquent order and decree affirming the order of the dairy commissioner. From an order of the district court denying a review by certiorari, Cofman appeals to this court. The whole procedure is based on a gross misconception of the law. A license may or it may not involve any property right, but a license to conduct a cream station or a creamery, to practise law or medicine, or to follow any business vocation, is a property right, of which a person may not be deprived in an arbitrary manner and without due process of law. By due process of law is meant the law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.

On May 15, 1917, Cofman was issued a license to conduct a cream station at Hazen. It was issued under chapter 103, Laws 1917. The license is granted to a qualified person for one year upon payment of a fee of $2 and renewed on payment of $1. And the dairy commissioner is given authority to revoke any license if the holder is "convicted of a failure to comply with the State Dairy Laws." To convict is to prove and find guilty of an offense, crime, or wrong. The statute gives no authority to revoke a license until the holder has been tried and convicted of a failure to comply with the Dairy Laws. In law there can be no conviction of a wrong without a formal written accusa-

tion and a fair opportunity for a trial. And until the accused is proven guilty, he is presumed to be innocent. He may not be called upon to prove his innocence. He must be confronted with the witnesses against him, and have a reasonable opportunity to cross-question them and to disprove their testimony.

Cofman had none of these opportunities and guaranties. The commission acted as if they had an absolute right to revoke the license without any written accusation or any conviction of wrong.

As the whole record is before this court, there is no reason for a writ directing the dairy commissioner or the secretary to duplicate and certify the same; and in regard to the merits of the case, there is no question of doubt. There is no charge or evidence that Cofman did wilfully overread his cream tester, or underread the weight of his two cans of cream, and there is no claim that on such reading any person can be always perfect and accurate, or that the cream tester is always perfect and accurate, and the same is true of the different scales used in weighing cream cans, and from the record now before the court it does appear that the revocation of the license and the whole procedure was absolutely void.

CHRISTINE ELLINGSON, Respondent, v. CITY OF LEEDS, Appellant.

(169 N. W. 85.)

City — private building — used as postoffice — steps erected on public sidewalk leading up to — ice and snow accumulated thereon — person slipping and falling — injuries sustained — action against city for damages — city not liable.

A city is not liable for damages sustained by falling on steps erected on a public sidewalk as a part of an entrance to a private building, which is used

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NOTE.—The question of liability of municipality for permitting an accumulation of ice and snow on sidewalk is discussed in notes in 21 L.R.A. 263, and 20 L.R.A. (N.S.) 656.

as a postoffice, even though such steps may be out of repair and in a dangerous and defective condition, and even though ice and snow may have accumulated thereon and such steps occupy a portion of the sidewalk.

Opinion filed September 7, 1918.

Action for personal injuries.

Appeal from the District Court of Benson County, Honorable *C. W. Buttz,* Judge.

Judgment for plaintiff. Defendant appeals.

Reversed.

Victor Wardrope and *L. L. Butterwick,* for appellant.

A municipal corporation is not required to provide steps or other means by which the streets or sidewalks may be entered from private property. Goodwin v. Des Moines, 7 N. W. 411; Fitzgerald v. Berlin, 24 N. W. 870; Smith v. Wendell, 7 Cush. 498, 13 L.R.A.(N.S.) 1240; James v. Wellston Twp. 13 L.R.A.(N.S.) 1219.

"And a town is not liable for damages from a defective road leading from a highway over private land, to a mill." Stricker v. Reedsburg, 101 Wis. 457, 77 N. W. 897; Abbott, Mun. Corp. p. 2307; 3 Abbott, Mun. Corp. pp. 2219, 2220; Elam v. Mt. Sterling, 20 L.R.A. (N.S.) p. 617; Wolf v. District of Columbia, 69 L.R.A. 83; Dubois v. Kingston, 102 N. Y. 209; Robert v. Powell, 168 N. Y. 411; Tiesler v. Norwich, 47 Atl. 161.

The existence of such objects as steps partly on the sidewalk leading to the entrance to private property is lawful. Dubois v. Kingston, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273; Dougherty v. Horseheads, 159 N. Y. 154, 53 N. E. 799.

The accident here resulted from the plaintiff slipping when she stepped on the loose snow on the lower step, but she deliberately went out of her way in stepping where this loose snow was accumulated. Sess. Laws 1915, chap. 70, p. 83; notes in 21 L.R.A. 263 and 20 L.R.A.(N.S.) 656.

A fact cannot be regarded as proved where the evidence merely gives rise to conjecture or supposition of its existence. 17 Cyc. 754 and cases cited.

Slight unevenness or a slope of a sidewalk presents no question of negligence on the part of the municipality, and there is question for

the jury. Harnet v. New York, 127 N. Y. Supp. 295; Snider v. Superior, 149 Wis. 671, 132 N. W. 541; Kawiecka v. Superior, 20 L.R.A.(N.S.) 633, 118 N. W. 192; Lexington v. Cooper, 43 L.R.A. (N.S.) 1158 and note; Richmond v. Shonberger, 29 L.R.A.(N.S.) 180; Davidson v. New York, 133 App. Div. 352, 117 N. Y. Supp. 185; Breckman v. Covington, 143 Ky. 444, 136 S. W. 865; Schall v. New York, 88 App. Div. 64, 84 N. Y. Supp. 737; Cook v. Milwaukee, 27 Wis. 1991; Richmond v. Courtney, 29 L.R.A. 182; Bigelow v. Kalamazoo, 97 Mich. 121, 56 N. W. 339; Weisse v. Detroit, 15 Mich. 482, 29 L.R.A.(N.S.) 183, 63 N. W. 423; Waggoner v. Point Pleasant, 42 W. Va. 798, 26 S. E. 352; Kleiner v. Madison, 104 Wis. 339, 80 N. W. 453; Beltz v. Yonkers, 148 N. Y. 67, 42 N. E. 401, 19 N. D. 542; Braatz v. Fargo, 19 N. D. 544; Beltz v. Yonkers, 148 N. Y. 67, 42 N. E. 401.

"Travelers upon streets must use all reasonable care and caution to avoid danger; they cannot carelessly run into danger and then make others pay for their negligence." Moeller v. Rugby, 30 N. D. 438; Lerner v. Philadelphia, 21 L.R.A.(N.S.) 614.

It is elementary that a traveler upon a public street is bound to use ordinary care, and what constitutes ordinary care and prudence depends upon the circumstances of each particular case. Lerner v. Philadelphia, 21 L.R.A.(N.S.) 632; Gerdes v. Christopher & S. Architectural Iron & Foundry Co. 25 S. W. 557; Henderson v. Burke, 44 S. W. 422; Conneaut 44 N. E. 236; Durkin v. Troy, 61 Barb. 437; Sickles v. Philadelphia, 58 Atl. 128.

Municipalities when liable at all are only liable when the defects in the sidewalk or other street improvements are the cause of the accumulation of snow and ice. Elam v. Mt. Sterling, 20 L.R.A.(N.S.) 662, note; Circleville v. Sohn, 20 Ohio C. C. 68; Bailey v. Cambridge, 54 N. E. 523; Wesley v. Detroit, 117 Mich. 658, 76 N. W. 104; Stamberger v. Cleveland, 22 Ohio C. C. 65; DePere v. Hibbard, 104 Wis. 666.

Flynn & Traynor, for respondent.

The steps here leading up to the entrance of the postoffice formed an integral part of the street. They were placed upon the traveled portion of the sidewalk, and although placed there by private parties they were so erected by and with the tacit consent of the city and its

authorities, and the city was responsible for their condition. Chambers v. Minneapolis, S. & S. S. M. Ry. Co. 163 N. W. 824; Estelle v. Crystal Lake (Minn.) 6 N. W. 775.

Evidence of knowledge of plaintiff of the dangerous condition of a sidewalk, while it may point to contributory negligence, yet it is a question for the jury, and the general rule in this state is that cities are liable for the damages caused by their own wrongful or negligent act, and no statute making them liable is necessary. Ludlow v. Fargo, 3 N. D. 485; Gagnier v. Fargo, 11 N. D. 77; 28 Cyc. 1371.

Where the plan of construction of sidewalks or steps leading to a public place from the sidewalk was manifestly unsafe, the city was held liable. 28 Cyc. 1387, 1388.

"Where a city had notice that a raised sidewalk ended abruptly several feet from the ground, and that the public used a loose plank as a means of descent, it was bound to see that such means was safe, and was liable to one injured by a fall from the plank, though it had not put the plank in place, and had not undertaken to furnish any means of descent." Hogan v. Chicago (Ill.) 48 N. E. 210; Senheim v. Evansville (Ind.) 40 N. E. 69; James v. Portage (Wis.) 5 N. W. 31, 34, 35; Johnson v. Milwaukee, 46 Wis. 568; Joliet v. Fuchs, 132 Ill. 407; Schively v. Jenkintown (Pa.) 36 Atl. 754; Kellogg v. Northampton, 8 Gray, 504; Jackson v. Grand Forks, 24 N. D. 601.

Bruce, Ch. J.: This is an action to recover damages for injuries occasioned by falling on the steps in front of the postoffice at Leeds, North Dakota. The city of Leeds has a population of at least 800. The postoffice is situated on the south side of the principal street of the city. The floor of the postoffice building is approximately 20 inches above the level of the sidewalk, and the building is reached from the sidewalk by means of two cement steps placed on the sidewalk and directly in front of the door. The postoffice building is owned by private parties. The accident is alleged to have occurred "on account of the dangerous condition of the steps, due to steepness and narrowness, and further on account of the accumulation of snow and ice *thereon,* making them slippery, thereby increasing the danger whereby the plaintiff, though personally in the exercise of the greatest care, partially lost her balance because of the slipping of her boot

or her foot thereon. The general narrow, steep, and slippery condition of the entire steps and approach thereto were such that her foot slipped as she placed it upon the lower step, which had a great amount of ice and snow thereon, and the plaintiff was suddenly and violently thrown to the sidewalk."

At the beginning of the trial the defendant's counsel objected "to the introduction of any testimony on the part of the plaintiff, on the grounds and for the reasons that the complaint in this case, and also the opening statement of counsel to the jury, show that the accident complained of occurred while the plaintiff in this case was using certain steps placed upon the sidewalk for the purpose of going in and returning from the postoffice in the city of Leeds, which is a private building, owned and controlled by private persons; and on the further ground that the city of Leeds is not shown or alleged to have placed the steps on which the injury occurred on said sidewalk, or to have been responsible for keeping them in repair, and it not being shown or alleged that they were placed on this said sidewalk with the consent of the said city, and it appearing from the allegations of the complaint and from the statement of counsel for plaintiff that plaintiff was injured, if injured at all, while using steps placed upon the sidewalk by a private individual for the purpose of going to and from the postoffice, and that she was not injured while using the sidewalk in the city of Leeds for the purposes of a sidewalk, and that the city of Leeds is not liable for any injury sustained by the plaintiff, if any there was."

This objection was overruled and this overruling is assigned as error. Another assignment of error is based on the instruction of the court to the effect that:

"The legislature of this state has passed a law which reads as follows:

" 'All municipalities in the state of North Dakota (and that would include cities) shall be absolutely exempt from all liability to any person for damages for injuries suffered or sustained by reason of the accumulation of snow and ice upon sidewalks within such municipality, unless actual knowledge of the defective, unsafe, or dangerous condition of such sidewalk or cross walk shall have been possessed by the mayor, board of city commissioners, police officer, or marshal of

such municipality, forty-eight hours previous to such damage or injury, and such actual knowledge shall in no case be presumed from the fact of the existence of such condition, but in all cases the same shall be proved as an independent fact. In no event shall any municipality in this state be liable in damages for any injury occasioned through the mere slippery condition of such sidewalk or cross walk due to the presence of frost or loose snow thereon.'

"You will notice, however, that in addition to her claim with reference to the accumulation of snow and ice upon these steps or sidewalk, the plaintiff has claimed that the steps themselves were dangerous and defective in construction, and that that brought about the injury.

"Now I say to you in this lawsuit the great question you have to deal with is whether or not the steps in themselves were so defective as to be dangerous for ordinary use by pedestrians under the conditions we have here in this climate during the various seasons of the year. Was the city negligent in this respect? Did it fail to use ordinary care to provide *a reasonably safe passageway or steps at this* particular place or in seeing that these particular steps were reasonably safe for the use of the public? Was there such a defective condition in the steps themselves or in their construction which existed and which may have contributed to the injury or the accident?

"When two causes combine to produce an injury to a traveler upon a walk, or upon steps like these, both of which are direct, the one being a defect for which the city is blamable and the other some occurrence for which neither party is responsible, the city is liable, provided that the injury would not have happened but for such defect. There is claimed an icy or snowy condition of these steps at the time of the accident caused by changes in the weather and fall of snow or moisture. The defendant is not liable for that condition; for were iciness or slipperiness produced by natural causes the city is not responsible. Yet, if such condition concurs with a previous defect for which the city is responsible, which defect caused the injury, or assisted in causing it, the city is liable in damages."

These assignments of error entirely cover the case and their decision will be conclusive. We are satisfied that no cause of action was stated or proved against the defendant. The accident did not occur upon the sidewalk, nor was it occasioned by an obstruction to the sidewalk, but

by the slippery condition, and perhaps defective condition, of steps which were erected by a private individual onto a private building, which was used by the United States as a postoffice.

We find no cases in the books where a city has been held liable for a defective entrance to a private building or for an injury occasioned on a defective private sidewalk. If the steps had gone down into the basement of the building, and not upwards to the level of the postoffice floor, no one would have contended that the city would have been liable if a person had fallen upon the lower steps, nor would they contend that the city would have been liable if he had fallen on the upper one and before reaching the sidewalk. There can be no difference between such a case and one where the steps arise above the sidewalk. If a person traveling along the sidewalk had fallen against the protruding steps on a dark night and the action had been maintained on the theory that a portion of the sidewalk had been obstructed, a recovery might possibly have been had, but here the injury was occasioned not while traveling upon and passing along the sidewalk, but while entering into a private building and upon a portion of that private building. It is clear, indeed, that if there had been no steps there would have been no way of entering the building from the sidewalk, and, though the public is required to keep its sidewalks in reasonably safe condition and repair, it is not required to construct a stairway or steps which shall lead into private buildings, nor is it required to keep the same in a safe and proper condition.

What duty, in short, did the city violate and what breach of duty on its part was there which occasioned the injury? For authorities supporting our conclusion, see Goodwin v. Des Moines, 55 Iowa, 67, 7 N. W. 411; Fitzgerald v. Berlin, 64 Wis. 203, 24 N. W. 879; Smith v. Wendell, 7 Cush. 498; James v. Wellston Twp. 18 Okla. 56, 13 L.R.A.(N.S.) 1219, 1240, 1241, 90 Pac. 100, 11 Ann. Cas. 938; Stricker v. Reedsburg, 101 Wis. 457, 77 N. W. 897, 5 Am. Neg. Rep. 515.

We are not unaware of the case of Estelle v. Lake Crystal, 27 Minn. 243, 6 N. W. 775. In that case, however, the accident did not occur while entering or leaving the building from the platform which was placed upon the sidewalk and extended past the building, but while

falling off the platform itself, which was a part of and took the place of the sidewalk, and was placed in the street to be used as a part of it.

The judgment of the District Court is reversed and the complaint is ordered to be dismissed.

GRACE, J. I concur in the result.

W. C. MACFADDEN, Petitioner and Appellant, v. EVA M. JENKINS et al., Respondents.

(169 N. W. 151.)

Partnership — between two parties — dissolution — one continuing the business — death of partner continuing business — before liquidation of old firm affairs — estate of — administration of — corporation — forming of — by administrator, wife of deceased and one other — purpose of — to continue former business — subscription to stock — entry of in corporation books — good will — constitutes agreement to pay amount stated.

1. Where there existed a partnership between two parties which was dissolved by mutual consent, one of the partners continuing and succeeding to the business of the firm including the firm name, and the partner who continues the business before the liquidation of the partnership is completed dies, and one who was not theretofore connected with the partnership was appointed administrator of the estate of the deceased partner, and, after his appointment and qualification as administrator and his entry upon the discharge of his duties as such administrator, forms a corporation, the incorporators consisting of himself and two others, one being the wife of the deceased, for the purpose of continuing the business of the deceased, and the following entry is made on the corporate books: "Paid for good will of company fifteen shares of stock to E. M. Jenkins, fifteen shares to Macfadden, and fifteen shares to B. Simonitsch," each share being for $100, the total of such shares being $4,500,—it is *held* under all the testimony, circumstances, and facts of this case that the corporation took over the business of the deceased, and the notation made upon the books of the company with reference to the good will is an agreement to pay $4,500 for the good will of such business.

Partnership — dissolved mutually — one of partners continuing the business — and name of firm — liquidation undertaken by — dies before completion — real and personal property — equitable title to — vests in the surviving partner in trust only — for liquidation purposes — heirs and representative of deceased — entitled to balance — after liabilities are paid.

2. Where a partnership existed and was dissolved by mutual consent, and one of the partners continues the business and succeeds thereto, and the name of the partnership, and the continuing partner undertakes to liquidate the partnership and is doing so, but has not completed such liquidation at the time of his death, the equitable title to all property, both real and personal, vests in the surviving partner in trust, and in trust only, for the purpose of liquidation, and the heirs or representatives of the deceased are entitled to any balance remaining after the partnership liabilities have been satisfied.

Estate of deceased partner — stranger to partnership business — appointed administrator — qualifies — assumes control — trust relation — corporation — forming of — administrator elected president of — property of deceased — sold to — through probate court proceedings — conflict between such relations — personal and individual interests.

3. Where a partnership existed, which has been dissolved by mutual consent of the partners, and one of the partners continues the business and succeeds to the name and becomes the liquidating partner, and is engaged in the continuance of the business and liquidation of the partnership at the time of his death, and one, a stranger to the partnership, is appointed administrator of the estate of the deceased and duly qualifies and enters upon his duties, such administrator immediately upon his qualification assumes a trust in relation to all the property of the deceased, and all such property of the deceased in the hands of the administrator is impressed by a trust which the administrator is in law bound to faithfully execute; and where such administrator after his qualification organizes a corporation of which he is president, to which is sold the property of the deceased by the administrator through the probate court, and such corporation comes into possession and control of the property of such deceased and sells and disposes of the same,—it is *held* that under these facts and circumstances there is a direct conflict between the trust relations of such administrator of the estate of the deceased, and his self-interest represented by the corporation of which he was president. In such case it is apparent that it would be to the interest of the administrator as a part owner of the stock of the corporation to purchase the property from the estate as cheaply as it could be purchased, and as administrator under these circumstances it would be to his personal interest and individual gain to sell the land and property of the estate to the corporation at as low a price as he could.

Administrator — selling estate property — to corporation of which he was president — taking possession of such property — amounts to purchase by administrator — profit or gain made — accrues to benefit of cestui que trust — administrator accountable for.

4. Where, as in this case, the administrator of the estate of a deceased person sells and disposes of the trust property to a corporation of which he is the president, or of which he is a member, and permits such corporation to receive and take possession of the personal property and control and dispose of it, it is *held* that the purchase of the property by the corporation is in such case a purchase by the administrator, and that the value of such property, and any gain or profit made by the corporation, shall accrue not to the corporation, but to the *cestui que trust* or the legal representatives of the deceased, and the administrator is accountable for all the value of the property of the intestate which came into his hands and under his control, and is held accountable therefor.

Trustee — violation of trust — conversion of trust property — by individual acts — or through other agencies — liability of.

5. Where a trustee violates his trust relations, and wrongfully and fraudulently converts the trust property either directly himself or by and through other agencies, such as corporations or other agencies formed, of which the administrator is a member, the administrator is liable in equitable conversion for the value of all such property so converted, and the profits and gains thereof, if any.

Corporation — legal entity — when used for legal purpose — wrongs — frauds — cannot be used to cover — courts — duty of.

6. A corporation may be considered a legal entity when used for the accomplishment of a legal purpose. Corporations, however, cannot be used as a cover under which wrongs may be committed and fraud perpetrated. In such case the court will look through the form of the corporation to ascertain its actual purpose and intent. If the purpose and intent of the corporation are bad its corporate entity will be no cover for wrong, fraud, and bad faith.

Administrators — estates — claims against — may not purchase at discount — and charge up full face of claims — may not make personal gain — in settlement of claims against estate.

7. Administrators may not purchase claims against the estate at discount and in their accounting charge up such claims for the full amount of the face of such claims. The administrator may not thus make an individual profit for himself and for his own personal benefit, either in dealing with or settling the claims against the estate, or in dealing with any of the property of the estate of which he is administrator.

Administrator — equitable conversion — liability — trial court — may restate account of — county court — directions to — from district court — final account.

8. Where the administrator has been held liable as in this case, for equitable conversion, it was proper for the trial court to restate the account in the manner in which it did in this case, and to order the county court from which the appeal was taken to correct the final account of the administrator in accordance with the finding and judgment of the trial court, the district court having appellate jurisdiction to try and determine the correctness or incorrectness of an order allowing or disallowing the final account.

Opinion filed March 6, 1918. Petition for rehearing denied September 9, 1918.

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

Affirmed.

Engerud, Divet, Holt & Frame, and *Fowler & Greene,* for appellant.

One partner cannot sue his copartner on an overdraft of the nature here presented, until their mutual accounts are settled by liquidation of the partnership. Devore v. Woodruff, 1 N. D. 143; Gleason v. White, 34 Cal. 258; Parsons, Partn. 3d ed. p. 293; Painter v. Painter (Cal.) 9 Pac. 450.

"A partnership interest is one owned by several in partnership for partnership purposes."

"The ownership of property by several persons is either of joint interests, or partnership interests, or of interests in common." Comp. Laws 1913, §§ 5261, 5263; Civ. Code, art. 2, chap. 74, Comp. Laws 1913, §§ 6389 et seq.

On the death of a partner the surviving partner succeeds to all the partnership property, whether real or personal, in trust for the purposes of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property. Comp. Laws 1913, § 6425.

These statutes form a departure from the American common law on the subject prevailing in most states, and are an adoption of the English rule, which embodies the rule recognized and applied in courts of equity. Woodward v. Nudd, 27 L.R.A. 340, and notes.

The surviving partner takes the title to partnership personalty for the purposes of liquidation and has the right to conduct such liquidation. If, in the process of liquidation, he finds it necessary to sell the lands to pay debts, or to recover his own claims on the partnership, he can resort to equity to compel the heirs to execute conveyance of the legal title. 27 L.R.A. p. 349, note, II. C.

A district legal estate is created termed a "partnership interest," which is neither a joint tenancy nor a tenancy in common. Comp. Laws, §§ 8711, 8717, 8768.

In such cases the administrator of the estate of a deceased partner acquires only the right to receive whatever balance, in money or other property, that may ultimately be found to be due to the decedent, when the partnership affairs are settled. Thompson v. Weeks, 26 Cal. 51; Theller v. Pioche, 57 Cal. 447; Andrade v. Court (Cal.) 17 Pac. 531; Gleason v. White, 34 Cal. 258; Painter v. Painter, 68 Cal. 395; McPherson v. Swift (S. D.) 116 N. W. 76; Re Amerbach (Utah) 65 Pac. 488.

The probate court has no jurisdiction whatsoever of the settlement or accounting of the partnership liquidation, because such a settlement or accounting can only be litigated in an action in the district court, between the administrator of the estate and the surviving partner or his representative. Tompkins v. Weeks, 26 Cal. 51; Theller v. Pioche, 57 Cal. 447; Andrade v. Court (Cal.) 17 Pac. 531, 532; Re Amerbach (Utah) 65 Pac. 488.

The transactions of the administrator in his conduct of the estate do not violate any of the rules which govern all trustees, including administrators. Comp. Laws 1913, §§ 6281–6287.

The purchase of Ellsworth's share in the partnership by the corporation personally did not violate any trust relation. The former was not a beneficiary of the latter's trust. Comp. Laws 1913, §§ 6281–6284, 6286; Hall's Appeal, 40 Pa. 409.

The copartnership affairs were outside of the trust relationship. Moses v. Moses, 50 Ga. 9; Barker v. Barker, 14 Wis. 142; (see especially opinion on rehearing); Haight v. Pearson (Utah) 39 Pac. 479; Lombard v. Carter (Or.) 59 Pac. 473; Peyton v. Smith, 22 N. C. 325; Allen v. Gillette, 127 U. S. 589; Fleming v. McCutcheon (Minn.) 88 N. W. 434; Bush v. Webster (Ky.) 72 S. W. 364; Mark

well v. Markwell (Mo.) 57 S. W. 1078; Hollingsworth v. Spaulding (N. Y.) 54 N. Y. 636; Rickey v. Hillman, 7 N. J. L. 180; Earl v. Halsey, 14 N. J. Eq. 332; Jones v. Novies, 22 N. J. Eq. 102; Stark v. Brown, 101 Ill. 395.

But even if appellant himself were precluded from buying out Ellsworth's interest, his disability in this respect would not extend to the corporation, of which he chanced to be president. Cook, Corp. 6th ed. §§ 663, 664.

"A corporation is in law a person or entity, entirely distinct from its stockholders and officers." Cook, Corp. § 663; Owen v. Potter (Mich.) 73 N. W. 976.

The claim purchased in this instance was a valid claim; the estate was not injured nor was there culpability in sharing as a stockholder. Houghteling v. Stockridge (Mich.) 99 N. W. 759; Copsey v. Bank (Cal.) 66 Pac. 8; Clark v. Eaton, 100 U. S. 146; Gray v. Mining Co. 68 Fed. 677–682; Davis & Co. v. Wagon Co. 20 Fed. 699; Monongahela Bridge Co. v. Traction Co. (Pa.) 46 Atl. 99.

The shares of the capital stock of a corporation are essentially distinct and different from the corporate property, and the owner of all the stock of a corporation does not own the corporate property or become entitled to manage or control it. Central Trust Co. v. Bridges, 57 Fed. 753; Richmond & Co. v. Co. 68 Fed. 105, 108; United Mines Co. v. Hatcher, 79 Fed. 517; United States v. Refrigerator Co. 145 Fed. 1007; Halls Safe Co. v. H. H. M. Safe Co. 146 Fed. 37; Victor & Co. v. Am. Graphophone Co. 189 Fed. 359; United States v. D. & H. Ry. 213 U. S. 366; Pullman Co. v. Ry. Co. 115 U. S. 588; Conley v. Alkali Works, 190 U. S. 406; Peterson v. Chicago & Co. 205 U. S. 362.

The purchase by the corporation of the Ellsworth interest is not in law a purchase by appellant himself, merely because he happened to be an officer and stockholder of the corporation. Int. Tel. Co. v. Ry. Co. 51 Fed. 49; LePage Co. v. Cement Co. 51 Fed. 941; Am. Nat. Bank v. Paper Co. 77 Fed. 85; Young & Co. v. Lock Co. 72 Fed. 62; Nat. & Co. v. Conn. & Co. 73 Fed. 491; Electric Ry. Co. v. Co. 61 Fed. 655; Re Horgan, 97 Fed. 319; Re Reiger, 157 Fed. 609; Re Watertown Paper Co. 169 Fed. 252; Re Berkowitz, 173 Fed. 1013; Gelders v. Haygood, 182 Fed. 109.

The "good will" of a deceased partner in the former business cannot be said to be an asset of his estate. It was only personal to himself. It cannot survive him. Sheldon v. Houghton, Fed. Cas. No. 12,748; Read v. Mackey, 95 N. Y. Supp. 935; Slack v. Suddoth (Tenn.) 45 L.R.A. 589; Rice v. Angell (Tex.) 3 L.R.A. 769; Masters v. Brooks, 117 N. Y. Supp. 585.

The good will of a business—not personal reputation—is property. Read v. Mackay, 95 N. Y. Supp. 935; Code, § 5466.

The business of the copartnership was a losing business. Such a business has no salable "good will." This is true because the value of the "good will" is measured by the surplus profits which the business yields over and above expenses, losses, interest on the investment, and reasonable compensation for the proprietor's own services and labor. F. & M. Schaefer Brewing Co. v. Moebs (Mass.) 73 N. E. 858; Long v. Evening News (Mich.) 71 N. W. 492; Whittle v. Davie (Va.) 82 S. E. 724; Nelson v. Hiatt (Neb.) 56 N. W. 1029; Carey v. Gunnison (Iowa) 17 N. W. 881; Re Sullivan, 105 N. Y. Supp. 872; Von An v. Magenheimer, 100 N. Y. Supp. 659; Re Ball, 146 N. Y. Supp. 499.

The administrator had the legal right to employ an agent or broker to find a purchaser of the land. Willard's Estate (Cal.) 73 Pac. 240; Lewis v. Reed, 11 Ind. 239; Armstrong v. O'Brien (Tex.) 15 S. W. 682; Dey v. Codman, 39 N. J. Eq. 258, 268.

Watson, Young, & Conmy, and *L. L. Twichell,* for respondent.

In this state, upon the death of a member of a copartnership, the realty belonging to the firm does not become converted into personal property. Personal property and real property descend to the heirs. Comp. Laws 1913, § 5742.

A surviving partner is a trustee of the firm property for the purpose of liquidation of the partnership affairs, and cannot assign his trust. Needham v. Wright (Ind.) 39 N. W. 510; Killifer v. McLean (Mich.) 44 N. W. 405; Valentine v. Wysong, 23 N. E. 1076; Porter v. Long, 98 N. W. 990; Andrews v. Stinson (Ill.) 98 N. E. 222; Nelson v. Hayner, 66 Ill. 487; Vetterlein v. Barnes, 6 Fed. 693; Comp. Laws 1913, § 6395; Woerner, Administration p. 283; Lay v. Emery, 8 N. D. 515; McPherson v. Swift (S. D.) 116 N. W. 76;

Heath v. Waters, 40 Mich. 457; Drucke v. Boylon (Mich.) 125 N. W. 416; Miller v. Berry (S. D.) 104 N. W. 311.

A surviving partner has the right to sell out his interest in the partnership, but the purchaser obtains nothing but the right to take his interest in the assets after the partnership affairs have been liquidated. Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; 30 Cyc. 605; 22 Am. & Eng. Enc. Law, 104, 105; Reece v. Hoyt, 4 Ind. 169; Chase v. Scott, 33 Iowa, 309; Reinheim v. Hemingway, 35 Pa. 432; Horton's Appeal, 1 Harris, 67; Armor v. Frey (Mo.) 161 S. W. 829.

An administrator can sell, on a proper showing, the interest of the decedent in a partnership. Comp. Laws 1913, § 8768.

He can also make a settlement with the surviving partner, and purchase the interest of the surviving partner in behalf of the estate. Comp. Laws 1913, § 8814; Boyd's Sureties v. Oglesby, 23 Gratt. 674; Roys v. Niles, 18 Wis. 169; Hamilton v. Wells, 55 N. E. 143; Valentine v. Wysor, 23 N. E. 1076.

No executor or administrator can legally purchase any claims against the estate; and if he pay any claim at less than its nominal value, he is only entitled to charge in his account the amount he actually pays, nor must he be interested in the sale of any property of the estate. Comp. Laws 1913, §§ 6282, 6283, 8789, 8819; 11 Am. & Eng. Enc. Law, 982, 983; 1 Perry, Trusts, pp. 198, 199; O'Connor v. Flynn, 57 Cal. 293; Boyd v. Blankman, 87 Am. Dec. 154, 155; 39 Cyc. 296, 298; Sheldon v. Rice, 30 Mich. 297.

Nor must he take or assume any position or interest inconsistent with his trust. The law esteems it a fraud in such a trustee to take, for his own benefit, a position in which his interest will conflict with his duty. Davoue v. Fanning, 2 Johns. Ch. 252; Michoul v. Girod, 4 How. 503; Whichote v. Lawrence, 3 Ves. 740; Lord Hardwicke v. Vernon, 4 Ves. Jr. 411; Ex parte Lacey, 6 Ves. Jr. 626; Docker v. Somes, 2 Myl. & K. 655; Farnam v. Brooks, 9 Pick. 212; Saeger v. Wilson, 4 Watts & S. 501; Rogers v. Rogers, 3 Wend. 503; Torrey v. Bank of Orleans, 9 Paige, 649; Terwilliger v. Brown, 44 N. Y. 240; Beaubien v. Poupard, Har. Ch. 206; Dwight v. Blackmar, 2 Mich. 330; Moore v. Mandelbaum, 8 Mich. 433; 4 Kent Com. 429; Story, Eq. Jur. 300, 301, 322; Rowell v. Rowell (Wis.) 99 N. W. 473; Moore v. Carey (Ga.) 42 S. E. 259.

Where the executor is the surviving partner he cannot sell the interest of the estate in the partnership to himself as surviving partner. Denholm v. McKay (Mass.) 19 N. E. 551; Miller v. Davidson, 44 Am. Dec. 715.

Neither can he sell to the surviving partner, and then buy back from such partner an interest in the partnership. 15 N. Y. S. R. 721; Comp. Laws 1913, §§ 8046, 8682, 8657.

If he does any of these acts he may be removed from his trust position, or office. Rev. Codes 1905, §§ 8062, 8696.

Property obtained by an administrator in any such manner as were the Ellsworth interests by the appellant, and held for his private gain, is held by him in trust, and must be accounted for as a part of the trust estate. Code 1905, § 8152; Comp. Laws 1913, § 8789.

"The executor is a trustee beyond all doubt." Hare & W. Notes, Cases in Equity, 148 et seq. and 164; 6 Casey 493; 8 Casey 317; 10 Casey 100; 11 Casey 174.

When such relation exists the rule applies as a principle of policy without regard to the honesty and fairness of the transaction, or the merit of the service rendered, or the price paid in case of a purchase. Fox v. Mackreth, 2 Bro. C. C. 400; 1 Lead. Cas. in Equity, 125.

The purchase of the Ellsworth interest in the partnership in the name of the corporation of which appellant was an officer must be held to be a purchase by the administrator without proof of actual fraud. United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 254; MacCaskill Co. v. United States, 216 U. S. 504, 54 L. ed. 590, 30 Sup. Ct. Rep. 386.

"The doctrine of corporate entity is not so sacred that a court of equity, looking through the forms to the substance of things, may not in a proper case ignore it, to preserve the rights of innocent parties, or to circumvent fraud." Re Rieger, 157 Fed. 609; United States v. Milwaukee Ref. Transit Co. (C. C.) 142 Fed. 247; First Nat. Bank v. F. C. Trebein Co. 59 Ohio St. 316, 52 N. E. 834; State v. Standard Oil Co. 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279.

"The court would not endure that a mere form or fiction or law, introduced for the sake of justice, should work a wrong contrary to the real truth and substance of the thing." Johnson v. Smith, 2 Burr.

962: Morawetz, Corp. § 227; Linn & Lane Timber Co. v. United States (9th Cir.) 196 Fed. 598, 599; Cook, Corp. (6th Ed.) No. 6,663, 664; Smith v. Moore (9th Cir.) 199 Fed. 690; Bermingham v. Wilcox (Cal.) 52 Pac. 822; C. & G. T. Ry. Co. v. Miller, 51 N. W. 981; Rowell v. Rowell (Wis.) 99 N. W. 476; Roberts v. Weimer (Ill.) 81 N. E. 40; Donovan v. Purtell, 75 N. E. 337.

The interests of the buyer and seller of the same property are necessarily antagonistic, and the only safe way or rule is one which absolutely forbids a trustee to occupy two positions, inconsistent with each other. Miles v. Wheeler, 43 Ill. 126; Lovejoy v. Bailey, 101 N. E. 63; Woods v. Irwin, 30 Atl. 233; Cox v. Johns, 32 Ohio St. 532; Campbell v. Walker, 5 Ves. Jr. 678; Sanderson v. Walker, 13 Ves. Jr. 600; Green v. Winter, 1 Johns. Ch. 27, 7 Am. Dec. 475; Piety v. Stace, 4 Ves. Jr. 620; Conway v. Green, 1 Harr. & J. 151; Ryden v. Jones, 1 Hawks, 497, 9 Am. Dec. 660; Perry v. Dixon, 4 Desau 504; 3 Whart. Am. Dig. 276, 278; Guier v. Kelly, 2 Binn. 294; Ex parte Bennett, 10 Ves. 381; Davoue v. Fanning, 2 Johns Ch. 252; Robbins v. Butler, 24 Ill. 387; Woods v. Irwin, 30 Atl. 232.

Where an administrator fraudulently sells land belonging to the heirs, the measure of damages in an action against him is not restricted to the price of the property at the time of the sale, but he will be held liable for its value at the time demand is made for an accounting thereof, with interest. Woerner, Administration, 1137–1139; Century Dig. Exrs. & Adrs. 1589; Dilworth's Appeal, 108 Pa. 92; Bechtold v. Read (N. J.) 22 Atl. 1085.

"Where the executor purchases property of the estate and it is later sold to bona fide purchasers, the executor is chargeable with the value at the time of sale, plus interest." Stiles v. Burch, 5 Paige, 134; Varney v. Saunders, 21 U. S. 292; Roberts' Appeal, 92 Pa. 407; Glass v. Greathouse, 20 Ohio, 503.

The administrator's account should be surcharged with the reasonable value of the partnership property, because of neglect of duty. Rev. Codes 1905, §§ 8071, 8075, 8081, 8131, 8178, 8181; Comp. Laws 1913, §§ 8707, 8711, 8717, 8768, 8816, 8819.

A legal method is provided for an administrator, in selling the estate's interest in partnership property. Rev. Codes 1905, § 8131; Comp. Laws 1913, § 8768.

His duties in respect thereto are defined by law. Molineaux v. Reynolds (N. J.) 35 Atl. 526; Comstock v. McDonald (Mich.) 85 N. W. 579; Woerner, Administration, No. 290; Rev. Codes 1905, § 8071; Comp. Laws 1913, § 8708; Re Robinson, 43 Atl. 207; Gray v. Palmer, 9 Cal. 216; Martin v. Morris (Wis.) 22 N. W. 525.

The administrator in such a case should be charged with the value of the business of the deceased which came into his hands as part of the assets of the estate, and has not been accounted for. This includes the "good will" of the business. 2 Lindley, Partn. 2d Am. ed. pp. 439, 443; 2 Bates, Partn. § 658; Parsons, Partn. 4th ed. §§ 181, 347; Burdick, Partn. pp. 353, et seq.; Washburn v. Dosch, 68 Wis. 436, 60 Am. Rep. 873, 32 N. W. 551; Fish Bros. v. LaBelle W. Co. 82 Wis. 546, 561, 16 L.R.A. 453, 33 Am. St. Rep. 72, 52 N. W. 595; Bank v. Warren, 94 Wis. 151, 68 N. W. 549; Scudder v. Ames, 142 Mo. 187, 43 S. W. 659; Re David & Matthews [1899] 1 Ch. 378; Rowell v. Rowell (Wis.) 99 N. W. 478.

"Good will" is the result of the employment of capital in some established business. It augments its value, and is an incident to the conduct of the enterprise. It exists at the place where the business is conducted, and gives value to the enterprise because of the benefits that are likely to come to a successor and which arise from being connected with its reputation. Bank of Tomah v. Warren, 94 Wis. 151, 68 N. W. 549; People ex rel. v. Roberts, 159 N. Y. 70, 45 L.R.A. 126, 53 N. E. 685; Mitchell v. Read, 84 N. Y. 556; Washburn v. National Wall Paper Co. 26 C. C. A. 312, 81 Fed. 17; Wilmer v. Thomas, 74 Md. 485, 13 L.R.A. 380, 22 Atl. 403; Lindemann v. Rusk (Wis.) 104 N. W. 126.

A person who participates in such an enterprise, reaping its benefits, is in no position, when brought to account, to claim that the "good will" bought was overvalued. Washburn v. National Wall Paper Co. 81 Fed. 20.

"The good will of a decedent's business which is continued after his death as a going concern is an asset of the estate, and should be distributed accordingly." 29 Cyc. 1276; Frey's Estate, 67 Atl. 192; Buck's Estate (Pa.) 39 Atl. 821; Thompson v. Winnebago Co. 48 Iowa, 155; Wilmer v. Thomas, 13 L.R.A. 380, 22 Atl. 403.

The partnership had a clientage. It had a place of business, a name

well established, and a successful business. This was all valuable. Rowell v. Rowell (Wis.) 99 N. W. 478.

"When a stranger and an administrator unite in a purchase of a debt due from the intestate at a discount, they stand in the same relation that the administrator would occupy if he alone had made the purchase, and can recover of the estate no more than they paid for the debt." Cox v. Johns, 32 Ohio St. 532; De Chamouen v. Cox, 60 Fed. 471; Page v. Nagley, 6 Cal. 241; Comp. Laws 1913, § 6283; Mitchum v. Mitchum, 33 Ky. (Dana) 260; 22 Century Dig. "Executors and Administrators" 761 (c); 2 Woerner, Administrators, p. 1157; Seagor v. Wilson, 4 Watts & S. 501.

GRACE, J. Appeal from an order and decision of the district court of Cass county.

The substantial facts in the case are as follows: Hallett H. Jenkins died intestate August 20, 1908. Until about four years prior to the time of his death he was in partnership in the real estate and loan business with one Ellsworth, under the firm name and style of Ellsworth & Jenkins. About four years prior to the time of Jenkins's death he and Ellsworth agreed to dissolve the partnership theretofore existing between them, since which time the partnership did no further business other than that which related to the liquidation of the partnership business, which liquidation matters were being conducted by Jenkins, and were not completed at the time of his death. After the partnership went into liquidation, Jenkins continued the real estate and loan business at Fargo, North Dakota, and was the owner of such business at the time of his death. At the time Jenkins died there survived him his widow, Eva M. Jenkins, and a posthumous child, Hallett H. Jenkins, Junior, who were his sole heirs. Jenkins died August 20, 1908. W. C. Macfadden was appointed administrator September 5, 1908, and duly qualified. E. A. Engebretson was duly appointed guardian of Hallett H. Jenkins, Junior, resigning from such position in May, 1910, when L. L. Twitchell was appointed to succeed him.

Macfadden as administrator filed his first annual account March, 1910, and his final account was filed about the time of his resignation as administrator, which was in the latter part of October, 1910. M.

W. Murphy was then appointed administrator, and later, in the month of February, 1915, resigned, after which Alexander Bruce, the present administrator, was appointed.

Part of the decedent's estate was in Minnesota and part in North Dakota. The appellant was appointed administrator of the decedent's estate in Minnesota by the probate court of Clay county, Minnesota. His administration of the estate in Minnesota was ancillary to the probating of the decedent's estate in North Dakota. Throughout appellant's administration of the decedent's estate the appellant assumed that the surviving partner, J. H. Ellsworth, and the administrator of the decedent's estate, were tenants in common with respect to the property of Ellsworth & Jenkins partnership, and proceeded with the liquidation of the partnership in consonance with this assumption. Acting on this assumption, the appellant considered the decedent's estate to be the owner of an undivided one-half interest in all the partnership property, and as such administrator sold and disposed of such half interest, and charged his account as administrator with the proceeds.

At the time of Jenkins's death, he had overdrawn his account with the partnership of Ellsworth & Jenkins to the amount of $10,744.14.

In September, 1908, Macfadden, Barney Simonitsch, and Mrs. Eva M. Jenkins, widow of the deceased, organized a corporation under the laws of North Dakota, the corporate name of which was Ellsworth-Jenkins Company, which commenced business operations shortly subsequent to its organization. Of this corporation the appellant was president, Simonitsch secretary and treasurer, and Mrs. Jenkins vice president. Simonitsch was the active business manager. The purpose for which this corporation was organized was one of the matters in controversy between the respective parties to this action. The testimony relative thereto will be discussed more in detail when we subsequently analyze the legal propositions presented in this case.

The appellant as administrator sold the partnership lands to the Ellsworth-Jenkins Company. The appellant as administrator also sold to Ellsworth-Jenkins Company certain land which belonged individually to H. H. Jenkins. The interest of the estate in eleven pieces of land, and in a contract which was known as the Knuth contract, and in the Haworth mortgage, were sold by the administrator to the

Ellsworth-Jenkins Company, and the estate credited with $7,011.97. The corporation also purchased and took over at administrator's sales Jenkins's interest in two pieces of land which he jointly owned with the administrator. The main office of the corporation of Ellsworth-Jenkins Company is at Minneapolis, Minnesota, and the name has been changed to Ellsworth Land Company. Simonitsch had been in the employ of Jenkins for several years next preceding the latter's death, and was employed in the capacity of bookkeeper, and continued in charge of the office of Jenkins for about two months following Jenkins's death, being so employed by the administrator Macfadden for the reason that Simonitsch had knowledge and was familiar with the business which Jenkins had been conducting. That about the month of January, 1909, Ellsworth sold and assigned to the corporation all his interest and rights in the Ellsworth-Jenkins partnership property, the corporation assuming all of Ellsworth's obligations as a surviving partner. The corporation paid Ellsworth for such assignment the sum of $4,000. The circumstances surrounding this transaction will be discussed more in detail in a subsequent part of the opinion, where the legal effect of such assignment will be treated in connection with the relationship of the administrator, the corporation, and Ellsworth, to and with each other.

These are the main facts around which the legal propositions range themselves. It is not necessary, and the statement of facts would be exceedingly long, were all items thereof incorporated in the statement of facts. There are several hundred items, and no further reference need be made to them, excepting as they appear to be such items as are controverted. We will therefore direct our attention to the analysis of the legal questions presented to us by this appeal.

This action is one for an accounting, and such accounting involves many hundreds of items. It would be impractical to attempt to write a statement of facts which would refer to all the facts in this case, or to the many hundreds of items of the account. Though no reference may be made to many of the facts, either in the opinion or the statement of facts, they nevertheless will have been considered.

The trial court found a balance due from the appellant to the respondents of $26,217.65.

We will direct our attention to the analysis of the legal questions

presented to us by this appeal in order to determine whether the trial court was in error in deciding the legal questions in the case in the manner in which it did. If the trial court's theory and conclusion upon the various legal questions presented to it at the trial are correct, the balance which it found due and owing from Macfadden to the respondents is substantially correct.

The case is one exceedingly complicated, and presents the necessity of separating the main questions from the mass of material presented, in order that the cardinal legal propositions may receive consideration by this court. The cardinal legal questions presented in this case are quite numerous. Each should receive a separate and thorough consideration, and with that end in view are classified in the order of their importance as follows: (1) The Ellsworth-Jenkins Company, its organization and purpose; (2) the partnership, its organization, dissolution, and liquidation; (3) the administrator, his duties, the nature of his relation or trust, his failure to perform them, and his liability therefor. Under this head may also be included the fraud, either legal or actual, of the administrator, if any.

These subdivisions include all the major questions of this case. Other minor questions there are, but they naturally group themselves about one or the other of these main subdivisions, and are largely dependent upon them or some of them. The disposition of the major questions of law involved in the three subdivisions necessarily carries with it a disposition of the minor questions of law.

Addressing ourselves to the first of these legal propositions, the Ellsworth-Jenkins Company, a corporation, we find it is incumbent upon us to determine from the records the purpose of this corporation. To do this it is necessary to examine all the surrounding circumstances attending its organization, and from such source draw our conclusion as to the reason of the origin and existence of such corporation. Ellsworth & Jenkins had been engaged in the real estate and loan business for a number of years, and accumulated and held considerable property, both real and personal. The partnership was dissolved about four years prior to Jenkins's death, and Jenkins continued the business for himself, and while doing so was also liquidating or trying to liquidate the partnership of Ellsworth & Jenkins. At the time of Jenkins's death he owned an undivided one-half inter-

est in all the property of Ellsworth & Jenkins, subject to any partnership liabilities. Such partnership owned at the time of Jenkins's death various tracts of land in the state of North Dakota, and some in Minnesota. Jenkins also owned several tracts of land individually, and owned a couple of tracts in common with Macfadden, the appellant.

The respondents claim that the corporation was organized at the solicitation of appellant under the representation that it would be a convenient method of handling the business of the estate and facilitate the handling thereof. The appellant claims there was no such purpose in the organization of the corporation. It seems from exhibits in the record that the authorized capital was $25,000, which was later increased to an authorized capital of $50,000, the par value of the shares being $100 each. When the organization was perfected with the officers we have enumerated in the statement of facts, each of the incorporators, Macfadden, Simonitsch, and Mrs. Jenkins, were given fifteen shares each at the organization meeting in October, 1908. The forty-five shares were entered on the books, crediting capital with $4,500, and charging loss and gain with a similar amount. In connection with the issuing of the stock, a notation was made on the books of the company as follows: "Paid for good will of company fifteen shares stock to E. M. Jenkins, fifteen shares to Macfadden, and fifteen shares to B. Simonitsch."

What is the meaning of such entry? Why was such entry made? The able counsel for appellant contends in his brief that "the entry manifestly does not purport to be any contract on the part of the corporation whereby it agreed to buy Jenkins's business and good will and pay $4,500 therefor." The same counsel also uses the following language: "If the entry is evidence against Macfadden at all, it could only be as an admission, but what does it admit? If it admits anything, it only admits that the company gave fifteen shares of stock to each of the three incorporators for such good will as it acquired from them." And the same counsel continuing says: "The plain language of the entry means, and could only mean, that the corporation was issuing to each of the three incorporators fifteen shares of stock for their good will."

The able counsel further undertakes to substantiate this view by

showing the stock was charged to loss and gain. But is the reasoning of the counsel sound when examined by the searchlight of surrounding circumstances? If, as the appellant contends, this corporation was organized for the purpose of conducting a real estate and loan business, and without taking into consideration, or having any reference to Jenkins's estate, if it were organized for the purpose of going abroad to seek its business upon its own initiative and responsibility, to build up its own business by advertising, to make its real estate loan connections, and its real estate connections, it is hardly to be conceived they would have thought of taking Mrs. Jenkins into such corporation. It does not appear from the testimony she was a business woman, that she ever had any experience in real estate business or in the loan business, or that she was ever engaged in any similar business; neither does it appear that she was possessed of any capital outside of what she might receive from her husband's estate and his life insurance. It does not appeal to one's reason that a woman, under these circumstances, would be taken into such a corporation which subsequent events showed to be a very paying institution, unless she was valuable in some way to such corporation. Simonitsch had been the bookkeeper for Jenkins; he was to be the secretary and business manager of the new corporation. What did he bring to the corporation? What did he put in at the inception of such corporation? Did he contribute capital when the corporation was organized? What did Macfadden contribute to the corporation in its inception? It does not appear that he put any money in at the outset. There is some testimony regarding certain notes given by Macfadden and Simonitsch, to which we will later refer. Macfadden was connected with a certain bank in Fargo, but whether such connection was to aid the new corporation we cannot say, but certain it is that the bank had no connection with the corporation. What did the new corporation do? Into what field did it go seeking its first profits? Did they spend some money advertising? Did they have correspondence with people who had money to loan? Did they expend any money for traveling to build up real estate and loan connections? Did they start out to build up a brand new business without any reference to Jenkins's estate? The appellant contends that the good will referred to meant the good will of the three individuals who formed such corporation. Such contention we believe to be untenable. The

words, "good will," as used in connection with the sale of an established business, have in law a well-understood meaning. Words & Phrases contain several definitions of the term, "good will," as defined by cases therein cited. Some of them are as follows:

"The good will of a partnership may be defined as every possible advantage acquired by the firm in carrying on its business, whether connected with premises, name, or other matter. Farwell v. Huling, 132 Ill. 112, 23 N. E. 438."

" 'Good will' as used in sales of business or professional locations, and the good will of the business, includes not only the established business and patronage or clientage thereof, but also an implied covenant that the seller will not engage in the same business in the same locality. French v. Parker, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 870."

"The good will of a business is not the business, but is one result springing out of it. It would be too narrow to construe the word 'business' to be the good will of the business. McGowan v. Griffin, 69 Vt. 168, 37 Atl. 298."

In the case of Bristol v. Bristol & W. Waterworks, 23 R. I. 274, 49 Atl. 974, it was said: "The probable retention of customers is what is meant by the 'good will.' "

"The good will of a business is the reputation it has established in the community, including the customers which usually trade there, and therefore, if a business is sold and with it the owners' good will, that amounts to a warranty that the seller will not thereafter attempt to draw off any of the customers which he had previously had, from the purchaser. Snow v. Holmes, 71 Cal. 142, 11 Pac. 856."

"The good will of a partnership includes among other things the tradename, to the extent that the purchaser may stand as a successor of the former firm; and upon the death of the last survivor of a firm, although no provision for the sale of the name is made by statute, and although that name itself is not assignable by the administrators, still they may sell, in addition to the property and trademarks, the good will of the firm, which shall include the right of the purchaser to advertise himself to the public thereafter as being the successor to the property and business of the firm which has become extinct. Fisk v. Fisk, 77 App. Div. 83, 79 N. Y. Supp. 37."

"As used in a contract of sale whereby a partnership is dissolved,

and one of the partners transfers to the others all his interests in the firm business and assets, together with the good will, with the understanding that they are to succeed to the business of the old firm, the term 'good will' includes the firm name. Brass & I. Works Co. v. Payne, 50 Ohio St. 115, 19 L.R.A. 82, 33 N. E. 88." [4 Words & Phrases, 3128–3130.]

Section 5465, Comp. Laws 1913, reads as follows: "The good will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired."

Section 5466 reads as follows: "The good will of a business is property, transferable like any other."

In the case of Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713, the principle is recognized that the sale of "good will" may become the subject of contract.

The respondent claims that the only good will that Jenkins had was the same kind of good will that a lawyer, doctor, or professional man acquires, and as to that kind of persons it is nothing but a personal reputation, and is not the kind of a good will which attaches to a trading or manufacturing business, or business of similar character, claiming in the latter cases the good will attaches to the business or establishment itself, and that good will must always rest upon some property, or tangible thing, and that it can never arise as an asset of a partnership where the members only contribute as capital their professional skill and reputation. The respondent further claims that the firm name cannot become a part of the good will in cases of business which depend upon the personal attributes of the partners engaged therein, and that no forced sale or transfer can be made of the good will when based upon reputation, standing, or business connections.

To sustain this view the respondent cites the case of Sheldon v. Houghton, 5 Blatchf. 285, Fed. Cas. No. 12,748; Read v. Mackay, 47 Misc. 435, 95 N. Y. Supp. 935; Slack v. Suddoth, 102 Tenn. 375, 45 L.R.A. 589, 73 Am. St. Rep. 881, 52 S. W. 180; Rice v. Angell, 73 Tex. 350, 3 L.R.A. 769, 11 S. W. 338; Masters v. Brooks, 132 App. Div. 874, 117 N. Y. Supp. 585.

It may be observed there is a division of authority upon these matters. The rule contended for by the respondent is rather the old and

narrow rule first laid down by Lord Eldon, which was: "Good will means nothing more than a probability that the old customers will resort to the old place," but Vice Chancellor Wood in the case of Churton v. Douglas, 5 Jur. N. S. 887, a leading case, said: It would be taking "too narrow a view of what is laid down by Lord Eldon there to say that it is confined to that. 'Good will,' I apprehend, must mean every advantage—positive advantage, if I may so express it—as contrasted with the negative advantage of the vendor not carrying on the business himself, that has been acquired by the old firm carrying on its business," whether connected with the premises on which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business.

The law, as other big institutions of modern society, is advancing. It has broadened in its conception of human rights, including property rights. Things which were not considered property several decades in the past, by reason of the evolution and development of modern society have become property rights. Professional business, such as surgery, dentistry, law, and many other kindred professions, have with the march of progress made big advances, and the law applicable to such professions has advanced. Good will by reason of the great progress of society is considered to be a property right in a great many instances, and under a great many conditions to which it was formerly held not to apply. Under the more modern view, courts are extending the meaning of good will so that even professions may be included.

We quote from 12 R. C. L. p. 978 as follows: "While it has frequently been held that in commercial or trade partnerships only can good will exist, and that it cannot arise in a professional business depending on the personal skill and confidence in the particular partner, yet, where a person acquires a reputation for skill and learning in a particular profession, as, for instance, in that of a lawyer, a physician, or an editor, he often creates an intangible but valuable property by winning the confidence of his patrons, and securing immunity from successful competition for their business, and it would seem to be well settled that this is a species of good will which may be the subject of transfer, and the courts have not infrequently adjudicated rights relating to good will in such cases with seemingly no question as to the real-

ity of the existence of this property right. The good will of a professional business or practice often forms an exception to the general rules relating to good will." Cowan v. Fairbrother, 118 N. C. 406, 32 L.R.A. 829, 54 Am. St. Rep. 733, 24 S. E. 212; Morgan v. Perhamus, 36 Ohio St. 517, 38 Am. Rep. 607; French v. Parker, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 870; Cook v. Johnson, 47 Conn. 175, 36 Am. Rep. 64.

In the case of Cowan v. Fairbrother, supra, the court said, with reference to good will: "Neither an editor, a lawyer, nor a physician, can transfer to another his style, his learning, or his manners. Either, however, can add to the chances of success and profit of another who embarks in the same business in the same field by withdrawing as a competitor. So that the one sells and the other buys something valuable, and the policy of the law limits the right to enter into such contracts of sale only to the extent that they are held to injure the public by restraining trade. The one sells his prospective patronage, and the other buys the right to compete with all others for it, and to be protected against competition from his vendor."

The case of Tichenor v. Newman, 186 Ill. 275, 57 N. E. 826, is one where a physician sold certain property and the good will in a general medical practice to another, and contracted to perform certain acts for the purpose of securing to the purchaser such good will. To facilitate the transfer of the good will, the seller and purchaser formed a partnership. The seller was to make known the fact of the partnership and introduce the purchaser to the families of the different patrons of the physician as a man worthy of confidence, and so far as possible establish the purchaser in the practice. The seller failed to keep his contract, and the purchaser brought an action for damages, and the court held that an action at law to determine the damages was maintainable, and that such action did not involve an adjustment of the partnership accounts. That Newman, the seller, contracted to deliver to Tichenor certain property and the good will of his business. The obligations of Newman as to the real estate and good will were held to be personal to Tichenor,—not the firm.

Largely to the same effect is the case of Dwight v. Hamilton, 113 Mass. 175, and also the case of Butler v. Burleson, 16 Vt. 176.

In the case of Bloom v. Home Ins. Agency, 91 Ark. 367, 121 S. W. 293, ¶ 3 of the syllabus is as follows: "Good will is the possibility that old customers will resort to the old place for the purpose of trade, and is recognized as a thing of value which may be sold."

In some instances good will is said to be the subject of appraisal and inventory as an asset of an estate, and transmissible by sale. Re Vivanti, 138 App. Div. 281, 122 N. Y. Supp. 954.

In Maxwell v. Sherman, 172 Ala. 626, 55 So. 520, it is said: "The good will of the business is property which the law protects and for injuries to which damages may be recovered."

In 20 Cyc. 1277, it is said: "The good will of an established business is incorporeal property which may be mortgaged, sold, or leased in connection with the business, but it cannot be sold by judicial decree or otherwise, unless it be in connection with the sale of the business on which it depends."

The trial court made a finding of fact that Mrs. Jenkins joined in the organization of the corporation with the understanding and with the suggestion made to her that the corporation be organized to continue her husband's business at the same place; that the corporation would take over the estate lands; would be used as a corporation to which all property of the estate would go for convenience, but that in the end all profits would appear assembled for the benefit of the estate, and those who shared with her in carrying on the corporation. The trial court also found that the Ellsworth & Jenkins Company took over and acquired the good will of the decedent which at that time was an asset of the H. Jenkins estate and worth the sum of $4,500; and that it ought to have been inventoried and accounted for as an asset of the decedent's estate.

While this is a special proceeding, and the trial court's findings of fact are not conclusive upon this court, they nevertheless should have great weight, and should not be disregarded unless the trial court is plainly in error. We see no reason why the findings of the trial court on these matters should be disturbed.

Mrs. Jenkins, in answer to a question as to the purpose of the organization of the corporation, testified that it was to sell the land and carry on the business.

The appellant seeks to show that there could be no good will for the

reason that Jenkins's business was not a paying one. This is a disputed question between the parties, the respondent making a very good showing that the business was a paying one, and the appellant on a different theory sets forth what he claims to be good proof that it was not a paying business. We are of the opinion that neither the fact that the business is very profitable or successful, nor that it is not a very profitable and even a losing business, is the only test of good will. A business may not be profitable, and may even be a losing business, and still be possessed of a good will. Where a business is very profitable it is apparent that those who deal with the owners of such business are the persons upon whom such good will depends. If they like the person or the company engaged in the business, even though they are aware of all the profits which the owners of such business are making and which the clients of such business are paying, such business may be said to have a good will. On the other hand, the business of a person, company, or partnership that pays poorly, and even sustains a loss, may have a very good will. If, for instance, the company is a mortgage loan company loaning money upon farms, if it has made its loans at a very moderate rate of interest and has not made much profit thereby, its business might not be a paying one. It might even be a losing business. Yet, the clients who received the loans from the company might be exceedingly well satisfied, having received a cheaper rate of interest, or having had their business done for them for a more moderate charge than was customary. Such clients might have, and most likely would have, a very good feeling towards such company who did their business and made them their loans at a lesser rate of interest than other companies doing a more profitable business loaned their money. Such company doing a losing business might have a very good name and a good reputation, and might have the good will of all or most of the clients with which it did business, and there would be, therefore, a desire of such clients to continue business relations which were satisfactory, agreeable, and profitable to the clients.

As we view the matter, a profitable business is not necessarily accompanied by the good will of its clients, nor does it follow that a business which pays poorly or which is operated at a loss is not

possessed of a good will, in view of the fact that good will may be said to be a desire of old clients to resort or return and continue business relations where the clients have been accustomed to do business, and such clients are just as apt to return and continue business with those who have not made so much profit for them as they are to return and do business with those who have taken much profit from them.

We cannot take space and quote any more testimony, but we are of the opinion that as a whole it tends strongly to support the findings of the trial court; that the findings of the trial court are strongly supported by many of the circumstances attendant upon the organization of the corporation, and the business transactions by it subsequent to its organization.

In the light of these definitions and the surrounding circumstances attendant upon the organization of the corporation, appellant's contention that the good will referred to was the good will of the incorporators, is not maintainable, and we cannot agree that the notation made upon the books with reference to good will had any reference to the good will of the incorporators of the corporation. We are of the opinion that such notation referred to the good will of the Ellsworth & Jenkins Company. Upon the dissolution of the partnership of Ellsworth & Jenkins, Jenkins succeeded to the name and good will of the Ellsworth & Jenkins Company. It was a company which had been in existence for a long period of time; had transacted a great deal of business both at home and abroad; it had built up business connections in other states for the loaning of money. It had undoubtedly become a firm whose name was well known. We conclude that the good will referred to in the notation on the books referred to the good will of Ellsworth & Jenkins.

Turning to the consideration of the partnership, we find that it is one organized and formed for the purpose of conducting a real estate and loan business, the members of the same being J. H. Ellsworth, of McGregor, Iowa, and H. H. Jenkins. The partnership had been engaged in business for a considerable period of time prior to 1904, when it was dissolved by mutual consent, and Hallett H. Jenkins succeeded to the business and the firm name, and continued the business until the time of his death, in August, 1908, and, after the disso-

lution, was also trying to liquidate the partnership, and was the liquidating partner until the time of his death. During the existence of the partnership there was accumulated considerable partnership property, a complete list of which appears in the testimony and findings of fact by the court. Shortly subsequent to the death of Jenkins, Macfadden was appointed the administrator of his estate. As such administrator he assumed that he was a tenant in common with J. H. Ellsworth, the surviving partner, in all the partnership property, and proceeded upon this theory. In pursuance of this theory the partnership property was inventoried by the administrator, petitions were filed in the county court for license to sell the various partnership lands, and permission was granted by the court to make sale thereof, and sales of the same were made to Jenkins-Ellsworth Company through the county court, which sales were confirmed by the county court. No appeal was taken from any of the orders of the county court with reference to such sales, and they became final orders until some action is directly maintained to set them aside and establish their illegality. During Macfadden's administration of the estate large amounts of personal property came into his possession, such as life insurance, bills receivable, proceeds of crops from the land, and other items of personal property,—all of which the court has in a proper manner charged to Macfadden's account.

It appears, the theory that the administrator and the surviving partner were tenants in common is erroneous when viewed in the light of § 6425, Comp. Laws 1913, which is as follows: "On the death of a partner the surviving partners succeed to all the partnership property, whether real or personal, in trust for the purposes of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property."

This statutory provision is somewhat peculiar to North Dakota, most of the other states having no such statute. It will be observed that this statute vests all partnership property in the surviving partner in trust for the purpose of liquidation. The appellant claims that the heirs or legal representatives of the deceased partner acquire no

title to the partnership property, but only a claim or cause of action for the final balance representing the deceased partner's share of the final settlement of the partnership affairs; and that such interest in the ultimate distribution of the assets is personal property, and must be disposed of as such even though the assets may consist entirely of real estate. The appellant intended the force of this argument to be, as based upon such statutory provision, that neither the heirs nor administrators of Jenkins's estate had any title to any part of the real or personal property belonging to the Ellsworth & Jenkins partnership; that they acquired only the right to receive any balance of money or property ultimately remaining, and which would be due the estate of decedent after the settlement of all partnership affairs. From this reasoning the appellant contends that the probate court never acquired any jurisdiction over any of the partnership property in the administration of Jenkins's estate, and contends that all the sales made through the county court of Jenkins's undivided half of the partnership lands were nullities, and that the entire title to all the property was in Ellsworth or his assignee in trust.

The district court, while recognizing the force of the statute in question, assumed the position that none of the orders of the county court, including those confirming the sales of Jenkins's undivided half in the partnership lands, having been appealed from, they became final, and would be treated as valid orders so far as the proceedings in the district court was concerned, and took the position that the administrator having a trust to perform, and it having been shown that he was the president of the corporation to whom such undivided half of the partnership lands belonging to Jenkins was sold, and at the time of such sales was the administrator of Jenkins's estate, and that such sales were in violation of his trust as such administrator, he should be held to be liable as for equitable conversion for the value of Jenkins's one half of such lands and property, the value of which was to be determined so far as the conversion was concerned by the price for which Jenkins's half interest in such lands was sold by the county court on the petition of the administrator.

All partnership real estate, under the circumstances of this case and under the laws of this state, is considered as personal property,

and the purchase price for which any land was sold through the probate court, which purchase price came into the hands of the administrator or under his control, is personal property,—all of which could be the subject of conversion.

The court further held that the value of such undivided one half of the partnership lands would not preclude respondents in a proper action from showing the real value of such land, but that in the action in the district court by reason of the apparent validity of the order of the county court, while they remained in force and not set aside by direct attack thereon, they were to be considered valid. Proceeding upon this theory, the district court itemized the property converted, and ordered that the order of the county court of Cass county, dated November 7, 1914, settling the account of the administrator, W. C. Macfadden, be vacated and set aside, and the report and account of said W. C. Macfadden as administrator of the estate of H. H. Jenkins, deceased, were settled and allowed as stated in the findings of the district court; and further ordered Macfadden to turn over to the present administrator, Alexander Bruce, the sum of $26,217.65, with interest from the 1st day of February, 1916, which was the amount of property of the estate of Jenkins which the district court found had been converted by Macfadden as administrator.

Assuming at this point, before we have analyzed the trust relations of the administrator, that the transfer of the property by the administrator through the probate court to the Ellsworth-Jenkins Company was in effect a transfer to himself, he being interested in the corporation and sharing in the profits thereof; and assuming, further, as the learned district court has found, that Macfadden was guilty of legal and actual fraud in the execution of his office of administrator in forming a corporation to which the lands and property in question were transferred, we are of the opinion that the procedure in the district court holding Macfadden liable as for equitable conversion of the property was proper, and we see no reason to interfere with the court's conclusion and orders resulting from its theory of the liability of Macfadden.

The meaning of § 6425, hereinbefore fully set out, is that the surviving partner has possession of all of the partnership property. That by operation of law the equitable title to all the partnership property,

whether real or personal, vests in the surviving partner or partners immediately upon the death of one of the partners, but in trust only, and for the sole purpose of liquidating the partnership. This being true, the equitable title to all the partnership property upon the death of Jenkins having by operation of law vested in Ellsworth in trust, and in trust only, there remained but one duty for Ellsworth to perform, and that was to liquidate the partnership. In the process of the liquidation of the partnership the surviving partner could sell all of the partnership property and use the proceeds to discharge the liabilities or debts of the partnership; and where the purchaser of such partnership property, in case of such sale, is an innocent purchaser, and has no notice of the trust relations, and the surrounding circumstances are such as not to put a prudent person upon inquiry, such purchaser will be held to hold such property free, and not impressed by any trust. But if the purchaser has knowledge of the trust relations, or by reason of the circumstances and facts ought to have known of the trust relations, he will be held to have purchased such property impressed with the trust. Where, as in this case, the surviving partner undertook to sell all his interest in the partnership, and did sell the same to a person who had knowledge of the partnership affairs and trust relations, or who was in such position that he must be held to have known of the trust relations of the partnership and the trust character of the property when he purchased the same, he takes such property impressed with the trust and holds it subject to the trust impressed thereon, and in fact can have no greater rights than the trustee from whom he received such property, which would be the right only to liquidate the partnership and to share in the balance of the partnership property or money, remaining after the payment of all liabilities of the partnership, in proportion as the interest of the partnership which he purchases bears to the whole partnership.

This would be the right, and the only right, the purchaser of an interest in the partnership would acquire even if the purchaser were not responsible and accountable by reason of certain other trust relations which would result if the purchaser was bound by trust relations arising out of the administratorship of the estate of Jenkins.

The corporation, in addition to claiming the ownership of Jenkins's interest in such partnership and partnership property by reason of

such purchase, claimed the ownership of a certain claim and the right to collect $10,000 and interest against the estate of Jenkins. Even if there were no other trust relations on the part of the purchaser which conflicted with this purchase, we believe the true rule to be that where one partner has made advances to the firm, or another has received advances from it, such advances do not constitute debts, strictly speaking, until the partnership is wound up, but such advances really only constitute items in the account between the parties. Where one of the partners has made advances to the firm, he is not really a creditor of the firm. He has no means of compelling payment of his debts unless he has taken separate security. The only way the creditor could proceed in such case to collect his debt would be to proceed to dissolve the partnership and have the property applied to the discharge of his obligation, or proceed in equity for an accounting. It would seem to be well settled that all such advances made or received can only constitute items of account, and until there is a full accounting or liquidation, the exact status of the account between the parties cannot really be determined. If a partner has made advances to the partnership, upon an accounting it might be shown that his share of losses sustained were greater than the advances made, and it would seem until the amount of profit and loss be ascertained by a full accounting, or the complete liquidation of the partnership affairs, no partner has a remedy against, or liability to, the others for payment of advances. It would seem that where an advance is made to one of the partners, his manner of reimbursement would proceed as follows: After an accounting or liquidation of the partnership, the profits of the partner to whom such advancement is made would be first applied in payment of the advance, and if that is insufficient, then his capital should be applied, and after that he would then be considered a debtor to the partnership, and he having no more property or interest in the partnership out of which to pay such obligation which will be determined on a full accounting and liquidation of the partnership, then recourse would be had to his individual property for the payment of such balance. In other words, advances made or received in partnership matters do not establish the relation of creditor and debtor. In the case at bar, until a full accounting was had, and until the partnership was fully liquidated, as a matter of law,

there could be no claim against any of the partners individually for advances made or received; nor could a claim be filed against the estate of the deceased partner until there had been a full accounting or liquidation of the partnership, by which determination of the amount of the individual claim, if any, could be had, and a showing that all his interest in the partnership, whether of profits or capital, had been first applied to the discharge of such obligation.

The general rule is stated in 30 Cyc. page 461, and is as follows: "As a rule an action at law by one partner against his copartners will not lie on a claim growing out of the partnership transactions until the business is wound up and the account is finally settled."

Under this note is cited numerous cases from many of the states supporting this rule. Analyzing this rule, the following language will be found in 30 Cyc. page 461: "It follows that a partner cannot sue a copartner on a contract between himself and the firm in the absence of legislation permitting it; nor can he maintain trespass or replevin against his copartner for any part of the firm property. The remedy of the complaining partner in such cases is to be sought ordinarily in an equity action for an accounting and settlement of the partnership affairs. The principal reasons for requiring an accounting and settlement between copartners as a condition precedent to an action at law by one against another upon partnership claims and transactions are these: (1) A dispute of this nature ordinarily involves the taking of a partnership account, for until that is taken it cannot be known but that plaintiff may be liable to refund even more than he claims in the particular suit; (2) in partnership transactions a partner does not as a rule become the creditor or the debtor of a copartner, but of the firm."

These principles are sustained by a great number of decisions from various states. (See 30 Cyc. 463, and cases cited.) This being true, it would seem to follow conclusively that a claim could not be filed against the estate of an individual partner until there had been an accounting of the partnership or a liquidation thereof, and the balance, if any, of money or property due the individual partner first applied upon his obligation before he could be proceeded against as a debtor and sued, or, in case of his death, a claim be filed against his estate. Even though the testimony in this case tends strongly to show,

and even though it is conceded that Jenkins had overdrawn his account in the partnership, or had received $10,000 more of the partnership fund or property than Ellsworth, yet, as a matter of law, he could not have been sued upon such claims under such circumstances until a full accounting had been had, or the partnership fully liquidated, and in the event of his death the claim could not be filed against his estate by the surviving partner, or anyone else to whom such surviving partner had sold his interest, until full accounting of all partnership matters had been had, and the liquidation of such partnership fully completed, and the balance, if any, of partnership property due or belonging to the deceased partner first applied upon his obligations. There has never been a full accounting of the partnership affairs of Ellsworth & Jenkins Company, nor has the partnership been liquidated. The corporation which assumed to purchase Ellsworth's interest in the partnership and assumed to purchase the $10,000 claim against Jenkins had no greater rights than Ellsworth would have had. The corporation, therefore, in law could not file the $10,000 claim, with interest against the estate of Jenkins, in the absence of a showing of a full accounting of the partnership and the liquidation thereof. This is the position in which the purchaser of Ellsworth's interest in the partnership would be if such purchaser was not charged with other trust relations relative to such property. Other trust relations, however, exist in the case at bar, and arise out of the trust relations of Macfadden as administrator of Jenkins's estate. Macfadden was the president of the corporation, and under the evidence and circumstances of this case had, or must be held to have had, knowledge of all the partnership affairs, the trust character of the partnership property, and his trust relations as administrator.

We will now consider the position of the administrator and his trust relations. It is elementary that the position of the administrator of the estate of a deceased person is a position of trust, and that all the property of the estate, whether it be real or personal, is impressed with such trust. It is a general principle of law thoroughly established that it is the duty of an executor or administrator to care for the estate and act in relation thereto for the exclusive benefit of the *cestui que trust,* and that such administrator or executor cannot profit individually from his dealings with the estate. On the con-

trary, he must act in the highest of good faith, and not seek to acquire any adverse interest in the estate. 11 Am. & Eng. Enc. Law, 982.

Section 6282, Comp. Laws 1913, is as follows: "A trustee may not use or deal with the trust property for his own profit or for any other purpose unconnected with the trust in any manner."

So far as material to this case, § 6283, Comp. Laws 1913, is as follows: "Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he act as agent has an interest, present or contingent, adverse to that of his beneficiary."

The rule is well settled that the trustee administering the trust must act for the beneficiary, and not for himself; his acts must not be antagonistic to the interests of the beneficiary; he cannot use his position to gain a benefit for himself, nor place himself in a position where his own interest will or may conflict with his duties as trustee. 39 Cyc. 296.

We quote from 39 Cyc. page 366, and cases therein cited: "The law does not stop to inquire into the fairness of the sale or the adequacy of price, but stamps its disapproval upon a transaction which creates a conflict between the self-interest and integrity of the trustee. The rule embraces not only direct purchases, but also indirect purchases through third persons, and applies regardless of whether the sale is private or under decree, or whether the *cestui que trust* is an infant or an adult, and even though the purchaser is one of several cotrustees, or is acting as agent for a third person. The rule is also applicable where the trustee is a corporation *or where the trustee transfers property to a corporation in which he is a large owner.*"

It would hardly seem possible that a trustee, such as an administrator or executor, could in good faith, either directly or indirectly, acquire an interest or benefit from the property which in his relation as trustee he holds, controls, or sells for his *cestui que trust.* It is his duty when selling such trust property to sell it to the greatest advantage possible for his *cestui que trust.* It is his duty to make the best sale for the highest price obtainable. If the trustee is permitted to become purchaser of the property which he is selling, it is self-evident there is an interposition of his own self-interest adverse to that of the *cestui que trust.* To permit such to be done would open wide the flood

gates of fraud, and ofttimes permit unscrupulous trustees who desire to advance their own selfish interest and individual profit to acquire interest adverse to the *cestui que trust.*

In the case at bar, Macfadden was appointed administrator of Jenkins's estate. The respondent in effect claims that matters were so manipulated by Macfadden as to secure his appointment. However this may be, it does appear that the petition for his appointment was signed by Mrs. Jenkins while she lay desperately sick in the hospital. Her husband was suddenly stricken by death. The shock of her husband's death prostrated Mrs. Jenkins, and she was in the hospital for a considerable period of time very ill.

An examination of the testimony and all the circumstances surrounding the case indicates at least that there was no particular need for haste in his being appointed administrator. The appointment was made, however, and the administrator duly qualified and entered upon the discharge of his duties. Some time after Macfadden's appointment as administrator, and after he entered upon the discharge of his duties as administrator, the idea of the corporation was conceived by Macfadden, or Macfadden and Simonitsch. The purpose of such corporation as found by the trial court was for the convenient handling of the property of the estate, taking over the estate lands and the continuing of the business of H. H. Jenkins, who, as we have seen, succeeded to the business of Ellsworth & Jenkins. We think the court was correct in making such finding; that the testimony tends to support such finding; and the same will not be disturbed.

If the corporation was organized for taking over the lands and the business of Jenkins, and was to be an organization through which most of the estate's business should be handled, and if, as subsequently appeared, a large part of the estate's property and interest were sold to such corporation, it is self-evident there would be a direct conflict of the trust relations of Macfadden as administrator of the estate, with his self-interest represented by the corporation of which he was president, and which corporation became the purchaser of a great deal of the estate's property. It is apparent that it would be to the interest of Macfadden as a part owner of the stock of the corporation to purchase the property from the estate of Jenkins as cheaply as it could be purchased. As administrator under these circumstances it

would be to Macfadden's personal interest and individual gain to sell the lands and property of the estate at as low a price as he could to the corporation. Macfadden could not under these circumstances sell the property to the corporation thus formed and remain true to his trust of administrator, nor remain in a position to protect the interest of the *cestui que trust.* His trust relations as administrator were in direct conflict with his relations with the corporation of which he was president.

Upon an examination of the entire record in this case it is clear that Macfadden gained an advantage for himself by selling the property of the estate to the corporation. The appellant cites the case denominated Hall's Appeal, 40 Pa. 409, wherein he undertakes to prove the principle, by the citation of several cases, that the administrator or executor may purchase interests of decedent's estate; as, for instance, where one partner dies and the legal title to the property and assets was in the surviving partner, and were purchased by the administrator of the deceased partner's estate; or, as where the administrator purchased the interest of a share of an heir or legatee in the estate. The main cases, among others cited by the appellant to sustain this contention, are the case we have just discussed, and the case of Stark v. Brown, 101 Ill. 395. The cases cited to some extent tend to support the appellant's theory, but even so, we do not believe they are the weight of authority, but, if they may be considered authority at all, are exceptions to the general rule. If an administrator or executor can purchase the interest of the legatee or an interest in the estate property, and by his doing so secures an advantage to himself in money or property, he does so in violation of his trust as administrator.

Where a partnership is dissolved by death, and all the partnership property passes to the surviving partner, it passes only in trust, and the representatives of the deceased partner have an exclusive right to the ultimate balance of money or property remaining after the liquidation of the partnership. By what manner of reasoning, then, could it be held lawful for the administrator of the deceased partner to purchase the partnership property, directly or indirectly, if in doing so he made an individual profit and gained any money or property? It is clear that such a purchase would be in direct violation of the trust duties of the administrator. If it is ever possible for the administrator or exec-

utor to purchase property of the estate or legatee, or a partnership, where he is the administrator of the deceased partner, it would be only where the administrator or trustee can affirmatively show that the purchase was advantageous to the beneficiary, and further affirmatively show he was not guilty of fraud, concealment, undue influence, and that no unconscientious advantage was taken by him.

In view of all these facts and circumstances in the case, such as the appointment of the administrator, his qualification and entry upon the discharge of his trust duties, and the further fact that the corporation was later formed, of which Macfadden became president, which corporation purchased an interest in the partnership lands which were sold by the administrator, and that the corporation also purchased Ellsworth's interest in the partnership in the name of the corporation, it must be held that all such purchases were purchases by the administrator, and that any advantage gained or profit made by the corporation by reason of such purchases accrued not to the corporation, but to the *cestui que trust,* or the legal representatives of the deceased.

The purchase by the corporation of Ellsworth's interest in the partnership and the partnership property included also the purchase of the claim for $10,000 and interest against the deceased. Whatever ultimate profit or gain there was in such purchase, including the $10,000 claim and interest by reason of the trust relations of Macfadden, would inure to the *cestui que trust* or representative of the deceased; and it is held that such purchase by the corporation under the circumstances of this case was for the benefit of the estate of the deceased. This is another reason why the $10,000 claim could not be properly filed against the estate.

Considering at this time the question of fraud, we find that the trial court in its 20th finding of fact uses the following language: "Because of the wrongful and fraudulent conversion of the partnership property by the administrator through the corporation, Ellsworth-Jenkins Company, I charge the administrator with the cash value of the real estate at the date of conversion, January 1, 1909, and the value of the personal property, which I fix as follows, together with interest at the rate of 6 per cent per annum, on the same."

Finding No. 8 of the court's findings of fact is as follows: "On or about January 1, 1909, as the result of negotiations conducted by Mr.

Simonitsch and Mr. Macfadden on behalf of the corporation, Ellsworth-Jenkins Company, with J. H. Ellsworth, through which they hoped to make a personal profit, the latter, said Ellsworth, sold, transferred, and assigned to that corporation all his, said Ellsworth's rights and interest in the Ellsworth & Jenkins partnership property; and the corporation assumed all of said Ellsworth's obligations as a surviving partner. The corporation paid to said Ellsworth for said assignment the sum of $4,000; and thereafter Mr. Macfadden considered said corporation as the lawful assignee of said Ellsworth's rights as a surviving partner in said firm, and dealt with it accordingly. Mr. Macfadden, acting on the advice of counsel, believed that said transaction was proper and lawful, and that the corporation thereby acquired and succeeded to all the rights of J. H. Ellsworth as a surviving partner. The court, however, further finds that in total disregard of the rights of Mrs. Jenkins and the interest which she in fact represented as a stockholder in said Ellsworth-Jenkins Corporation, the said Macfadden, together with said Simonitsch, knowingly, willingly, and fraudulently sought to deprive her and said estate of all interest in said corporation, and the property thus secured from said estate, by canceling her stock in said corporation. All of which the court holds was in the nature of, and is evidence of, a conversion of the property of said estate by said Macfadden as of the date of the sale to the corporation of the Ellsworth interest; to wit, January 1, 1909.

"The court further holds that said transaction was unlawful because the decedent's estate being interested in the partnership estate, which was the subject of said transaction, and Mr. Macfadden being a stockholder and officer in the corporation to whom the assignment was made, the transaction necessarily placed him in a situation where his personal interests were or might be in conflict with his duty as administrator.

"The court therefore holds that as a matter of law the transaction must be treated and dealt with, not as a purchase by and assignment to the corporation, but as a conversion by Mr. Macfadden of the property of which he was a trustee, through the medium of the corporation."

The effect of these findings of fact by the court is to hold that Macfadden converted the property sold to the corporation to his own use in a fraudulent manner; that such fraud is further shown by the forcing of Mrs. Jenkins out of the corporation and canceling her stock. We

are of the opinion that the finding of the trial court is supported by the testimony. It would seem that the administrator being first appointed and having entered upon the discharge of his duties, and his position being one strictly of trust, and after having entered upon the performance of his trust as administrator, having formed the corporation of which he became president, which took over the business of the decedent, and which purchased through the administrator the property hereinbefore referred to, and having represented to Mrs. Jenkins the objects for which the corporation was formed, and thereafter the corporation having forced her out of the corporation, that it must be held the corporation was not conceived in good faith, but only as a medium through which the administrator could act and operate and secure undue advantage and profits to himself and those who were permitted to continue to share with him. This would in effect be a fraud against the interest of the *cestui que trust,* or the representatives of the deceased.

The $1,500 notes given by Macfadden and Simonitsch, whether given at the time the corporation was formed or just before they forced Mrs. Jenkins out of the corporation, do not place Macfadden in a more favorable position, nor is the giving of such notes any proof that Macfadden acted in good faith. At whatever time such notes were given they were immediately charged off to profit and loss. As we already in effect have held, the shares of stock of the corporation first issued to Macfadden and Simonitsch were issued to them for the good will of the Ellsworth & Jenkins business, Mrs. Jenkins also at the same time receiving fifteen shares. The stock issued to Macfadden and Simonitsch was never paid for otherwise than out of the profits of the corporation. Mrs. Jenkins was forced out of the corporation on the ground that she did not pay for her stock. It further appears that Simonitsch in 1908 paid into the corporation $1,000, receiving therefor ten shares of stock, but very shortly thereafter borrowed from the corporation $900. Later Macfadden received $1,500 worth of stock for his interest in the Soberg farm, the estate receiving $750 credit for the same interest. Macfadden later on paid $2,500 in cash and a half interest in another certain piece of land.

The correspondence between Macfadden and Ellsworth shows the activity of Macfadden in and about purchasing Ellsworth's interest in such partnership, including the $10,000 claim and interest of Ellsworth against Jenkins. Macfadden, after his appointment as adminis-

trator, hastened to collect the life insurance, which the record shows he did collect and which Jenkins carried, and out of the $10,000 policy made payable to the partnership he hastened to pay a $5,000 note which Ellsworth held against Jenkins, and in addition a claim of $1,600, all of which were exclusive of the additional amount claimed to be due from Jenkins to Ellsworth in the sum of $10,000.

After these transactions, Macfadden proceeded to purchase the interest of Ellsworth in the partnership, including the $10,000 claim,—all of which was purchased on behalf of the corporation, and the $10,000 claim and interest was thereafter filed against the estate of Jenkins. It is unnecessary to go into detail and set out the correspondence between Macfadden and Ellsworth leading up to the purchase of Ellsworth's interest in the partnership. It would seem from the correspondence and from all of Macfadden's acts with reference to his haste in being appointed administrator, the collection of the insurance and the forcing of Mrs. Jenkins out of the corporation, and many other circumstances and facts in the case, that Macfadden was acting in bad faith and was violating his every trust as administrator. Macfadden's actions are not placed in a more favorable light because he acted through a corporation. There is no doubt of the general rule of authority that a corporation is a legal entity, and will be considered as such until there is sufficient cause to consider it otherwise. Corporations, however, cannot be used as a cover under which wrongs may be committed and fraud perpetrated. If corporations are sought to be used as a cover for fraud and wrong, the court will look through the form of the corporation to ascertain its actual purpose and intent. Cook on Corporations, § 664, contains the following: "The disabilities of the corporation are not disabilities of the stockholders, nor are the disabilities of the stockholders the disabilities of the corporation. Hence it is that a corporation is often organized as a 'cloak' for frauds. Such cases as these are becoming common, and the courts are becoming more and more inclined to ignore the corporate existence when necessary in order to circumvent the fraud." No corporation can become so securely organized and protected as a legal entity as to become a cover for wrong and fraud, and thereby defeat the rights of innocent parties. A corporation cannot be greater than law and equity, nor by reason of its legal entity be immune from answering for fraud and wrong. In such case the protecting hands of

equity will brush aside the outward forms of the corporate entity, and analyze the foundation purpose and intent of the corporation; and if the purpose and intent of the corporation are not embedded in good faith, and are but a cover for wrong and fraud against the innocent, the corporate entity will afford no protection for such wrong and fraud in a court of equity.

Corporations in the transaction of business have a legitimate use as a matter of convenience, and when so used for the accomplishment of a legitimate purpose are not looked upon with disfavor either by courts of law or equity; and the legal entity of such corporations when engaged in a legitimate enterprise is recognized both at law and in equity; but neither law nor equity will ever recognize the right of a corporate entity to become the receptacle or cover for fraud or wrong based upon deception for the purpose of defeating the right of innocent parties.

The appellant has asked to be stricken from the account as stated by the learned trial court the following items: The good will item of $6,457.50. The appellant also asks that there be stricken from the account all the receipt items shown in the trial court's finding No. 23, which items immediately follow the good will item and include all the items to the end of the receipts, such items being so voluminous, and not enumerated herein. The appellant further asks that, in addition to the above items being stricken from the account, all other partnership items should be stricken therefrom. We are of the opinion that such items were properly included and should remain as stated by the trial court. The court made a proper allowance of the Wheeler and Derner claims, allowing them for the actual amount which the administrator paid in making settlement of them, such claims being settled at a discount by the administrator, who sought to include the full amount of such claims in his account. The administrator may not purchase claims against the estate at discount and receive credit in his account of his administration for the full amount of the claim, thereby securing a profit to himself. The court was also right in disallowing the $160 item paid by the administrator to Ellsworth-Jenkins Company as commission for selling the Lee farm, upon the same principle just stated with reference to purchasing claims against the estate. The payment of a commission by the administrator to the Ellsworth-Jenkins Company was in effect a payment of a commission to himself; for, being a member of the

corporation and president thereof, he must have received a part of the profits.

The appellant complains that he is charged with property, money, and effects between the time of the death of Jenkins and the time when the corporation, according to the claim of the appellant, actually commenced business, which was about the 1st of the year 1909.

It must be borne in mind, however, that this accounting is against W. C. Macfadden as administrator of the estate of H. H. Jenkins. Whatever property, money, or effects had or owned by Jenkins at the time of his death which came under the control of Macfadden must be accounted for. It is not shown that Mrs. Jenkins had anything to do with handling the money or property either before or after the appointment of the administrator; nor is it shown that any other person came into possession of any of the property, money, or effects of H. H. Jenkins after the time of his death, excepting W. C. Macfadden. W. C. Macfadden was appointed administrator on the 2d day of September, 1908. The corporation was organized and doing business, or about ready to do business, on October 3, 1908. All of the property of the H. H. Jenkins estate, whether of his personal estate or of the partnership, came into the possession and control of W. C. Macfadden, considerable of which, as we have seen, was sold by him to the corporation, of which he was president. It seems, therefore, that it is proper that he should account for all the property, money, or effects H. H. Jenkins possessed, or had an interest in, at the time of his death, whether it be his individual property or his interest in the partnership property. Appellant seeks to show that, if he is to be charged with the property, money, or effects of H. H. Jenkins, deceased, and during the time before the corporation was organized, and down to December 31, 1908, that then certain disbursements aggregating $11,363.39 should be allowed, Macfadden, the appellant, claiming that such disbursements had not been allowed; but in this we think the appellant is mistaken. One of the main disbursements which appellant claims should be allowed is a note of $5,000 to J. E. Ellsworth, and interest thereon aggregating $1,480, in all $6,480. Another of the disbursements is a note for $1,500 to the Equitable Insurance Company. Another is a note for $500 to the Fargo National Bank. At first glance his claim would appear plausible, but upon further examination it is found that the court, instead of charging the ap-

pellant's account with the $10,000 insurance payable to Ellsworth & Jenkins, charged only $1,538.11. This is the amount of that insurance policy remaining after the payment of such claims. If the disbursements were to be allowed in the manner contended for by the appellant, then the court would have charged his account also with $10,000 on account of the insurance payable to the partnership, instead of the balance which was left after paying the above claims, which was $1,538.11. Two of the important items in the disbursements which are claimed should be allowed is one of $900 and one of $808.10, which are amounts the appellant claims he paid out on the Bowers farm to pay up a $1,600 mortgage. At the time the Bowers farm was sold the petition for the sale thereof showed there were two mortgages against it, one for $2,500 and one for $1,600. As a matter of fact there was only the $2,500 against the farm at the time of its sale through the probate court. The farm sold through the probate court for $1,500. It is apparent that said farm was sold with the idea that there was a $2,500 mortgage and a $1,600 then in force and effect, and the farm must have been sold subject to these two mortgages. It appears, therefore, that no credit is due the appellant for the $900 and $808.10 items.

The other items of disbursement which the appellant claimed should be allowed are several small items the appellant claims to have expended in regard to the Daley farm, Ripan farm, Bowers farm, Loomis farm, Van Vleet farm, Emerson farm, and the Henning property, together with certain amounts claimed to have been paid out for interest on mortgages against the Bowers, Ripan, Loomis, and Van Vleet farms. We are of the opinion that the court must have considered all these matters at the time of its findings of fact and the statement of account which it has set forth in its findings of fact. We notice, also, that in the statement of account of the receipts where charges of the various sums of money were made against the appellant, there appears to be no charges for any crops that might have been grown on the four farms above mentioned. If there were any crops for the year 1908 on such farms, they do not appear to be charged to the appellant. If there were crops upon such farms, and the appellant used the proceeds of such crops to pay the interest, then he has already been reimbursed.

The court below held in effect that all orders made by the probate court, and not appealed from within thirty days, became binding, and

were to remain effective, and were not to be disturbed unless by direct action. It also would not receive any testimony as to the value of the land sold by the administrator through the probate court to the corporation; and the price of the equities of the land so sold to the corporation would be the measure of damages in this particular accounting. Whatever the whole price of the equity of any piece of the partnership land or other land belonging to the decedent at the time of his death, or in which he had an interest which was sold by the administrator through the probate court to the corporation, would be the true measure of damages and the value of such equity to be charged to the account of the administrator in this action. In other words, the court held that in this proceeding no other value could be shown of the lands so sold by the administrator through the probate court except the cash value as determined by the sale of such land through the probate court; and no appeal having been taken from the orders confirming the sales, such orders became binding upon the district court so long as such orders remained in force, even though such orders were voidable orders and sales. This we believe to be the proper rule. We notice, however, the court in fixing the value of the equity of the land so sold increased the price of the land in the court's final account. That is, the court allowed a greater value for the equity in a given piece of land in making up the account which the court did make on the same piece of land, than the value of the equity of the same piece of land appears to have been as determined by the price for which such equity in such tract of land was sold in the probate court. For instance, the equity in the southeast quarter of section 27, township 140, range 50, was sold by the administrator through the probate court for $1,500, but the court in its account charged the account of Macfadden for the same piece of land $2,100, with interest on $2,100 from January 1, 1909, to February 1, 1916. This we believe to be an incorrect charge under the rule which governs in this case. As we view the matter, for the piece of land just described the court should have charged Macfadden's account $1,500, together with 6 per cent interest thereon from the date of the sale of such land through the probate court; and so it appears to be with other tracts of land, the equities of which were sold through the probate court by the administrator to the corporation. Wherever the administrator is charged with the value of an equity in a tract of land which was sold by him through the probate

court to the corporation, he should be charged the full value of such equity as determined by the price received for the same in the sale through the probate court, with interest on the price paid for such equity in the probate court at the rate of 6 per cent. And wherever the lower court has affixed a greater value to the equity of any given tract of land sold by the administrator through the probate court to the corporation than the price for which such equity of such tract of land sold in the sale through the probate court, the administrator's account is entitled to a credit of the difference between what the land sold for through the probate court and the amount with which the court charged the administrator for the equity in such piece of land in the account stated by the court. In other words, taking the southeast quarter of section 27, township 140, range 50 as an example, interest should be figured on $1,500, the price in the probate court, from the date of the sale to February 1, 1916, and that amount should be deducted from $2,992.50. The difference thus found should be credited to Macfadden's account as such account was stated by the lower court. Of course the estate will be entitled to receive interest until the time when the amount found to be owing from Macfadden to the estate is paid. Whatever difference the calculation in accordance with this requirement makes in regard to the manner and method of determining Macfadden's liability, which we have outlined, should be deducted from the whole amount found to be owing by him by the trial court, which was $26,217.65. This would not prevent, as we view the matter, under the theory under which this case has been tried, the exercise of any right of action which the respondent might have of a separate action to recover the balance of the value of the equities, if any, of the lands sold through the probate court by the administrator.

The court below held that there could be charged to the appellant only the cash selling price of the land at the time they were sold, and the sale of the farms was made only of the equity that remained in them at the time of the sale. The court held that no other value could be shown of such farms in these proceedings except the cash value as determined by the sale of such land through the probate court, the orders of which sales and the consummation thereof, not having been appealed from, were binding upon the district court so long as such orders remained in force, and even though they were voidable orders and sales. We are of the

opinion that the trial court took into consideration all the items of disbursement which the appellant claimed he should be allowed from the time of the death of Jenkins until the 31st of December.

We see no reason for disputing the findings of fact of the trial court, nor its account as stated in its findings of fact, except as we have indicated and set forth.

We might also further add that under the circumstances of this case the court might very well have disallowed any administrator's fees to the appellant, he not having performed his trust as administrator in the manner required by law.

A further fact to be taken into consideration is that Mrs. Jenkins has been put to great expense in litigation extending over a period of several years. Her mind has been in suspense, not knowing whether she would ever come into possession of that part of the proceeds of her husband's estate to which she was rightfully and lawfully entitled; and she having been denied for all these years the benefits of the use of the proceeds of her husband's estate by reason of the unfaithfulness of the administrator to his trust in not looking after all the property of the estate of the deceased with care and faithfulness, as he is required to do in obedience to the laws of this state. Courts cannot, or at least should not, look with favor upon the acts of one who occupies a trust relation and who by such acts in any manner fails to fairly, fully, and conscientiously execute his trust duties. Courts will scrutinize carefully the acts of persons in trust relations. Administrators are appointed by the courts which have jurisdiction over them, for the reason that such courts at the time of such appointment have confidence and implicit faith in the good faith, integrity, honest intention, and unquestionable character and ability of the one appointed as such administrator to fully execute the duties of what may be termed his sacred trust.

Where a man after many years of ceaseless struggle and toil has acquired some competence, some little property interest, or money, which is being accumulated for the protection and support of those dependent upon him, and for their use and benefit when the accumulator can no longer struggle for their support by reason of being called upon to answer the summons of the dread messenger of death, he has every reason to expect that in pursuance to the laws of the state such property, money, or effects will be safeguarded for the benefit of his dependents in order

that they may not become charges of the state, and in order that they may continue to maintain the same respectable place in society which they occupied during the lifetime of the decedent. Courts are exceedingly jealous, therefore, in the enforcement of such trust relations, and in holding those who assume those trust relations such as exist in this case, to strict accountability, to the end that the decedent's property held in trust by the administrator may pass to those representatives entitled to receive the same.

Any balance in Macfadden's favor in the ancillary administration in Minnesota may be offset against the amount which Macfadden is owing the estate in the principal administration in North Dakota, and also the amount of any credits he may be entitled to by what we have heretofore said with reference to the price or value of any equity as determined by the sale in the probate court. These deductions, if any, should be made from the amount of $26,217.65, the amount found owing by the trial court in its account stated.

The order and decision appealed from are affirmed, with costs.

BRUCE, Ch. J., and ROBINSON and BIRDZELL, JJ., concur in result.

CHRISTIANSON, J. (dissenting). I am unable to agree with the conclusions reached by my associates on many of the questions presented on this appeal, and will endeavor to discuss briefly the propositions on which I differ.

I desire to say at the outset that I fully concur in the sentiments expressed in the opinion prepared by Mr. Justice Grace, with respect to the obligations of an administrator or executor. I fully agree that every safeguard should be thrown around the administration of estates, and that an administrator or executor should not be permitted in any manner to enrich himself at the expense of the estate. And it is with this principle in mind that I have considered and arrived at my conclusions in this case.

This litigation arose in the county court. Macfadden was appointed administrator of the Jenkins estate in September, 1908, and continued to act as administrator until in October, 1910. At that time Macfadden tendered his resignation as administrator and filed his final account. A supplementary account was filed in July, 1914. Exceptions were filed

to the accounts and a full hearing had before the county court, with the result that the county court in January, 1915, made an order settling the account. An appeal was taken from the order, and on a hearing in the district court many of the findings made by the county judge were overturned. The principal questions presented on this appeal are whether the county judge or the district judge was correct in their respective conclusions upon the facts and the law. The county court of Cass county has increased jurisdiction, and the presiding judge is a man of ripe experience. He has been an incumbent of his office for a long term of years, and was probably as well qualified to pass on the credibility of the witnesses and the other questions arising in consideration of the account as was the district judge. Not only did the county judge have the same opportunity to observe witnesses and parties, but he was familiar with the various details of the administration of the estate. Consequently I don't believe that in this case the findings of the trial court insofar as they overturn those of the county court are entitled to any particular weight.

The evidence shows that at the time Jenkins died he was in dire financial straits. The land business conducted by him in Fargo had for some months prior thereto concededly been a losing venture, and the books show a considerable loss. The only property left by Jenkins, aside from certain life insurance policies, consisted of equities in lands. The lands were all covered by one or more mortgages. At the time of his death and for sometime prior thereto, Jenkins had in his employ as bookkeeper and assistant manager one Simonitsch. It was suggested that the land business started by Jenkins might be carried on with some profit, and that a corporation might be formed to carry on land business, and also that this corporation could aid the administrators in handling the equities in the lands to good advantage. The corporation was organized in September, 1908, and commenced business in October, 1908. The three incorporators were Macfadden, Simonitsch, and Mrs. Jenkins. Macfadden was cashier of one of the principal banks of Fargo. Simonitsch had had considerable experience in the land business and was particularly familiar with the affairs of Jenkins. No money was paid in by any of the incorporators, but they made an entry upon the books of the corporation listing as an asset "good will" in the sum of $4,500, and issued stock in the amount of $1,500 to each of the three incorporators.

The trial court held that the administrator in this manner permitted the good will of Jenkins's land business to be converted, and that the entry on the corporate books of $4,500, for "good will" was an admission that the business had this value. There was no other evidence whatever tending to show the particular value of the business except such entry.

If any evidentiary value is to be attached to the entry in the books, this, when taken in connection with the amount of stock actually issued to each of the three incorporators, could not be deemed to establish any valuation upon Jenkins's business, in excess of the amount of the stock actually issued to Mrs. Jenkins. As already stated Jenkins's land business had been, for some months prior to his death, operated at a considerable loss. Manifestly the business was of such a character that it could not very well be continued by the administrator. The good will contributed by Macfadden and Simonitsch was probably as great as any contributed by the Jenkins's estate. In fact Simonitsch was probably its chief asset, if he had stepped out there was little or nothing left.

The evidence shows that the Ellsworth-Jenkins Corporation became an actual going concern. It extended its operations and achieved a degree of success greatly in excess of the business formerly carried on by Jenkins. The business manager and directing spirit in the corporation was Simonitsch. Macfadden had little or no hand in its actual management or control. While the corporation aided in making rentals and otherwise looking after some of the lands belonging to the estate, only a very small, in fact an insignificant, portion of its business had anything to do with the affairs of Jenkins.

In my opinion the evidence clearly shows that the corporation was formed for a lawful purpose; that there was no intent on the part of Macfadden to utilize the corporation as a sham through which transactions with the estate might be carried on for his benefit; that the various transactions had by the corporation were for its own benefit, and not for the benefit of Macfadden, except as he might benefit the same as any other stockholder therein. The purchase by the corporation of the interest of Ellsworth in the partnership property was one which was directly in the line of business in which the corporation was engaged. Manifestly Macfadden could not, if he had desired to do so, have purchased Ellsworth's interest in the partnership property with the funds of the estate. The deal was one which the corporation itself might prop-

erly make and one which Macfadden as one of the stockholders could not possibly have prevented it from making. There is no contention on the part of anyone that the estate has in any manner suffered any detriment or injury because the Ellsworth-Jenkins Company purchased such interest. On the contrary it is quite clear to me that the sale resulted in considerable benefit to the estate. The Ellsworth-Jenkins Company succeeded in making sales of, and realizing moneys from, various equities of no particular value. By all such sales the estate was directly benefited. In what manner could the estate possibly be injured by the fact that this corporation acquired Ellsworth's interest? Ellsworth, the former owner, was an old man living in Iowa, and he apparently took little or no interest in a disposition of the property belonging to the partnership. The corporation instituted an active campaign to dispose of those equities, and converted paper equities into real money. The estate received an actual benefit therefrom.

While it is true that the supposed interest of the estate in these lands was sold to the corporation, it is also true that the corporation treated the sale by the administrator to it as a mere nominal transfer. Macfadden testified that the sale was made to the corporation, in order to have the title vested in the corporation, so that the equities could be conveniently handled and conveyed when a purchaser was found. The sales to the corporation were treated as nominal, and the administrator has accounted for the full share to which the estate would have been entitled if Ellsworth had made the sales as surviving partner.

The subsequent trouble between Macfadden and Mrs. Jenkins, and the cancelation of her stock in the Ellsworth-Jenkins Company, has no particular bearing upon the liability of Macfadden as administrator or the amount due on his final account, but it probably furnishes a reason for the bitterness manifested toward Macfadden in this matter.

It is interesting to note that the district court not only allowed Macfadden his fees as administrator, but further found as a fact that "*Mr. Macfadden throughout his administration handled the business thereof with care, skill, and good business judgment, with a view to the best interest of the estate as he understood it to be,* except as to the cancelation of Mrs. Jenkins's stock in the corporation, the conversion of the partnership property through the corporation, and the appropriation by himself and the corporation of the business of the deceased, Jen-

kins. Other errors found in his accounts and rectified by this court were due to mistakes of law as to his rights, duties, and obligations, or inadvertent errors."

In my opinion the decision in this case results in a grave injustice to Macfadden.

PER CURIAM. After the filing of the decision of this court in the above-entitled action and within proper time, each party applied for a rehearing. A rehearing will not be necessary in order to finally dispose of this case. The opinion handed down, however, we believe should be modified in one important particular. The lower court, in ¶ 27 of its findings and decree, in effect, held that it was bound by the decree of the county court of Cass county as to all sales of real property made by Macfadden as administrator, and for this reason could not, in this proceeding, consider any question as to the validity of these sales or inadequacy in the sale price. This court, in its former opinion, understood and believed that such findings referred to all the real property which belonged to Jenkins individually as well as the partnership real property. In this we were mistaken, and it is clear that such finding referred only to the real property belonging to Jenkins individually, and did not refer to the property of the partnership.

The court refused to receive any testimony relative to the value of the real property and lands belonging to Jenkins personally of which sales were had through the probate court, and in this regard the court proceeded properly. The lower court, however, did receive testimony as to the value of the partnership lands, and after hearing such testimony the court placed valuations upon the equities in such land, which values are set forth in the court's findings, with reference to the value of the partnership lands. We do not feel disposed to disturb the value of the equities of the partnership land as ascertained by the lower court, and hold that the values of the partnership land and property as found by the trial court are sustained by the testimony, and that the appellant is entitled to no reduction because of any increase in value of the partnership property fixed by the trial court over and above the sale price of such lands as evidenced by the records of the county court of Cass county, this upon the theory that the purchase of the partnership property by Macfadden through the medium of the corporation,

in the manner fully set out in the original opinion, amounted to conversion of such property, by reason of which the respondent would be entitled to recover the actual cash value of all the partnership property so purchased, both real and personal.

The former and original opinion is modified to the extent that the values of the equities of the partnership property as fixed by the trial court shall be taken to be the actual cash value of the equities and such partnership property. The appellant, in his brief and additional brief filed in response to the court's request, claimed that, from the $26,217.65 which the trial court found to be the amount owing by Macfadden, there should be deducted $6,064.46, being all partnership items prior to 1909, and also the good will item of $6,457.50, and in addition to that, to deduct the partnership property items of $775.31 and the Emerson farm item $926.25, and $359.61 for alleged excess of interest.

We believe we analyzed most of such matters quite fully in the main opinion, and do not think it necessary to again analyze such matters to any great length. Nothing more need be said with reference to the good will item for $6,457.50. That item has been discussed at great length in the main opinion, and the proper conclusion arrived at with reference to the same.

The appellant claimed that $6,064.46 should be deducted for partnership items prior to 1909. We analyzed this proposition quite fully in the main opinion, and concluded that a deduction of said amount for partnership items prior to 1909 should not be allowed. In other words, we, in effect, held that the trial court had made findings as to these partnership items, and we sustain such findings. We may analyze the item composing the $6,064.46 made up from the partnership items prior to 1909, with the view of making it clear that such items were properly charged against Macfadden. The items which made up said sum were:

Balance of insurance money and interest	$2,191.90
One half of Knuth contract and interest	1,066.75
One half of Haworth mortgage and interest	776.63
Daily crop and interest	111.90
Buettell farm	85.50
Mallory farm	8.55
The thirteen items from October 3, 1908, to November 14, aggregating	1,823.33

The insurance policy to the partnership was $10,000. The insurance company held a note for $1,500. This was deducted. There was also paid out of the said insurance $513.11 to the Fargo National Bank, which took up a note for $500, and interest. Out of said insurance was also paid a note of $5,000 to J. H. Ellsworth, and also interest on said note to the amount of $1,480. The balance left after these deductions was an asset of the partnership, and it was proper for the trial court, as it did, to require Macfadden to account for it, and that item, with interest thereon amounted to $2,190.90, which the court charged against the account of Macfadden, which was proper. The trial court also found that the $1,090 that was received on the Haworth mortgage was a partnership asset, and that only $545 had been accounted for. This $545, and interest thereon, was charged to Macfadden's account. The trial court also found that $1,500 had been paid over by J. H. Carleton, January 3, 1909, in part payment of J. H. Ellsworth's interest in the Knuth contract, and that said $1,500 was a partnership asset and only $750 had been accounted for. The trial court therefore charged Macfadden's account $750, with interest thereon from January 3, 1909. The trial court charged $111.90 on account Dailey farm for part of the crop and interest on the value of such share of crop and $60, with interest from January 1, 1909, for hay from the Buettell farm, and $8.55 for hay from the Mallory farm. These, together with the $1,823.33, the other thirteen items, as we understand the matter, are objected to for the reason that such items were received by the partnership prior to the time the corporation bought out Ellsworth. We think that such objection is not well founded, and that the trial court was right in charging such items to Macfadden. Macfadden qualified and became administrator of Jenkins's estate on or about the 5th day of September, 1908. He then became the administrator of the entire estate of Jenkins. Jenkins's estate did not consist alone of his own individual property, but also included his interest in all the partnership affairs and property. It was the duty of Macfadden to look after and preserve faithfully and as a trust the entire interest of the estate. If, while acting as such administrator, he was instrumental in forming a corporation of which he became the president, which bought up the interest of Ellsworth in the partnership, any profits arising from such purchase by Macfadden, either to him or to the corporation of which

he was the president such profits accrued not to such corporation or to Macfadden personally, but accrued to the benefit of the Jenkins's estate, as we have most fully shown in the main opinion; and it was perfectly proper then to require Macfadden to account for all the property which came into his hands from the time he became administrator of Jenkins's estate. This accounting is brought, not only to compel Macfadden to account for the partnership property, but for all property which came into his hands, either partnerships or that which belonged to the individual estate of Jenkins, and the interest which Jenkins had in the partnership property was an asset of his estate.

We think, therefore, that all items referred to which were charged against Macfadden which came into his hands in 1908, and it is not successfully disputed but what all such items did come into his hands, were properly charged to him by the trial court, and we think it is proper to sustain such findings of the trial court. The appellant claims, however, that if he should be charged for such items, there should be deducted certain disbursements a list of which appellant has set forth in his brief, aggregating $11,918.56. An examination of such disbursements discloses that the major portion of them were allowed by the trial court; as, for instance, the $1,500 payable for the Equitable Insurance Company note, $500 and interest to the Fargo National Bank, $6,480 principal and interest of the note to Ellsworth. All of these the appellant has received credit for. The credits for $900 and $800.10 for payments made by J. H. Carleton on the Bowers farm were completely disposed of in the main opinion, so that practically all the disbursements claimed by appellant either have been allowed, and such as were not we believe were properly disallowed. There remain several other items in said list, none of which is very large, and most of which payments are for interest or mortgage on some of the farms which belonged to the partnership and which farms were purchased by the corporation. The court evidently did not allow these interest charges to Macfadden as disbursements.

As near as we are able to determine, we believe the trial court, at the time it fixed its values upon the equity of the partnership property which was converted, did so, taking into consideration that there were certain mortgages and interest owing upon said property, and that the value fixed by the court was the net value of the equity exclusive of any

interest on mortgages. We think this must be likely the reason why the court disallowed the interest disbursement charges made by the appellant. Any other disbursement charges claimed by the appellant which were disallowed by the trial court, we believe were properly disallowed. The trial court had the respective parties before it and was in a better position than we to pass upon each item of the disbursements. It was also in better position to know with which items to charge the account of Macfadden as administrator. We think the items which the trial court charged against the account of Macfadden as administrator were properly chargeable to such account.

In the main opinion we referred to a $1,600 claim paid out of the insurance money. The amount deducted by the insurance company was $1,500. The main opinion is corrected in this regard, as we should have stated that it was $1,500 deducted by the insurance company instead of $1,600. We also stated in the main opinion the following:

"Later Macfadden received $1,500 worth of stock for his interest in the Solberg farm, the estate receiving $750 credit for the same interest."

We should have said that Macfadden received $1,500 stock for his interest in the Solberg and Estby farm. However, the result is the same.

It is true that Macfadden and Simonitsch each contributed certain capital to the corporation, but did not contribute such capital at the time of the inception or organization of the corporation, but some time later as is shown by the evidence in the case. The organization of the corporation was completed about October 23, 1908, and about that time or about the 24th of October, 1908, commenced business. Later, commencing possibly with November 1, 1908, various amounts were contributed to the capital of such corporation by Simonitsch and Macfadden, for which they received stock in such corporation, but none of the amounts paid in by either were paid in at the inception of the corporation; that is, at the time the organization of the corporation was completed.

We have gone into the matters connected with this case at great length. The main opinion was exceedingly long and quite exhaustive. We have reviewed at considerable length the matters presented on the petition for rehearing. We are fully satisfied that the findings of the

trial court should not be disturbed. Especially in cases where a long account is involved should the findings of the trial court receive much credit. Not only has this case received the most careful attention by the trial court, but also by this court. The main opinion shall stand as heretofore rendered except as the same is, in any manner, modified by this per curiam opinion.

The petition for rehearing both of the appellant and respondent is denied.

All concur except Mr. Justice CHRISTIANSON, who adheres to the views expressed in his dissenting opinion.

JAMES KENNEDY, James P. Reynolds, Mrs. James P. Reynolds, and Clarence Dahl, Respondents, v. CITY OF FARGO, a Municipal Corporation, Alex Stern, R. B. Blakemore, J. J. Jordan, D. C. Mills, and O. M. Strate, as City Commissioners of the City of Fargo, F. L. Anders, City Engineer, W. H. Shure, City Attorney, George L. Tibert, City Building Inspector, All of the City of Fargo, Appellants.

CITY OF FARGO, a Municipal Corporation, Appellant, v. JAMES KENNEDY, Clarence Dahl, James P. Reynolds, and Mrs. James P. Reynolds.

(169 N. W. 424.)

City — public sidewalks — space set apart for — public has right to use its entirety — unauthorized obstructions — free from — fee of — resting in adjacent property owners.

1. Whatever space in a public place in a city is set apart for the use of the public as a sidewalk, the public has a right to use in its entirety, free from any and all unauthorized obstructions; and this, even though the fee to the street may be in adjacent property owners, and not in the public.

City — past failure to enforce ordinance — against obstructions — not estopped by — to subsequently cause obstructions to be removed.

2. A city is not estopped, by reason of its past failure to enforce its ordi-

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NOTE.—The question of power of municipality to require removal of vault in street is discussed in notes in 32 L.R.A.(N.S.) 1034, and L.R.A.1915F, 1009.

nances against the obstructions of sidewalks, from subsequently removing all obstructions therefrom.

City commissioners — removal of area ways — encroachment upon sidewalks — powers.

3. Under the provisions of § 3818, Compiled Laws 1913, the city commissioners of the city of Fargo have the power to compel the removal of area ways which encroach upon the public sidewalks.

Opinion filed September 9, 1918.

Cross actions to enjoin the obstructions of a public sidewalk, and to prohibit the city officials from interfering therewith.

Appeal from the District Court of Cass County, Honorable *C. M. Cooley,* Judge.

City of Fargo appeals.

Reversed.

Statement of facts by BRUCE, Ch. J.

The case of Kennedy et al. v. City of Fargo et al. involves an appeal from a temporary injunction, enjoining and restraining the city of Fargo, its city commissioners, its city engineer, its city attorney, and its city building inspector, "from obstructing, hindering, or interfering with the plaintiffs (who are the owners or lessees of certain abutting property) in the use and maintenance of that certain area way, located immediately in front of the three story brick building and basement, known as the Hotel Dacotah, said area way providing an entrance and opening to the basement of said building and the barber shop of the above-named defendant, James P. Reynolds, said area way to be protected by railings and gate as set forth in the files in this action, pending the trial of said action on the merits."

It appears from the record that Broadway, including the whole of the sidewalk on the east side and in front of the Hotel Dacotah, has been the principal business street of the city of Fargo for forty years; that the tracks of the Northern Pacific Railway Company cross Broadway just south of the said hotel, and that there are three of such tracks diverging just east and west of the street; that all trains cross Broadway at this point, and that much switching and making up of trains is there done; that through passenger trains going West are so long that

almost invariably the rear coaches extend half way or more across the crossing and obstruct the west half of the street, and that such trains usually stop for seven minutes or longer; that, aside from ordinary pedestrian travel on the east sidewalk, numbers are in the habit of crossing from the west side to the east walk when the former is obstructed by trains; that the southwest corner of the Hotel Dacotah is 14 feet north of the gate and is about 24 feet north of the rail of the track; that the gate does not extend clear across the sidewalk, and pedestrians crossing when it is down often go around the end, and that the same is true of the gate on the south side. The record also shows that in 1916 plaintiffs made an application for leave to make an excavation in the sidewalk immediately in front of the hotel and near the southwest corner, but that this application was denied. It appears, however, that the building inspector afterwards stated that there was a misunderstanding as to whether the area way was to be located in front of the Dacotah Hotel or on one side, and that, if it was to be erected on the side, no permit was necessary, as it would have been on railroad property, but that, if he had understood that the area way was to be erected in front of the building, he would have granted the permit. However that may be, the plaintiffs proceeded with the construction of the area way, and, after the same was partially constructed, the city ordered them to desist, but brought no action and took no legal steps to enforce such legal demand. The plaintiffs then proceeded, and just as they were about to place the railings, guards, etc., in position, the city brought the present mandamus proceeding to compel the abatement of such area way. In this case the writ was quashed by the trial judge, and an appeal was taken.

Later the city authorities removed the railing and closed up the area way, and plaintiffs brought this action against the city for a permanent injunction, restraining such city from interfering with the plaintiffs' use of such premises and of the area way. An order to show causes why a temporary restraining order, restraining the city from interfering with the use of the premises pending the action, should not be issued or made by the court, was then obtained, and on the hearing the temporary restraining order was granted and from this order an appeal was also taken. These two appeals are now before the court.

Spalding & Shure, for appellants.

Permanent obstructions to travel constitute nuisances, and are indictable offenses; or, the parties may be proceeded against in a suit to abate a nuisance, or the nuisance may be abated summarily.

No person has the right to do any act which renders the use of a street more hazardous or less secure than it was when finished and left by the municipal authorities. 4 Dill. Mun. Corp. § 1725; Congreve v. Morgan (N. Y.) 72 Am. Dec. 495; Bauermeister v. Markham (Ky.) 72 Am. St. Rep. 397.

The public right to the free and unobstructed use of public sidewalks in cities extends to the full width of the street, and no person can rightfully obstruct or make the street more dangerous for the public use, than when left by the municipal authorities. Wheeler v. Ft. Dodge (Iowa) 108 N. W. 1057; Costello v. State, 108 Ala. 45, 1 Am. St. Rep. 348, 353 note; Atty. Gen. v. Brighton & H. Co-op. Supply Asso. L. R. 1 Ch. Div. 276; Windfall Mfg. Co. v. Patterson (Ind.) 62 Am. St. Rep. 532; Wylie v. Ellwood (Ill.) 23 Am. St. Rep. 673; 107 Am. St. Rep. 245 and 248, note; Reimer's Appeal, 100 Pa. 182, 45 Am. Rep. 373.

Anything unlawfully placed in a public street that tends to make its use more unsafe or insecure for the public is a nuisance. Weiss v. Taylor, 144 Ala. 440; San Francisco v. Buchman, 111 Cal. 25; Hall v. Brefogle, 162 Ind. 496; Young v. Rothrock, 121 Iowa, 588; N. P. R. Co. v. Lake, 10 N. D. 541; 28 Cyc. 893; 3 Dill. Mun. Corp. § 1175; State ex rel. v. Minn. Transfer Co. (Minn.) 83 N. W. 32; Joyce, Nuisances, § 231; Pontiac & La. P. R. Co. v. Hilton, 69 Mich. 115, 36 N. W. 739; Neal v. Gilmore, 141 Mich. 519, 104 N. W. 609.

Cellars, vaults, and underground excavations may be made under the street or sidewalk only when traffic on the street is not interfered with or hindered. McCarthy v. Syracuse, 46 N. Y. 194; Dell Rapids Merc. Co. v. Dell Rapids, 11 S. D. 116; Papworth v. Milwaukee, 64 Wis. 389; Fisher v. Thirkill, 21 Mich. 1.

The owners of the soil or fee may only make a reasonable use of the land above and below the surface for operations which do not incommode the public or impair the usefulness of the way. 83 Me. 508; Clark v. Lake St. Clair etc. Co. 24 Mich. 508; McCarthy v. Syracuse, 46 N. Y. 194.

A street cannot be put to any use by any person which subordinates the right of the public to free and unobstructed passageway to the private use. Tillie v. Mitchell & L. Co. 121 Wis. 1; Reimer's Appeal, 100 Pa. 182, 45 Am. Rep. 373; Field v. Barling, 148 Ill. 556; Savage v. Salem, 23 Or. 381; Chicago etc. R. Co. v. Quincy, 136 Ill. 563; Pastorino v. Detroit, 182 Mich. 5, Ann. Cas. 1916D, 768; Fuller v. Grand Rapids (Mich.) 63 N. W. 530; Ann. Cas. 1916D, 773, note; Pagames v. Chicago, 111 Ill. App. 590; Com. v. Morrison, 197 Miss. 199, 125 Am. St. Rep. 338, 345, 346 and 348, note; Ann. Cas. 1917A, 558, note.

Lawrence & Murphy and *Barnett & Richardson,* for respondents.

After making proper application for permit to build, or to do any other lawful act, and permission is denied, the citizen may invoke the aid of the court to prevent an unreasonable refusal to allow him to use his property in a lawful manner. City v. Army (Tex.) 127 S. W. 860.

"Trustees are not relieved from their duty under an ordinance to grant a building permit when the application is in substantial accordance with the ordinance, because of failure of the commissioner of public works to approve of the plans." People v. Village (Ill.) 109 N. E. 11.

"The superintendent of buildings cannot arbitrarily refuse a permit, nor should he refuse it when application and plans filed comply with all provisions of law." Lakes Co. v. McDermott, 160 N. Y. Supp. 450; People v. Reville, 100 N. Y. Supp. 584; City v. Kellner, 153 N. Y. Supp. 472; Stubbs v. Scott (Md.) 95 Atl. 1060; People v. Stroebel (N. Y.) 103 N. E. 735.

Owning the fee to the center of the street, the plaintiff was at liberty to use, subject to the public easement, the same or any parts of his property, and the construction of the area way was not, in itself, unlawful. The rule might be otherwise where the fee of the street was in the city. Dell Co. v. City (S. D.) 75 N. W. 898; Water Co. v. City (Cal.) 90 Pac. 1053.

The rule is settled in this state that under the power to control, cities and towns may permit the use of streets close to buildings for area ways and cellarways, if properly protected, so long as they do not unreasonably obstruct the street, or cause private injury to others. Went v. Town (Iowa) 142 N. W. 1024; Crosby v. City (Iowa) 150 N. W.

246; Ward v. Kellog (Mo.) 148 S. W. 174; Sears v. City (Ill.) 93 N. E. 158; Tacoma Co. v. City, 93 N. E. 153; People v. Ahearn, 109 N. Y. Supp. 249; Adair v. City (Ga.) 52 S. E. 729.

To give to the law the construction placed by counsel would place every house, every building and business, and all property of the city at the uncontrolled will of the temporary local authorities. Yates v. City (U. S.) 19 L. ed. 984; Mayor v. Hitchins (Md.) 59 Atl. 49.

The city cannot and does not have absolute control over things which do not hinder, delay, or endanger the public in its use of the streets and sidewalks. State v. Higgs (N. C.) 48 L.R.A. 446; City v. Teass (W. Va.) 19 L.R.A. 803, 809; Mayor v. Wineland (Md.) 64 L.R.A. 627; Pauer v. Albrecht (Wis.) 39 N. W. 771; Murdon v. Town (Del.) 96 Atl. 506; City v. Harland (Idaho) 151 Pac. 1191; R. Co. v. City (Tex.) 122 S. W. 413; City v. Rogers (Colo.) 104 Pac. 1042; City v. Weber (Ill.) 92 N. E. 859; Donohoe v. Fredlock (W. Va.) 79 S. E. 736; City v. R. Co. (Ill.) 102 N. E. 785.

The contention that the city has power to arbitrarily declare a certain structure a nuisance, and therefore it is a nuisance, cannot be sustained. Everett v. City, 19 N. W. 140; Wolff v. District, 196 U. S. 153; Robert v. Powell, 61 N. E. 699; Village v. Ward (Ohio) 96 N. E. 937; City v. Lambert (Va.) 68 S. E. 276; Keyes v. Cedar Falls (Iowa) 78 N. W. 227; Aldrich v. City (Mass.) 99 N. E. 329.

It matters not whether the structures be underneath or above the surface of the street, so long as they are within the reasonable use of the property. 3 McQuillin, Mun. Corp. pp. 2280–2281; Reynolds v. Bank (Iowa) 136 N. W. 529; Pickrell v. City (Ky.) 121 S. W. 1029; Litchfield Co. v. Com. (Ky.) 136 S. W. 639; City v. Lambert (Va.) 68 S. E. 276; Perry v. Castner (Iowa) 66 L.R.A. 160; Aldrich v. City (Mass.) 99 N. E. 329; Jorgenson v. Squires (N. Y.) 39 N. E. 373; Morrison v. McAvoy (Cal.) 70 Pac. 626; Everett v. City (Mich.) 19 N. W. 140.

"It is not unreasonable to accord to a citizen property owner the same privileges enjoyed by nearly all the lot owners in the same locality." Pittsburgh Co. v. Fidelity Co. (Pa.) 56 Atl. 436; Pickrell v. City (Ky.) 121 S. W. 1029; Perry v. Castner (Iowa) 66 L.R.A. 160.

"An ordinance providing certain restrictions in the erection of certain structures constitutes an implied authorization to erect such struc-

tures." Laviasa v. R. Co. McGloin (La.) 299; Livingston v. Wolf, 20 Atl. 551; Jorgenson v. Squires (N. Y.) 39 N. E. 373; City v. Sheppard (Pa.) 27 Atl. 972; Devine v. Co. 88 N. Y. Supp. 704; Bristow v. Co. 75 N. E. 1127; Morrison v. McAvoy (Cal.) 70 Pac. 626.

How can the city, after having passed and enforced for many years, the ordinance in question, now claim that an area way constructed exactly according to such ordinance is unreasonable or dangerous? Such a contention would, in effect, amount to a collateral attack on its own ordinance. 2 McQuillin, Mun. Corp. p. 1708.

BRUCE, Ch. J. (after stating the facts). The statute provides that "the board of city commissioners shall have power . . . to lay out, open, alter, establish, widen, grade, pave, park, or otherwise improve streets, alleys, avenues, sidewalks; . . . to prevent and remove obstructions and encroachments upon the same; . . . to regulate the use of sidewalks and all structures thereunder and to require the owner or occupant of any premises to keep the sidewalks in front of or along the same free from snow or other obstructions; . . . to declare what shall be a nuisance and abate the same." See § 3818, Compiled Laws 1913.

Section 3818, Compiled Laws 1913, also gives to the city commissioners the power "to declare what shall be a nuisance and abate the same. Section 14 of the Revised Ordinance of the city of Fargo provides "that no person shall injure or tear up any sidewalk or cross walk, drain or sewer or any part thereof, or dig any hole, ditch or drain in any street or sidewalk or public ground, or remove any gravel sod or sand from any street, without procuring a permit from the city engineer so to do."

Chapter 13 of these ordinances provides that "it shall be the duty of the inspector of buildings . . . to examine all certificates, permits, and notices required to be under this provision; to make complaint of all violation thereof. . . . The inspector of buildings shall have full power to pass on all questions arising under the provisions of this ordinance, relating to the manner of construction or material to be used in the construction, altering, or repairing of any building. It then provides in § 2 for an application to be made to the inspector for any "permit to erect, repair, change or alter any building or structure," and how such application shall be made, and that it shall not be lawful

to materially alter any building without a permit from the building inspector.

Chapter 13 also provides among other things that "no stairway or open area way shall extend into the sidewalk more than 4 feet on streets having walks 14 feet wide, or more than 3 feet on streets having walks less than 14 feet wide," and requires such stairway or open area to be protected by strong iron or brass railings.

The obstruction complained of was about 3 feet wide and left about 8½ feet clear space on the sidewalk.

It appears, also, that subsequently to the plaintiffs' application for a permit a resolution was passed by such commission, forbidding the issuance of any more permits for area ways.

There can be no doubt that the area way in question tends to obstruct the sidewalk, nor can there be any question that there is extensive travel upon the walk, and that at the times when the trains block the crossing that travel is largely increased. The plaintiffs, however, contend that: (1) No permit was necessary under the terms of the ordinance. (2) A proper application for a permit was made, but by reason of a clerical misunderstanding was not formally issued; that if a permit was refused, such refusal was unwarranted and arbitrary.

It is first maintained that reference to permits is made only in connection with the construction or alteration of buildings and other erections, and that § 49 of the ordinance, being the section expressly providing for area ways, makes no reference to the necessity of any permit. We think, however, there is no merit in this contention. The ordinance provides for an application to be made to the inspector for a permit to erect, repair, change, or alter any building.

Section 49 of the ordinance provides that "no stairway, or open area way shall extend into the sidewalk more than 4 feet, etc.," and mentions stairways and open area ways in connection with porticoes, bay windows, and brackets. It is quite clear to us that when a person is erecting an area way and building steps and making a doorway in order that access may be had from the street to a room in the basement of a house or building, that he is repairing, altering, and changing such building, even if he is not erecting such structure.

In the case of State v. Kean, 69 N. H. 122, 48 L.R.A. 102, 45 Atl. 256, a bay window which projected from a building and which extend-

ed into and over a street, but did not extend downward within 8 feet of the ground, was held to be an obstruction and to come within the term, "building or structure;" while in the case of Karasek v. Peier, 22 Wash. 419, 50 L.R.A. 345, 61 Pac. 33, a fence was held to be a structure. Here we have a stairway and a railing, and we have an alteration to the building by making a new entrance thereto, and by erecting a door therein, excavating around its foundation, and removing a part of its lateral support.

We do not deem it material whether the fee to a street in a city and the fee to the particular street in question was in the public or not. The right of the public to prevent obstructions to the free passage thereover seems to exist in either event. Where the fee rests in the property owner there can be no doubt of his right to extend his cellar or foundation beneath the sidewalk. There can be no doubt, however, of the right of the city to require a permit before the building is so improved or the new structure is erected. Where, as in the case at bar, he seeks to appropriate a part of the sidewalk, and to erect a permanent obstruction thereon, and to make an excavation therein, it is perfectly clear that the city has both the power to require a permit and to refuse the appropriation of the street and the limiting of the surface over which the public may travel if it so desires. The right of the public travel still exists, and the rights of the owner may grow less as the public needs increase. Allen v. Boston, 159 Mass. 324, 325, 38 Am. St. Rep. 423, 34 N. E. 519; State v. Kean, supra.

The statute clearly gives to the board of the city commissioners the power to "lay out, open, alter, establish, widen, grade, pave, . . . streets, alleys, avenues, sidewalks, . . . and . . . to *prevent and remove obstructions and encroachments* upon the same; . . . and . . . to regulate the use of sidewalks and all structures thereunder."

Nor are we concerned with the question whether the obstruction was a reasonable obstruction or not, or whether it was unreasonable for the public to insist on the full use of the sidewalk. The fact is that the public had the right to the use of the whole walk, and free from any obstruction whatever.

There is, in fact, a wide distinction between an excavation under the walk, which does not interfere with its full use, and one which cuts

therein and materially lessens its area. Chapman v. Lincoln, 84 Neb. 534, 25 L.R.A.(N.S.) 400, 121 N. W. 596.

It will be noticed that the charter of the city gives it the full power to declare and abate nuisances, and to prevent and remove obstructions and encroachments upon the street and the sidewalks; and we do not have to consider the many cases which deal with charters forbidding the granting of permits for permanent encroachments, or with the right of the city to restrict the public use and to allow obstructions to public travel. Here the public is merely seeking to assert its rights, and under a general grant of power, and the general rule undoubtedly is that "a municipality may require the removal of an obstruction on a street notwithstanding there is still ample room left for the passage of teams." "This," says Judge Elliot, "is the only safe rule; for, if one person can permanently use a highway for his own private purposes, so may all, and, if it were left to the jury to determine in every case how far such an obstruction might encroach upon the way without being a nuisance, there would be no certainty in the law, and what was at first a matter of small consequence would soon become a burden not only to adjoining owners, but to all the taxpayers and the traveling public as well." Elliott, Roads, 3d ed. § 828; Lacy v. Oskaloosa, 143 Iowa, 704, 31 L.R.A. (N.S.) 853, 121 N. W. 542. We, indeed, find but few cases which deny this right to the public, and most of those which seem to deny it do not deny it at all, but merely concede the right to the municipality to grant permits or revocable licenses which they at any time may cancel or revoke. See Kellogg v. Cincinnati Traction Co. 80 Ohio St. 331, 350, 23 L.R.A.(N.S.) 158, 88 N. E. 882, 17 Ann. Cas. 242. Many of the other cases also are cases in which the sole question is whether the structure is in itself a common-law nuisance and whether a person may be indicted for maintaining the same.

We held in the case of Ashley v. Ashley Lumber Co. post, 515, 169 N. W. 87, that a city could require the removal of that which was erected in violation of its ordinance, even though the structure was not in itself a common-law nuisance. Here, if, as we have held, the public is entitled to the use of the whole walk, the obstruction is certainly a nuisance.

Nor is there any merit in the contention that in the past the city of Fargo has been very liberal in its policy of allowing obstruction on its

streets and sidewalks. We are not here dealing with the authority to permit obstructions, but to forbid them. Upon the subject, however, it might be well to quote from Mr. McQuillin, where he says: "In many cities the streets have been subjected to a great number of invasions for the benefit and use of private owners, but in recent years it has been more and more realized by the courts how dangerous such invasions have been, and how if one person is permitted to use the street others will likewise have to be accorded equal privileges, with the result that, sooner or later, especially in the larger cities, the rights of the public and of adjacent landowners to use the streets will be seriously interfered with. Unquestionably many permits to encroach on the street are granted by nearly every municipality of any considerable size, which, if the question were litigated, would be held to be entirely beyond the power of the municipality." See 3 McQuillin, Mun. Corp. p. 2873.

For a clear and full discussion of nearly all, if not all, of the questions involved we refer to the case of Chapman v. Lincoln, 84 Neb. 534, 25 L.R.A.(N.S.) 400, 121 N. W. 596.

In the case of Kennedy v. City of Fargo the order of the District Court is reversed and the temporary injunction is ordered to be set aside and vacated; while in the case of City of Fargo v. Kennedy the order is also reversed and the injunction, which is prayed for, is ordered to be issued and to be made permanent.

GRACE, J., I concur in the result.

ROBINSON, J., I dissent.

MICHAEL JAHNER, Respondent, v. GEORGE KARY, Appellant.

(169 N. W. 31.)

Justice court — appeal from — to district court — appeal dismissed — order on — not appealable.

Following Re Weber, 4 N. D. 119, it is *held* that an order of the district court dismissing an appeal from a justice's court is not an appealable order.

Opinion filed September 20, 1918.

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

Defendant appeals from an order dismissing an appeal from a justice of the peace.

Dismissed.

H. C. Berry, for appellant.

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

Per Curiam. On July 3, 1917, the plaintiff recovered a judgment against the defendant in a justice's court in Stark county. The defendant appealed to the district court. On December 7, 1917, the district court made an order dismissing the appeal. The order was served upon the defendant's attorney personally on December 8, 1917. On February 4, 1918, the defendant attempted to appeal from such order, by serving and filing notice of appeal and undertaking on appeal. The record on appeal was transmitted to and filed in the office of the clerk of the supreme court on February 13, 1918. On September 16, 1918, the plaintiff moved for a dismissal of the appeal on the grounds: (1) That the order is not appealable; and (2) that, in any event, the appeal has not been prosecuted with due diligence. In our opinion both grounds would be well taken; but a determination of the first precludes and makes it unnecessary to consider the second ground. That such order is not appealable is well settled by the decisions of this court.

See Re Weber, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523; Dibble v. Hanson, 17 N. D. 21, 114 N. W. 371, 16 Ann. Cas. 1210.

The appeal is dismissed.

GRACE, J. In concur in the result.

STATE OF NORTH DAKOTA EX REL. EDWARD S. ALLEN, Petitioner, v. TIMOTHY E. FLAHERTY, County Auditor of Burleigh County, North Dakota, Respondent.

(169 N. W. 93.)

Primary election law — total vote cast — party candidates for office — percentage required — of vote for governor, secretary of state, and attorney general — nominations — statute — unconstitutional and arbitrary — lacks uniformity — system must be stable and constant throughout the counties of the state.

Section 862 of the Compiled Laws of 1913, which at a primary election provides that "if the total vote cast for any party candidate or candidates for any office for which nominations are herein provided for shall equal less than 25 per cent of the average total number of votes cast for governor, secretary of state and attorney general of the political party he or they represented at the last general election then no nomination shall be made in that party for such office," is unconstitutional in that its provisions are arbitrary, unnatural, and lack uniformity in the different counties of the state, and does not provide a standard for determining the basis for classification which is stable and constant throughout the counties of the state.

Opinion filed September 20, 1918.

Mandamus to compel the printing the name of petitioner on the official ballot.

Writ ordered issued.

William Langer, Attorney General, and *Edward B. Cox,* Assistant Attorney General, for respondent.

Edward S. Allen, for petitioner.

BRUCE, Ch. J. This is a petition for a writ of mandamus to compel the county auditor of Burleigh county to print the name of petitioner as the Democratic candidate for the office of state's attorney of said Burleigh county on the official ballot at the next general election to be held on the 5th of November, 1918.

The affidavit of petitioner is as follows:

"State of North Dakota }
"County of Burleigh } ss.:

"Edward S. Allen being duly sworn according to law on his oath deposes and says that he is the petitioner in the above-entitled proceeding and a party beneficially interested therein; that he now is and during all the times hereinafter mentioned has been a qualified elector of the county of Burleigh in the state of North Dakota and qualified to exercise the duties of the office of state's attorney in and for said Burleigh county; that at the primary election held in said Burleigh county on the 26th day of June, 1918, affiant received on the Democratic ticket 95 votes for the said office of state's attorney, as shown by the return of the votes cast at said primary election by the canvassing board, and that there were cast for other elector or electors on said Democratic ticket for said office 13 votes, as shown by said return, making as shown by said return the number of 108 votes cast for two or more electors for the office of state's attorney on the Democratic ticket; that affiant's name was not printed on said Democratic ticket as a candidate for said office of state's attorney, and that there was no candidate for said office on said ticket by petition; that 25 per cent of the vote for governor, attorney general, and secretary of state at the last general election was 110 votes; that there were over 200 party votes cast for the Democratic ticket at the primary election in Burleigh county held on the 26th day of June, 1918, and that the Democratic party is entitled to a column on the ballot at the next general election. Affiant further says that the canvassing board neglected to state and set forth in their return of the votes cast for the office of said state's attorney the name or names of the person or persons receiving the said 13 votes, and the said canvassing board designated the same as "scattering 13 votes,"—said designation being made, as affiant is informed and believes, because affiant had received by far the highest number of votes on the Democratic ticket for

said office, and the said canvassing board deemed it useless and unnecessary to name the person or persons who had received the said 13 votes. Affiant says that there was at least one person entitled to exercise the duties of said office of state's attorney who received for the said office several, at least, of the said 13 votes, and that affiant was not the only person selected by the Democratic voters as a candidate for nomination for said office at said primary, and therefore that there was more than one person candidates for said nomination and selected as such candidates by the said voters, but that affiant received the highest number of the votes cast by the Democratic voters for the said office. Affiant further says that he has made demand on the said Timothy E. Flaherty, county auditor as aforesaid, requesting that the name of affiant be printed on said Democratic ticket as a candidate for the said office of state's attorney, but the said Timothy E. Flaherty, as county auditor, has refused, and now does refuse to print same as demanded and requested, as shown by said demand, and affidavit of service of same, and said refusal in writing, attached hereto, made a part hereof, and respectfully referred to. Affiant further says that the petitioner in the above-entitled proceeding has no other plain, speedy, and adequate remedy in the ordinary course of the law, and therefore asks that a writ of mandamus issue commanding the said Timothy E. Flaherty, county auditor of said Burleigh county, to print the name of Edward S. Allen on the Democratic ticket for the office of state's attorney to be voted at the next general election to be held in said Burleigh county on the 5th day of November, A. D. 1918.

"It is admitted that 25 per cent of the average total number of votes for the state officers, to wit, governor, secretary of state, and attorney general, at the last general election was a fraction over 109; that there were cast at the primary election held on June 26, 1918, in Burleigh county, 198 party votes; that for the office of state's attorney 108 votes were cast, of which petitioner received 95 votes, and other persons received 13 votes, the canvassing board returning the said 13 votes as "scattering," though they were not divided among 13 different persons; that there were no names printed on the Democratic primary ticket for said office, there being no candidate by petition; that the 95 votes cast for petitioner and the 13 votes cast for the other persons were so received and cast as the voluntary choice and will of the Democratic electors and

voters voting at said primary election, and that petitioner and the others receiving votes for said office were candidates only as made so by being the voluntary choice of the Democratic voters manifested by their writing in the names of petitioner and said others on the Democratic primary ticket.

"The respondent bases his refusal on the provisions of § 862, Comp. Laws 1913, the said auditor contending that the vote cast for each county office at the primary election must equal in number 25 per cent of the average total vote cast for governor, secretary of state, and attorney general at the last general election."

This section is as follows: "If the total vote cast for any party candidate or candidates for any office for which nominations are herein provided for shall equal less than 25 per cent of the average total number of votes cast for governor, secretary of state and attorney general of the political party he or they represented at the last general election then no nomination shall be made in that party for such office, but if 25 per cent or more of such party vote is cast and there is more than one candidate for any such office the person receiving the highest number of votes shall be declared the nominee of such party for such office, provided, further, that where there is more than one person to be elected to the same office the persons to the number to be elected receiving the highest number of votes cast for such office shall be declared the nominees of the party for such offices."

This section is an amendment to § 12 of chapter 109 of the Laws of 1907, which provides:

"If the total vote cast for any party candidate or candidates for any office for which nominations are herein provided for shall equal less than 30 per cent of the total number of votes cast for secretary of state of the political party, he or they represented at the last general election, no nomination shall be made in that party for such office, but if 30 per cent or more of such vote is cast and there is more than one candidate for any such office, the person receiving the highest number of votes shall be declared the nominee of such party for such office; provided, further, that where there is more than one person to be elected to the same office the persons to the number to be elected receiving the highest number of votes cast for such office shall be declared the nominees of the party for such offices."

This amendment was the result of the decision in the case of State ex rel. Dorval v. Hamilton, 20 N. D. 592, 129 N. W. 916, wherein this court expressly overruled its prior holding in the case of State ex rel. Montgomery v. Anderson, 18 N. D. 149, 118 N. W. 22, and held that:

"Under the provisions of the general primary election law, the classification provides by the requirement of § 12, chap. 109, Laws of 1907, to the effect that no nomination shall be made unless the vote cast for state, district, or county offices is at least 30 per cent of the total number of votes cast for the candidate for secretary of state of each political party at the last general election, is arbitrary, unnatural, and lacks uniformity in the different counties of the state, by reason of the fact that the standard provided for determining the basis of classification places the party group authorized to make a nomination in each county in a relation to the actual party strength and to each other that is unstable, inconstant, and without uniformity in the different counties of the state. Such provision of the law is, therefore unconstitutional and void. On this point the holding of State ex rel. Montgomery v. Anderson, supra, is overruled."

In this case the court in its opinion by Ellsworth, J., points out the fact that the vote of a party candidate for secretary of state at a general election, held eighteen months previous to the election in issue, was hardly a proper criterion of the party strength. It, however, went very much further, and for reasons given in its opinion, and in which we fully concur, intimated that the party strength, as represented at the particular primary in controversy, if such strength could be properly established, was a much better criterion. It did not hold that the 30 per cent of the strength at such primary would be unreasonable. It did not, however, intimate how that strength should be ascertained.

The legislature of 1913 sought to obviate the objection raised by this opinion by reducing the per cent to 25 per cent and by making the average total vote for governor, secretary of state, and attorney general at the preceding general election the criterion.

In this, however, we believe it entirely failed, and that the act before us is as vulnerable as its predecessor. It is difficult indeed for us to understand why, with the possibility before it of arriving at a just estimate of the party strength, and in the light of § 2 of chapter 213, of

the Laws of 1911, which provides for a direct canvass by the county assessors and the registration of all persons who are to vote at the primary elections according to their party affiliations, and which clearly shows that a more just and accurate criterion may be had, it should have been deemed necessary to pass any such measure as that which is before us.

Section 862 of the Laws of 1913, which was enacted as § 2 of chapter 222 of the Session Laws of 1913, is an identical copy of chapter 321 of the Session Laws of 1911, and which act, though passed by the legislature, was vetoed by Governor Burke. The reason for this veto was that the act in question would, in the opinion of the governor, bring the average of votes required for a nomination even higher than the percentage required by law, which was held to be unreasonable in the case of State ex rel. Dorval v. Hamilton, supra; and the record which is before us clearly shows that the fears of the governor were well founded, and this in spite of the fact that, instead of the vote for secretary of state being made the criterion, the vote of the governor, the attorney general, and the secretary of state is adopted in its stead. In the general election of 1908 the vote of the governor of Burleigh county was 1,094, that of the secretary of state 677, and that of the attorney general 585. The total vote was 2,356. The average total vote was 785,-33. 25 per cent of 785.33 is 196.25. The vote of secretary of state was 677. 30 per cent of this would make 203.10. According to the figures of the election of 1908, 6.77 more votes would be required for nomination under the original enactment than under the present amendment.

If we take the figures for the general election of 1910, however, we find that the reverse is the situation. The vote for governor was 1,020, that of secretary of state 503, and that of the attorney general 560. The total vote was 2,083. The average total vote would be 694.33. 25 per cent of this would make 173.58. The vote for secretary of state was 503. 30 per cent of this is 150.90. 22.68 more votes would be required for nomination under the amendment than under the original enactment.

When we turn to the general election of 1912, we find that the vote for governor was 768, that of the secretary of state was 90, and that of the attorney general was 609. The total vote was 1,467. The aver-

age total vote was 489. 25 per cent of this makes 122.25. The vote for secretary of state was 90. 30 per cent of this makes 27. 95.25 more votes, therefore, were required for nomination under the amendment than under the original enactment.

Turning to the general election of 1914, we find that the vote for governor was 797, that of the secretary of state 423, and that of the attorney general 394. The total vote was 1,614. The average total vote was 538. 25 per cent of this makes 134.50. The vote for secretary of state was 423. 30 per cent of this makes 126.90. 7.60 more votes, therefore, were required for a nomination under the amendment than under the original enactment.

Turning to the general election of 1916, we find that the vote of the governor was 470, that of the secretary of state was 344, and that of the attorney general 496. The total vote was 1,310. The average total vote was 436.66. 25 per cent of this makes 109.66. The vote for secretary of state was 344. 30 per cent of this makes 103.20. 5.96 votes, therefore, were required for a nomination under the amendment than under the original enactment.

In the Hamilton Case also the lack of uniformity is sought to be shown by considering the vote at the general election in the year 1908 for secretary of state in the counties of Bottineau, Stark, Morton, and Adams; and it is shown by the opinion that 98 per cent in Bottineau, 93 per cent in Stark, 136 per cent in Morton, and 424 per cent in Adams of the entire strength of the party vote as demonstrated by its vote at the primary election in the year 1910, would have had to be obtained in order to enable the nomination of any county officer whatever. Such a result, it was held, made the working of the original enactment preposterous and ridiculous, and lacking in uniformity, and prevented the regulation from operating "on voters and candidates of the same class with substantial equality."

The same result follows under the present act, and this even though the average vote of the governor, the secretary of state, and the attorney general is made the criterion, and the percentage required is reduced to 25.

"At the general election of 1908 in Bottineau county the average of the total vote of the candidates for governor, secretary of state, and attorney general was 1,340 votes. At the primary election of 1910 the highest number of Democratic ballots called for and voted in that coun-

ty was 351. By the application of the 25 per cent rule 335 votes, or 95 per cent of the highest number of that party voting at that election, was necessary to enable it to make a nomination for any county office whatever. In Stark county the average of the total vote of the governor, secretary of state, and attorney general was 507. The Democratic vote at the primary election of 1910 was 150. As 126 votes were necessary for nomination, it required 84 per cent of the party vote cast at this election to nominate. In Morton county the average total vote for said group in 1908 was 1,029. The Democratic vote at the primary election of 1910 was 201. As the number required to nominate was 257, it would require 127 per cent, or 27 per cent more than the entire party vote cast at the primary election, to make a nomination. A discrepancy still more magnified between the party strength as ascertained by the provisions of § 2 of chap. 222, Laws of 1913, and that shown by the practical result of participation in an election, is that returned from Adams county, where the average total of the vote for governor, secretary of state, and attorney general in 1908 was 207. The highest Democratic vote at the primary election of 1910 was 13. The number required to nominate was 51, and in order to make a nomination it was necessary for the Democratic party to cast a vote equivalent to 392 per cent of its entire strength as demonstrated by the vote at the primary election.

"As was said by this court in the Hamilton Case: "As these statistics are selected at random from a list of the counties of the state, it is a fair inference that conditions thus shown to prevail in any county obtain in every county, differing only in degree.' "

As we view the matter, § 862 of the Compiled Laws of 1913 does not meet the objections that are raised in the case of State ex rel. Dorval v. Hamilton, and it is, therefore, unconstitutional.

Section 862 of the Laws of 1913 being unconstitutional, it is clear to us that the petitioner is entitled to have his name placed upon the ballot under the provisions of chapter 212 of the Laws of 1911.

The prayer of the petition is, therefore, granted and the writ of mandamus will issue.

GRACE, J. I concur in the result.

CHRISTIANSON, J. I dissent.

STATE OF NORTH DAKOTA, Respondent, v. FRANK BUSHBACKER, Appellant.

(169 N. W. 82.)

Rape — prosecution for — improper — evidence — admitted without objection — subject matter of — witness cross-examined by defendant — admission of such evidence not error.

1. Where, in a prosecution for rape, evidence, which might have been excluded had objection been seasonably made, is admitted without objection and the defendant has availed himself of the opportunity to cross-examine the witness touching the matters covered by such evidence, the admission of such testimony is *held* not to be error.

Rape — defendant seeking to establish his innocence — third person — by implicating — testimony of third person — in denial — admissible.

2. Where a defendant in a prosecution for rape seeks to establish his innocence by implicating a third person, testimony of such third person, denying his guilt, is admissible.

Defendant — statements of — to third persons — admissions — admissible.

3. Certain statements of the defendant to third persons are *held* admissible as amounting to admissions.

Conduct of defendant — toward other persons — in presence of prosecutrix — admissible as corroborative evidence.

4. Certain conduct of the defendant manifested towards a person other than the prosecutrix, but in the presence of the prosecutrix, is *held* admissible as a circumstance tending to corroborate the prosecuting witness.

Statutory rape — elements of — admitted — identity of guilty party — only issue — instructions — "rape in first degree or no crime at all" — not error.

5. Where every element essential to the commission of the crime of statutory rape in the first degree is admitted, and the only issue is as to the identity of the one guilty of the crime, it is *held* not improper for the court to instruct the jury that the offense committed "is either rape in the first degree or no crime at all."

Opinion filed July 23, 1918. Rehearing denied September 24, 1918.

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

Conviction affirmed.

Frank T. Lembke (on trial) and *Sullivan & Sullivan* (on appeal), for appellant.

A defendant is rightfully entitled to a fair trial, and the presiding judge should so conduct the trial that this right shall not be impaired. 12 Cyc. 519.

In a rape case, evidence of previous statements made by the prosecutrix must show that they were voluntarily made, and not made under the influence of pressure or fright. A mere complaint of the existence of a certain condition is not proper evidence, except to show that the crime has been committed. Such evidence must be confined to the bare fact that complaint was made, without going into details. 33 Cyc. 1464; State v. Brener, 16 N. D. 83, 112 N. W. 60.

Statements made in answer to questions, or otherwise involuntarily made, do not constitute such complaint as to be admissible. Such seems to be the settled rule. 33 Cyc. 1468; People v. Wilmot, 139 Cal. 103, 62 Pac. 838; People v. Lambert, 120 Cal. 171, 52 Pac. 307.

"In this class of prosecutions, the defendant, owing to the natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the time of the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence that he should be given the full measure of every legal right." People v. Baldwin, 117 Cal. 251, 49 Pac. 156; 33 Cyc. 1464.

Evidence or declarations of a third person, not made in the presence or hearing of the defendant, are not admissible, either for or against him. 33 Cyc. 1460.

The evidence of the attorney general as to what the prosecutrix or other said to him before the arrest or at any other time was hearsay and inadmissible. 12 Cyc. 405.

Evidence of other like offenses is wholly inadmissible, especially in this class of cases, and more especially when it comes from the testimony of the prosecutrix, as to admissions made by defendant to her. State v. Haakon (N. D.) 129 N. W. 234; State v. La Mount (S. D.) 120 N. W. 1104.

Evidence to impeach on a collateral matter is not admissible. Schanse v. Goetz, 18 N. D. 594, 120 N. W. 553.

In such cases the jury may find defendant guilty of any offense the commission of which is necessarily included in that with which he is on trial, or of an attempt to commit the crime charged. It was there-

fore error to instruct the jury that "it is either rape in the first degree, or no crime at all." Comp. Laws 1913, § 1098; People v. Baldwin (Cal.) 49 Pac. 187; 33 Cyc. 1502.

William Langer, Attorney General, *H. A. Bronson* and *D. V. Brennan,* Assistant Attorneys General, and *L. H. Connoly,* State's Attorney, for respondent.

"The general rule is that all objections to the admission or exclusion of evidence, its competency, relevancy, or sufficiency, and as to the competency of witnesses and their examination, must be made in the trial, and cannot be raised for the first time on appeal." 3 C. J. 807; 59 N. W. (S. D.) 224; (N. D.) 126 N. W. 110; (N. D.) 121 N. W. 63; (S. D.) 94 N. W. 587; 3 C. J. 742.

A defendant on trial will not be permitted to sit mute on the trial and listen to questions asked of the witnesses, and to evidence given, without objection, and then, because the answers are against him, complain for the first time on appeal. (Dak.) 29 N. W. 661.

But, however irrelevant, immaterial, or incompetent evidence may be, the right to raise these questions is completely destroyed and waived by the defendant's participation and cross-examination in relation to the same questions and subject-matter. 33 Cyc. 1467, 1468.

Statements made by defendant outside the trial and relating to the identical matter are competent to show. Jones, Ev. §§ 851, 854.

A motion to strike from the record certain testimony is not analagous to nor does it take the place of a proper objection to the evidence, which should have been interposed at the proper time. (S. D.) 61 N. W. 806.

The court fairly and fully cautioned and advised the jury as to defendant's rights, and as to the presumption of innocence. It is not necessary for the court, in charging a jury, to go into and repeatedly mention all these set and fixed rules, with each phase of his charge and on each point to which he refers. Instructions must be considered as a whole. 12 Cyc. 654; (N. D.) 91 N. W. 436; (S. D.) 50 N. W. 625; 17 N. D. 495.

BIRDZELL, J. This is an appeal from the judgment of the district court of Morton county, entered upon the verdict of the jury finding the defendant guilty of the crime of rape in the first degree, and also from an order entered denying a motion for a new trial.

The information charges the offense to have been committed by the defendant upon one Mary Gartner, a female of the age of thirteen years, on or about the 15th day of March, 1916. A detailed statement of the facts is not necessary to an understanding of the questions involved upon this appeal, and we shall only state such of them as are requisite to an intelligent discussion of the questions raised.

It is conceded by the appellant that the evidence is sufficient to support the verdict of the jury, but in the assignments of error questions are raised relative to the conduct of the trial, from which it is argued that the defendant did not have a fair trial. There are twenty-one assignments of error, most of which relate to the admissibility of evidence. Most of the evidence, the admission of which is assigned as error, was not objected to at the time it was offered. On the contrary, a reading of the record discloses that counsel for the defendant availed himself of the opportunity afforded by the broad range of the examination of the state's witnesses to extend his cross-examination, and that he attempted to impeach the various witnesses upon matters covered by the testimony that is objected to for the first time upon this appeal. Brief reference to some of the testimony will serve to illustrate the lack of merit in the appellant's contention. Assignments 1, 3, 4, 7, and 8 refer to evidence given during the trial, to which no objection whatever was made, and relate to the complaint of the prosecuting witness made to her parents. The complaining witness and her father and mother testified to the circumstances under which she communicated her condition to her parents in connection with which the name of the defendant was used as the person who was responsible therefor. It is contended that the particulars of the complaint (if such it was) are inadmissible; at least, insofar as they might embrace a hearsay statement identifying the defendant as the guilty party. But a reading of the record discloses not only that the defendant denied his guilt, but that, as a part of his defense, he sought to establish the guilt of another person. This was foreshadowed early in the trial by the cross-examination of the prosecuting witness, Mary Gartner, wherein it was attempted to commit her to an accusation against a third party, as the following testimony will amply show:

A. I stated that my father and mother are the first persons I told that the defendant had sexual intercourse with me.

Q. Did you not tell the defendant's wife, Mrs. Bushbacker, sometime before that in the month of August that you were in a family way from ——— (a person not the defendant)?

A. I did not have anything to do with ———.

Q. Answer my question. Did you not tell Mrs. Bushbacker that you had?

A. No, I did not tell Mrs. Frank Bushbacker that I was afraid that I was in a family way because my monthlies had stopped at that time.

Q. Did you not sometime in the early spring of 1916 have sexual intercourse with ——— on the bed in the dining room where the bed was while your mother and sister were upstairs?

A. Frank Bushbacker, and not ———."

Not having objected to the evidence in chief, and having in this manner taken the benefit of that portion of the testimony wherein the witnesses identified the defendant as the person against whom the prosecutrix made the complaint, the defendant cannot complain now of the evidence on account of its hearsay character. For a similar reason the admission of the testimony of the sheriff and the state's attorney, which went in without objection and which relates to the complaint made to them by the prosecuting witness, in which the name of the defendant was used, cannot be relied upon as error. This disposes of the 9th and 10th assignments of error.

In view of the attempt of the defendant to raise a doubt of his guilt by implicating a third person, the testimony of the third person, denying his guilt, was clearly admissible. This disposes of the 5th and 6th assignments of error.

The 11th and 12th assignments of error relate to statements of the defendant himself: First, to the statement which the prosecuting witness claims defendant made to her concerning his familiarity with others; and, second, the statement by the defendant to one Marcus Helman, to the effect that Gartner, father of the prosecutrix, had said "that the father of Mary's child was ———" (a person not the defendant). These statements were both clearly admissible; the first, for the reason that it was a circumstance tending to show the relations between the de-

fendant and the prosecutrix; and the second, because it is a statement of the defendant himself from which the jury would be warranted in drawing an inference that he was interested in shielding himself at the expense of another. The testimony amounts to an admission.

The 13th assignment relates to the testimony of one Eva Kohler. This witness testified to the conduct of the defendant towards her and the prosecuting witness on an occasion in June, 1916, when she was visiting the latter. According to her testimony, both the defendant and the prosecuting witness were present. The testimony relates wholly to acts of familiarity which would tend, circumstantially, to corroborate the evidence of the prosecuting witness, and was clearly admissible.

The remaining assignments of error requiring consideration relate to the instructions given to the jury. The court, in the course of his charge, said: "It is either rape in the first degree or no crime at all." It is contended that, under the allegations in the information, the jury could have found a verdict convicting the defendant of an attempt to commit rape or of a simple assault and battery or even of a simple assault. It is true that under § 10,890 of the Compiled Laws of 1913, the jury would be authorized, in a case of this character, to find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the information, or of an attempt to commit such an offense; but it does not follow from this that the court is precluded from defining to the jury the elements of the crime with which the defendant is charged in the information. Nor does it follow that the court is precluded from characterizing the offense according to its legal designation. In the case at bar, there can be no doubt whatever that the offense was committed as charged; the age of neither the prosecuting witness nor the defendant was questioned, and a child was born. There is no dispute in the testimony bearing upon any of the elements of the offense. It is wholly a question of the identity of the person who committed the offense.

It is further contended that the court erred in instructing the jury that they might take into consideration the condition of the clothing of the prosecutrix, the complaint to the father and mother, the state's attorney, and the sheriff. There was ample evidence in the record touching these matters, which went in without any objection, to warrant the giving of the instructions complained of. The court did not comment upon

the evidence; but merely told the jury the matters which they might take into consideration in arriving at their verdict.

It is urged upon this appeal that, insofar as evidence was admitted without objection being made, the trial court was remiss in its duty to safeguard the rights of the defendant; but a reading of the record convinces us that the trial judge was in no way remiss in his duty of seeing that the trial was properly conducted. On the contrary, the record shows that the trial judge interceded as far as proprieties would allow in an effort to clear up the question of the identity of the guilty person.

The defendant has had a fair trial, there is no error in the record, and the conviction is affirmed.

ALBERT PETERSON, as Administrator of the Estate of Anna Stina Lindquist, Appellant, v. OSCAR LINDQUIST, Respondent.

(169 N. W. 76.)

Promissory notes — transfer of — by deceased person during last illness — suit by the administrator — to set aside transfer.

The plaintiff brings suit as administrator of Stina Lindquist to set aside an alleged transfer to defendant of promissory notes and a mortgage for $2,000 and interest. The transfer, if made at all, was made by the deceased during her last sickness and about a month prior to her death.

Transfer without consideration — except oral contract for care — during life — and to pay funeral expenses.

a. It was made without any consideration, only an alleged oral contract to care for his mother during her life and to pay her funeral expenses.

Obtained by fraud — undue influence — deceased feeble in mind — incompetent.

b. It was obtained by fraud and undue influence, and when the mother was feeble-minded and incompetent and helpless, and in the power of the defendant.

Promissory notes — transfer of — none in fact — no delivery of notes or mortgage.

c. There was in fact no transfer of the notes and mortgage. The alleged transfer was not signed by the deceased, except possibly by her mark, and she never delivered to the defendant either the notes or the mortgage.

Opinion filed May 24, 1918. Rehearing denied September 24, 1918.

Appeal from the District Court of Mountrail County, Honorable *Frank Fisk*, Judge.

Plaintiff appeals.

Reversed.

Fisk, Murphy, & Linde, for appellant.

Where a son obtains the transfer of property to him, by his mother, who, at the time is sick and in an enfeebled condition mentally and physically, it is well settled that transactions of such a character will be most carefully scrutinized by a court of equity, and unless it is clear that such transaction is fair and free from undue influence, it will be set aside. Massey v. Rae, 18 N. D. 409; Gibson v. Hannag (Neb.) 88 N. W. 500; Davis v. Dean (Wis.) 26 N. W. 737.

Testimony to the effect that the mother assigned the notes and mortgage in question to the son, in consideration of his promise to care for her during lifetime and to pay funeral expenses, is clearly incompetent. Comp. Laws § 7871 and cases cited in note; Samson v. Samson (Iowa) 25 N. W. 233.

There is no competent proof of defendant's title by purchase. The only consideration was defendant's oral promise to care for his mother during her lifetime and to pay her funeral expenses, and that no other person was present except the defendant's wife. Defendant's wife was not called as a witness and defendant's testimony was wholly incompetent. Rogans v. Jones, 14 N. D. 591; Cardiff v. Marquise, 17 N. D. 110; Larson v. Larson, 19 N. D. 160, 23 L.R.A.(N.S.) 849; Wagenen v. Bonnot (N. J. Eq.) 18 L.R.A.(N.S.) 400, and note; Wall v. Wall, 45 L.R.A.(N.S.) 583.

Decedent retained the ownership, possession, and control of the papers until her death. There was no delivery and hence no executed contract of sale. 7 Cyc. 814, 815, and cases cited; 3 R. C. L. 967.

The transaction was not a gift. In order to constitute a gift either *inter vivos* or *causa mortis*, there must be an unconditional delivery of the subject of the gift. Luther v. Hunter, 7 N. D. 544; 12 R. C. L. 957 and cases cited; Comp. Laws, § 5541; Bishop v. Hassell, 107 U. S. 602, 27 L. ed. 500.

James Johnson, for respondent.

The deceased was the owner of the papers sold to her son, and she had a legal right to assign them to her son, or to any other person.

There was no fraud, or undue influence, exercised over her before she assigned the papers. The transaction was proposed by her, and carried out under her directions. Olson v. Olson, 150 N. W. 1070; McKillip v. Farmers St. Bank, 129 N. D. 541.

"Evidence must be clear and convincing of fraud or duress to justify setting aside the mortgage." Engbert v. Dale, 25 N. D. 587.

"It might be unfair and inequitable, but the law allows every person to dispose of his property according to his own notions of his obligations to those having claims on his bounty, and this court will insist, that, having done so, his property shall be distributed according to his directions." Stufflebean v. Selinsky, 112 N. W. 815; Allig v. Allig, 114 N. W. 1056; Nowlen v. Nowlen, 98 N. W. 383; Seofield Impl. Co. v. Minot Farmers Elev. Co. 31 N. D. 605, and cases cited; McLennan v. Plumber, 34 N. D. 269.

ROBINSON, J. The plaintiff brings suit as administrator of Stina Lindquist to set aside an alleged transfer to defendant of promissory notes and a mortgage for $2,000 and interest. The transfer, if made at all, was made by the deceased during her last sickness and about a month prior to her death:

a. It was made without any consideration only an alleged oral contract to care for his mother during her life and to pay her funeral expenses.

b. It was obtained by fraud and undue influence, and when the mother was feeble-minded and incompetent and helpless, and in the power of the defendant.

c. There was in fact no transfer of the notes and mortgage. The alleged transfer was not signed by the deceased, and she never delivered to the defendant either the notes or the mortgage.

No one can read and consider the evidence without coming to the conclusion that defendant was a bad and undutiful son, and that his testimony is worthy of no credit. He had two deceased brothers, John and Charlie. He managed to get all the estate of Charlie, and he did his best to get and to hold the estate of John.

To secure her rights the mother was forced to retain a lawyer and to incur expense and delay. She retained C. B. Miller, an attorney and member of Congress, of Duluth, Minnesota, and it took him three years

to force Oscar to put up for the estate which belonged to his mother. He testifies concerning Oscar: "He always spoke of his mother in a slighting manner and in a contemptuous way. When I mentioned the manner of his treatment of his mother, to reason him out of what seemed to be a plain and bold theft, he would grunt and sneer. When I undertook to help her, she was absolutely destitute because he had driven her out of the home that belonged to her, and was endeavoring to secure the property in North Dakota as well as in this state. There was no cordiality between them. Their relations were always at swords points. Of all the men that I have ever known, I have always considered his attitude towards his mother was the worst that had ever come to my attention, and I told him so in emphatic language. I know that Mr. and Mrs. Richards supplied Mrs. Lindquist for a long time and paid my expenses in connection with the case, including two trips to Grantsburg and two to North Dakota, and I know she made her home with them for a long time. I found that at no time did she sign her name by a mark. I had an awful fight with him over his account as administrator, and told him that I would have him indicted for it."

The testimony is in keeping with that of the sister, Lottie Richards, of Duluth. She testifies: "One day Oscar came to my house, and mother was there, and he asked her to settle up with him for her interest in the estate of John. Mother said, 'You will have to go and see my attorney,' and he threatened her and swore at her and called her names. He threatened her so much, my mother would not let my husband leave the house. He laid off from work until we got my younger brother Julius to stay with her in the daytime until Oscar left town. She was afraid of him."

A short time before the decease of the mother, Lottie, with her husband, went to visit the mother, and insisted that she should have a doctor. Oscar refused, and ordered them out of the house, and while they were in the house he gave them no chance to speak with the mother, and of course he said not a word to them about the transfer of the notes and mortgage.

The testimony fairly shows that Oscar has not the virtue of truth and honesty, so that what he says concerning a contract with his deceased mother has no probative force.

According to his story, his mother wanted to make a will in his favor. Then he told her it would do no good.

Q. What did you say?

A. I said, "Sign them over if it was to be any good." He said: I directed her that the assignment would be better than a will.

And so, when she was too weak to sign her name, too weak in body and in mind, he got her to touch her hand to the penholder while making a mark. But while she lived she retained possession of her notes and mortgage, and she never thought of turning them over to her cruel and dishonest son, who doubtless brought her to his house for the purpose of robbing her, and not to show her any kindness, not to secure for her medical treatment. It will bode ill for the cause of justice when such a transaction meets the sanction of any court.

It is true that the testimony of Erik Johnson, who filled out the assignment blank, is that she appeared quite rational and was able to sit up and to direct him to fill out the blank, but he was near to Oscar's house. He was a trader, and in giving his testimony he felt disposed to argue the case, and he volunteered to come from Wisconsin to this state to give his testimony. The chances are he did not do it for nothing. The testimony of the several witnesses residing at or near Palermo show that when the sick woman left for Wisconsin she was not competent to do business, and of course her mental and physical condition was not improved by the duration of her sickness and her approach to death. When she made her mark on the paper she was absolutely at the mercy of her cruel and dishonest son, who refused to permit her other children to converse with her. For him to insist on her making the transfer was to put her between the Devil and the deep sea. She was in no position to say no. It may be true that the helpless mother did freely and knowingly consent to do an unkind and unmotherly act by making the assignment and the marking, but the chances are it is not true.

It is impossible to determine the facts with any real certainty. We see not the wireless waves and the operation of electricity or of the mind, and yet we know there are times and conditions when a strong mind dominates and enforces a weak mind. We know that when the body is captive the mind is not free. In any view of the case to decide for the defendant would be to give sanction to a mean unconscionable act, while

to decide for the plaintiff is merely to permit the property of the deceased to go to her heirs as provided by the statute. The trial judge did not hear the witnesses. The testimony was all taken by deposition or before a referee.

It may be worthy of note, the deceased never delivered the notes or the mortgage to defendant. She kept them in her trunk until she died.

Oscar testifies: She got to his place November 15, 1912, made the assignment December 12, died February 2.

Q. The mortgage and notes were left in her trunk until she died?
A. Yes, I had seen them at Palermo.
Q. She never gave them to you?
A. No, she didn't.
Q. She kept them all the time?
A. Yes, she kept them.
Q. Until she died?
A. Yes.

It also appears that when he learned that she had proved up on a homestead of her son John near Palermo, he thought she might be worth looking up and went there to see her. He went to her shack near Palermo, remained with her an hour about noon, went back to Palermo and loafed around without going to bed until the next day about noon, when he took the train for home. And that was the first time he had seen his mother in seventeen years, except for an hour at Duluth when he cursed her and swore at her and threatened her.

Ordered that judgment be entered in favor of the plaintiff as demanded in the complaint.

Reversed and remanded.

BRUCE, Ch. J. (dissenting). This is an action which is prosecuted by an administrator to set aside the assignment of a certain mortgage, and to secure possession of the notes secured thereby. The plaintiff alleges the execution and delivery to the deceased of the notes and mortgage by one Larson, and that the same were the property of the deceased at the time of her death. The defendant, on the other hand, claims that the notes and mortgage were duly assigned to him in payment of services rendered and money expended, and in consideration of his promise

to care for the deceased during her life. The trial court found for the defendant, and the plaintiff appeals.

I can see no legal reason for reversing the judgment of the trial court. The only questions involved are whether there was a delivery, and whether fraud and undue influence were proved.

As far as fraud and undue influence are concerned, the plaintiff introduces no positive testimony, but inferences merely, and opposed to these inferences are not merely the positive denial of the defendant himself, but the positive testimony of the doctor, who last attended the deceased, of the two persons who witnessed the assignment of the mortgage, and the indorsement of the notes, and of the justice of the peace who acknowledged the assignment. These witnesses are, with the exception of the doctors, the only disinterested witnesses in the case. They testify that the assignment was willingly signed and without any fraud, compulsion, or duress, and that the deceased was in a proper mental condition to execute the same. Their testimony is also positive that the assignment was made for the purpose of paying the said Oscar for his services rendered and for his care of the deceased.

Though the doctor at Palermo testifies that before the deceased left Palermo she acted in an eccentric manner, he in no place testifies that she really lacked in legal capacity. The doctor in Wisconsin testifies that shortly before the execution of the instrument, although her vitality was not very good, he could see nothing unusual as far as her mental capacity was concerned.

There is, in short, in this case nothing on which to base any claim of duress or fraud, except the fact that until shortly before the assignment of the mortgage the plaintiff had taken but little interest in his mother. The testimony, however, shows that this was true of all of the children, and that this was no doubt due to the attitude of mind of the deceased herself. As far as I can learn, indeed, there are no equities in the case. Since the deceased left some other property, namely, her claim in North Dakota, and a house, there seems also to have been some provision for her remaining son and daughter.

The case, indeed, is a peculiar one. Throughout it seems to illustrate not the pleasant and usual simple and unselfish annals of the poor, but those which are sordid and selfish. The Lindquists were natives of Sweden. They emigrated to this country when Oscar was but a child, and

Oscar seems to have worked out from early boyhood. They settled at Trade Lake, Wisconsin, and lived there for a number of years. On or about October, 1907, John Lindquist, a son of Anna Stina Lindquist, took up a homestead in Mountrail county, North Dakota, and died before he perfected the proof. Thereafter his mother, the deceased Anna Stina Lindquist, came out to Mountrail county, and proved up on the claim, and the mortgage in question seems to have been obtained by her on the sale of this property. Later she herself took up a homestead north of Palermo and was living on it shortly before she was removed by the son Oscar to his home in Wisconsin, Oscar having been notified that she was sick and needed help. She had lived in North Dakota from 1907 to the fall of 1912, during which time Oscar seems to have visited her once, and the other children not at all, though the daughter appears to have sent her a little money. This daughter was married. One son was a lumberman in Wisconsin or Minnesota, and the others seem to have lived in Wisconsin. This neglect, however, seems to have been due largely to the deceased herself, as she seems to have evidenced but little affection for her children; and the fact that she proved up one quarter section for her son John, and took one for herself, shows her to have been possessed of an independent mind. At the time she was taken sick, one J. B. Hage notified her son Oscar Lindquist of the fact, and he immediately made preparations and came to Palermo, where he found her suffering with cancer, and took her home. It appears that it was necessary for him to borrow $100 for the purpose of making this trip. As soon as he had the business settled up he took her to his home in Trade Lake, Wisconsin, and after she had been there two or three days he called Dr. Albert Swanson, who told him he diagnosed the case as cancer of the stomach. According to Oscar's testimony, and this seems to have been corroborated by the testimony of the witnesses Eric H. Johnson and John E. Anderson, she told Oscar that she was pleased with the care she was getting and that she wanted to make a will in his favor. Oscar told her that he thought it wasn't right to take all, but if she wanted to it would be better if she assigned to him the certain notes and mortgage in controversy. A few days after this Oscar went over to Johnson's, and the latter and one Anderson went out to have the instrument executed. At about the same time a justice of the peace, Christensen, took the acknowledgment. This assignment was evidently given to Oscar either at

the time or soon after, and it was recorded within a few days. The notes were returned to the trunk from which they had been taken, but to which Oscar had access. It was, according to his testimony, agreed between him and his mother that he was to take care of her during her natural life, and this he did, and she stayed at his home until the 2d day of February, 1913. Much is made by counsel for appellant of the fact that Oscar did not send his mother for treatment to Rochester, Minnesota. If, however, we consider her advanced age, and the fact that a successful operation at such an age would be an impossibility, we see nothing peculiar about this. Much also is made of the fact that the defendant, Oscar, had been somewhat selfish in his dealing in the past, and had had some controversy with his mother and sisters over the estate of her son John, who had died some time since. The proceeds of this estate, however, had been given to his mother, and as there seems to have been no love lost between the members of the family generally, the fact is not controlling. It showed a selfish man, but it was not sufficient to overcome the positive testimony of the witnesses Eric H. Johnson and John E. Anderson, that the assignment was executed willingly and without fraud; nor is there anything in the testimony, save in reflections upon the character for generosity of the defendant, which negatives his testimony as to what occurred. It is also to be remembered that the assignment was acknowledged on the 21st of December, 1912, before O. T. Christensen, a justice of the peace, and this acknowledgment must be given some weight.

Though, indeed, it is unquestionably the law that transfers of this kind should be carefully scrutinized by the courts of equity, I find no proof of undue influence in the case which is before us. I see no reason, indeed, why the deceased should have been solicitous for the welfare of her other children, and, as I have said before, some property was left for them.

It is also maintained that a gift obtained by a child from a parent, to whom he stands in a confidential relation, is prima facie void, and the burden of proof is on the donee to show that it was a free unbiased act of the donor. This, undoubtedly, is the law; but not only has the burden of proof been met, but the proof tends to show that the transfer was for a valid consideration, namely, money expended, care bestowed, and the promise to take care of the deceased during the remainder of her life.

See McKillip v. Farmers State Bank, 29 N. D. 541, 151 N. W. 287, Ann. Cas. 1917C, 993; Stufflebeam v. Sellensky, 135 Iowa, 338, 112 N. W. 815; Altig v. Altig, 137 Iowa, 420, 114 N. W. 1056.

Nor is there any merit in the contention that no delivery is proved. The evidence shows that the assignment was recorded by the defendant a short time after it was made. He testifies that it was given to him. He also testifies that he was told that he could take the notes from the trunk whenever he desired. They were in his possession at the time of the trial, and prior thereto. There is certainly a presumption of due delivery, and this presumption has not been overcome. Hall v. Cardell, 111 Iowa, 206, 82 N. W. 503; Cecil v. Beaver, 28 Iowa, 241, 4 Am. Rep. 174; Nowlen v. Nowlen, 122 Iowa, 541, 98 N. W. 383.

It is to be noted that at the time the assignment of the mortgage was made the notes were also indorsed by the deceased, and the indorsement was witnessed by the same parties that witnessed the assignment of the mortgage.

No point can be made on the ground that part of the testimony of the defendant, Oscar Lindquist, involved a transaction with a deceased person, as this testimony was either elicited from the witness by the plaintiff himself, or, if given on cross-examination, was not objected to.

I am of the opinion that the judgment of the District Court should be affirmed.

OTTO THRESS, Respondent, v. F. W. ZEMPEL, Appellant.

(169 N. W. 79.)

Mortgagee in possession — real property — insurance on — obtained by mortgagee — premium paid by — charged to rents and profits of property — loss by fire — insurance paid by draft to both parties — suit by plaintiff to recover — trial — verdict — should have been directed for plaintiff.

As a mortgagee in possession of a livery barn, defendant insured it for $1,000, charging the premiums paid to the rents and profits of the barn. For the loss of the barn by fire, defendant received a draft for $1,000 payable to himself and the plaintiff, the owner of the property. Under the facts presented,

it is *held* that the trial court should have directed a verdict for the plaintiff for the insurance.

Opinion filed July 19, 1918. Rehearing denied September 24, 1918.

Appeal from an order of the District Court of Stark County.

Defendant appeals.

Affirmed.

Jacobsen & Murray, for appellant.

In an action for money had and received it is essential that plaintiff prove that the defendant actually received the money. 27 Cyc. 860; Borroughs v. Peterson (Utah) 114 Pac. 758; Abbott, Trial Ev. 2d ed. p. 337.

"The action for money had and received will not lie against a party into whose hands the money is not shown to have come." Whittier v. Home Sav. Bank (Cal.) 119 Pac. 92; Hoyt v. Paw Paw Grape Juice Co. (Mich.) 123 N. W. 529; J. C. LeClair Co. v. Rogers-Rogers Co. (Wis.) 102 N. W. 346.

"Although trial courts are vested with a large discretion in granting or refusing new trials, such discretion is a legal discretion, and appellate courts will not hesitate to interfere for the protection of litigants in a clear case of abuse of such discretion." Olson v. Riddle, 22 N. D. 144, 132 N. W. 655.

An insurance policy is a personal contract between the insured and the insurer, and not a contract which in any sense runs with the property, and the insurance money is generally payable to the insured without regard to the nature and extent of his interest in the property, provided he had an insurable interest at the time of making the contract and at the time of loss. 19 Cyc. 883; McLaughlin v. Park City Bank (Utah) 63 Pac. 589; Anderson v. Quick (Cal.) 126 Pac. 871; 19 Cyc. 663–884; Ryan v. Adamson (Iowa) 10 N. W. 287; Nordyke & Marmon Co. v. Gery (Ind.) 13 N. E. 683; Johnson v. Northern Minn. Land & Inv. Co. (Iowa) 150 N. W. 596; Imperial Elev. Co. v. Bennett (Minn.) 149 N. W. 372.

The defendant makes no claim of offset against the rents and profits of the amount he paid as premium for the insurance. There is nothing of this nature in the answer. Comp. Laws 1913, § 7762.

The defendant in an action is not bound by matters extraneous to the issues, and a finding by the court on such extraneous matter is merely surplusage, and not binding on anyone. Sobolisk v. Jacobson (N. D.) 69 N. W. 46; Bank of Visalia v. Smith (Cal.) 81 Pac. 542; Lillis v. Emigrant Ditch Co. (Cal.) 30 Pac. 1108; House v. Lockwood (N. Y.) 33 N. E. 595, 23 Cyc. 1317.

Redemption must be made within one year from date of sale. Comp. Laws 1913, § 7754.

The law governing accounting actions does not give the court the right to extend the time of redemption. It is the statute, and not the act of the court, that gives the extension of time. The court has no jurisdiction beyond the limits of the statute. Little v. Worner, 11 N. D. 382, 92 N. W. 456.

The time in which to move for a new trial was not extended by the court. Therefore, after the expiration of such time, the court had no authority to grant a new trial. Comp. Laws 1913, § 7664.

W. F. Burnett and *Thomas H. Pugh*, for respondent.

Appellant now claims that he did not receive the insurance money and therefore this suit cannot be maintained, because an action for money had and received will not lie unless the party sued actually received the money. That appellant, even though the money was placed in the bank and to his credit, did not receive the actual money. The proof shows the receipt of the money, and it was not questioned on the trial, but raised for the first time in this court. McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 243; VanGorden v. Goldamer, 16 N. D. 323, 114 N. W. 609; Poirier Mfg. Co. v. Kitts, 18 N. D. 556, 120 N. W. 558; Golden Valley Land Co. v. Johnstone, 21 N. D. 97, 128 N. W. 690; Allen v. Cruden, 34 N. D. 166, 157 N. W. 974.

The case must come to this court and here be presented on the same theory upon which it was tried in the lower court. DeLaney v. Western Stock Co. 19 N. D. 630, 125 N. W. 499; Jackson v. Sabie (N. D.) 161 N. W. 722; Victor Produce Co. v. C. & N. W. R. Co. (Minn.) 160 N. W. 201; 3 C. J. 689, § 580.

The former judgment has never been attacked or assailed. The court had jurisdiction over the parties and over the subject-matter. Even though it may be irregular as to form or erroneous as to the law, it is conclusive, so long as it remains unreversed and in force, and it can-

not be impeached collaterally. 23 Cyc. 1090; 15 R. C. L. p. 859, §§ 334–337, 339; 10 N. D. 440, 87 N. W. 977; St. A. & D. Elev. Co. v. Marineau, 30 N. D. 425, 153 N. W. 416; 23 Cyc. 1095, and cases cited in notes; Black, Judgm. 2d ed. § 261.

Having charged the premium to his pledgeor and having received payment therefor, the appellant was in the position of a trustee for his pledgeor, holding the money arising from the loss for the benefit of the pledgeor, for whose benefit he would be adjudged to have continued the insurance in force. 27 Cyc. 1263.

A motion for a new trial is addressed to the sound judicial discretion of the court, and its ruling in granting a new trial will not be disturbed on appeal, unless the court manifestly abused that discretion. Where a new trial has been granted the supreme court will be reluctant to reverse the lower court. Keystone Grain Co. v. Johnson, 165 N. W. 977; First National Bank v. Davidson, 36 N. D. 1, 161 N. W. 281; Reid v. Ehr, 36 N. D. 552, 162 N. W. 903; Blackerby v. Guinther, 34 N. D. 248, 158 N. W. 354; State v. Cray, 31 N. D. 67, 153 N. W. 425; McGregor v. Gt. Northern R. Co. 31 N. D. 471, 154 N. W. 261; Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419.

Robinson, J. This is an action to recover $700 for money had and received. The answer is a general denial. The jury found a verdict for defendant. The court made an order granting a new trial, and defendant appeals.

In July, 1912, Otto Thress being the owner of lots 4 and 5 in block 1 of New England, contracted to sell and convey the same to C. N. Murphy for $900. In August, 1912, to secure $156.50, Murphy transferred the contract to defendant. He obtained a judgment of foreclosure under which sale was made, and he bid in the title and interest of Murphy for $261.93, subject to redemption within one year. Zempel at once took possession of the lots and the large livery barn, which he insured for $1,000. And in an action for an accounting between Murphy and Zempel, the insurance premiums were charged and allowed against the rents and profits of the lots and barn. The court found that the reasonable rent and value of the premises was $300; that for repairs defendant had expended $15, and for insurance $98.90, making in all $115.10, which left to the credit of Murphy a balance of

$186.10 to apply on the sum necessary to redeem. Then Murphy assigned to the plaintiff his contract of purchase and all his title and interest in the premises.

On December 10, 1917, pursuant to judgment of the district court, Otto Thress paid the sheriff who made the sale $143.09, with interest at 12 per cent from the date of the sale, and obtained from the sheriff a certificate of redemption. In the accounting suit of Murphy v. Zempel, no appeal was taken from the judgment which was duly given two years prior to the trial of this action, and hence it is final and conclusive.

The barn was burned and defendant received insurance to the amount of $1,000 from which he paid Otto Thress $300, and put the balance of $700 to his own credit in his bank. Defendant now claims that he never actually received the $700 and never had it in his possession, and that he is the owner and entitled to the $700; but, as the trial court justly found, the plaintiff, Otto Thress, is the owner of the premises, owning both the fee to the real estate and having taken up the outstanding contract against the premises, made redemption, paid the money to the sheriff. He paid the insurance premiums, and defendant, Zempel having no interest in the property at the time of the fire, Thress, having borne the burden of the insurance premium, is entitled to the insurance money. He is entitled to receive from defendant $700, with interest at 6 per cent from the time he received the draft for the same. In the brief of counsel for defendant it is said: The court greatly abused its discretion in granting a new trial because the undisputed evidence shows that defendant never actually received the money, and that defendant was the owner and entitled to the money. But that is just the reverse of truth. For the insurance loss the defendant received a draft for $1,000 payable to the order of himself and the plaintiff. He gave the plaintiff $300 and put $700 to his own credit in his bank when he had no shadow of an honest claim to the money. He had sustained no loss. He was not the owner of the barn that was burned.

On the record and the undisputed evidence the case presented no question of fact to submit to the jury. The court should have directed a verdict in favor of the plaintiff or allowed the motion for judgment notwithstanding the verdict.

Order affirmed and case remanded for proceedings in accordance with this decision.

VILLAGE OF ASHLEY, Appellant, v. ASHLEY LUMBER COMPANY, Respondent.

(169 N. W. 87.)

Villages — boards of trustees — powers of — fires — prevention or extinguishment — measures for — fire limits.

1. Under the provisions of ¶ 3 of § 3861 of the Compiled Laws of 1913, which among other things gives to the board of trustees of villages the power generally "to establish other measures of prudence for the prevention or extinguishment of fires as it shall deem proper," such village trustees have the power to establish fire limits.

Honesty of actions of — courts must presume.

2. The courts must presume honesty, and not dishonesty, as far as the actions of village trustees are concerned.

Fire district — limits of — discretion of board.

3. The limits of a fire district must necessarily be largely left to the sound discretion of the administrative or legislative body which is authorized to create it.

Village — ordinance — fixing fire limits — violation of — penalty prescribed — in addition to fine — removal or destruction of wooden buildings — erected in violation of ordinance — validity of ordinance — determination of court — orders of court — nuisances.

4. Where, in violation of the provisions of a village ordinance, a person erects a wooden structure within a fire district, and the only penalty prescribed by the ordinance is a fine of $10 for such construction, but the ordinance also provides that the village trustees may condemn such building, if erected, and order its destruction or removal, and when there is doubt as to the validity of the ordinance and the power of the village trustees to create the same,

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NOTE.—That a city has the right to establish fire districts, and prohibit the erection of wooden buildings, as a safeguard against the occurrence and spread of conflagation, is not denied and is well settled by the authorities collated in a note in 13 L.R.A. 481, on municipal control over the erection of wooden buildings within fire limits. On power of municipality to prescribe fire limits and prohibit the erection of wooden buildings therein, see note in 12 L.R.A. 150; as to what is a sufficient compliance with ordinance requiring buildings to be constructed of noncombustible material, see note in 2 L.R.A.(N.S.) 483; on the question of municipal control over wooden and frame buildings as a nuisance, see note in 38 L.R.A. 170; on power to require removal, or to prohibit repairs, of wooden building within fire limits when damaged or partially destroyed by fire, see note in 21 L.R.A.(N.S.) 454.

the court in a proceeding in equity to determine such question and after resolving the doubt in favor of the village, may order the defendant to remove such building, even though generally speaking it is not of such a nature as to be a nuisance at the common law.

Opinion filed August 5, 1918. Rehearing denied September 25, 1918.

Action to compel the removal of a frame building constructed in violation of a village ordinance.

Appeal from the District Court of McIntosh County, Honorable *Frank P. Allen,* Judge.

Judgment for defendant. Plaintiff appeals.

Reversed.

M. J. George and *W. S. Lauder,* for appellant.

A municipal corporation, either city or village, possesses, without special authorization, the inherent power to establish by proper ordinances, fire limits within its borders, and to prosecute actions for the removal of buildings constructed in violation of such ordinances. 2 Dill. Mun. Corp. 5th ed. § 727; 28 Cyc. 741 et seq.; 13 Am. & Eng. Enc. Law, 2d ed. 396.

But here such power has been conferred by statute. Comp. Laws 1913, § 3599, subds. 46 and 47; § 3861, subd. 2.

"No one at this time doubts the power of the legislature to prohibit the erection of wooden buildings within the limits of a city or borough, nor that the legislature may confer the same power upon municipal corporations such as cities and boroughs." Klinger v. Bickel, 117 Pa. 326; Com. v. Tewksbury, 11 Met. 58; Olympia v. Mann, 12 L.R.A. 150 and note, 1 Wash. 389; Mt. Vernon First Nat. Bank v. Sarlls (Ind.) 13 L.R.A. 481, and note.

A village, like every other municipality, is an agency established by law for the convenient government of the people residing therein.

"The municipality is regarded as the representative of the public for the purpose of maintaining suits in equity or at law for the vindication of the public rights, hence the city was a proper party in this action." LaMoure v. Lasell, 26 N. D. 638, 647; Lee v. Harris, 206 Ill. 428; Methodist Episcopal Church v. Hoboken, 33 N. J. L. 13; California v. Howard, 78 Mo. 88.

A building erected within a fire limit in violation of a valid ordinance

may be summarily removed by authority of the city. Wadleigh v. Gilman, 23 Me. 403; Baumgartner v. Hasty, 100 Ind. 575; King v. Davenport, 98 Ill. 305.

This may be done without judicial proceedings. Lemmon v. Guthrie, 113 Iowa, 36; Eichenlaub v. St. Joseph, 113 Mo. 395; Hine v. New Haven, 40 Conn. 478; King v. Davenport, 98 Iowa, 305; Baumgartner v. Hasty, 100 Ind. 575; Klingler v. Bickel, 117 Pa. 328; McKibben v. Ft. Smith, 35 Ark. 352.

The ordinance here involved is a necessary, fair, and reasonable regulation. Olympia v. Mann, supra.

Gannon & Ludwigs, for respondent.

Municipal corporations take the authority and powers which they possess from the legislature. They are inferior political subdivisions of the state, and have no other powers than those granted by the state. 1 Dill. Mun. Corp. 5th ed. § 236; Barnett v. Denison, 145 U. S. 135; Detroit v. R. Co. 171 U. S. 48; Treadway v. Schnauberl, 1 Dak. 227; Cooley, Const. Lim. §§ 192, 195; Kneedler v. Norristown, 100 Pa. 368, 45 Am. Rep. 383; Thompson v. Lee County, 3 Wall. 327; Minturn v. Larne, 23 How. 435; Willard v. Killingsworth, 8 Conn. 247; Bridgeport v. Housatonic R. Co. 15 Conn. 475.

Any doubt must be resolved against the corporation. Minturn v. Larne, 23 How. 435; Sutherland, Stat. Constr. § 380, and cases cited.

Restrictions on building or repairing wooden structures, called fire limits, are invasions of private rights and are to be strictly confined to their literal import. Sutherland, Stat. Constr. § 367; Booth v. State, 4 Conn. 65.

Such limitations and restrictions must not only be convenient, but they must reasonably appear to be indispensable. Dill. Mun. Corp. § 236, supra; Cooley, Const. Lim. 192, 195.

Do the statutes of this state confer the power on village boards to ordain the destruction or removal of wooden buildings erected within so-called fixed fire limits of the village?

In construing a statute it is an elementary principle that such general language as is used in this statute must be taken in connection with and limited by the special powers conferred. Keokuk v. Sorogs, 39 Iowa, 447; Mt. Pleasant v. Breeze, 11 Iowa, 339; St. Louis v. Laugh-

lin, 49 Mo. 599; Comp. Laws 1913, § 3861, subd. 3; Des Moines v. Gilchrist, 67 Iowa, 210; Pratt v. Litchfield, 62 Conn. 112.

The power must be expressly given, either by statute or by the charter. Olympia v. Mann (Wash.) 12 L.R.A. 150; 28 Cyc. 260 to 266.

"Implied power springs from necessity. That which is necessary for a large city may not be for a small city or borough. That which is necessary cannot be implied." 2 McQuillin, Mun. Corp. § 732.

A municipality has no inherent power to establish fire limits. State v. Schuchardt, 42 La. Ann. 49; Hudson v. Thorn, 7 Paige, 261; Rye v. Peterson, 45 Tex. 315, 23 Am. Rep. 608; Kneedler v. Norristown, 100 Pa. 368, 45 Am. Rep. 383.

If this village had the power to pass such an ordinance, was its passage such a fair and reasonable exercise of the power as the law requires? Ordinances which are partial or unfair, or which discriminate in favor of one class against another, are invalid, and if they seem to the court oppressive, unfair, partial, or discriminating, they are declared unreasonable and void whether this appear from their face, or from proof aliunde. 28 Cyc. 369–370 and cases cited; 3 McQuillin, Mun. Corp. pp. 2066, 2071, and notes on 2072; Richmond v. Dudley (Ind.) 13 L.R.A. 586 and note; Janesville v. Carpenter, 77 Wis. 288, 20 Am. St. Rep. 123; N. D. Const. § 20; Lake View v. Tate (Ill.) 6 L.R.A. 268 and note.

The question of the reasonableness or fairness of an ordinance is for the court. Hawse v. Chicago (Ill.) 30 L.R.A. 225; Chicago v. Rumpff (Ill.) 92 Am. Dec. 196; Cicero Lumber Co. v. Cicero, 42 L.R.A. 696; Sioux Falls v. Kirby, 6 S. D. 66, 25 L.R.A. 621.

In determining this question, the size, conditions of, and circumstances of, a village are to be considered. Olympia v. Mann, 12 L.R.A. 155; State v. Tenant, 15 L.R.A. 423.

This action is brought for a final injunction, and the time when such an injunction may be granted is fixed by statute, and this statute is the only authority for such action, and plaintiff cannot proceed under any so-called common-law right. Civ. Code, §§ 7213, 7228, 7229, 7312 and 7331.

Equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation, restraining an act, unless the act is shown to be a nuisance *per se*. Coast v. Spring Lake, 51 L.R.A.

657 and note; 2 Dill. Mun. Corp. 5th ed. § 650; St. Johns v. McFarlan, 33 Mich. 72, 23 Am. Rep. 671; Waupun v. Moore, 34 Wis. 450, 17 Am. Rep. 446; Finnegan v. Allen, 46 Ill. App. 553; 2 McQuillin, Mun. Corp. § 806; High, Inj. § 788, 4th ed. 748; Hudson v. Thorn, 7 Paige, 261; Phillips v. Allen, 41 Pa. 481; Eden, Inj. 160; Schuster v. Board of Health, 49 Barb. 450; Grant, Corp. 84; Lake View v. Letz, 44 Ill. 81; Ottumwa v. Chinn (Iowa) 39 N. W. 670; Manchester v. Smythe, 64 N. H. 380, 10 Atl. 700; Ogden v. Weldon, 40 N. Y. S. R. 235; Honesdale v. Weaver, 2 Pa. Dist. R. 344; Williamsport v. McFadden, 15 N. C. 269; Ellwood City v. Mani, 16 Pa. Co. Ct. 474; Redwing v. Guptil (Minn.) 41 L.R.A. 321 and note 328; Bangs v. Dworak (Neb.) 106 N. W. 780; 2 Dill. Mun. Corp. 5th ed. 1107 note; Janesville v. Carpenter, 77 Wis. 288, 20 Am. St. Rep. 123; New Rochelle v. Lang, 75 Hun, 608, 27 N. Y. Supp. 600; Griener Kellog Drug Co. v. Truett, 97 Tex. 377, 79 S. W. 4; Kissinger v. Hay, 52 Tex. Civ. App. 295, 113 S. W. 1005.

The power to declare what shall be a nuisance does not authorize a village to declare that a nuisance which is not such in fact. Yate v. Milwaukee, 10 Wall. 497; 2 Dill. Mun. Corp. 5th ed. § 684, and cases cited; Lake v. Aberdeen, 57 Miss. 260; Rye v. Peterson, 23 Am. Rep. 608; Ward v. Little Rock, 48 Am. Rep. 46; Dill. Mun. Corp. 3d ed. § 374; High, Inj.; Orlando v. Pragg (Fla.) 19 L.R.A. 196; Evansville v. Miller (Ind.) 38 L.R.A. 161; Mt. Vernon Bank v. Sarlls, 13 L.R.A. 481; Grossman v. Oakland (Or.) 36 L.R.A. 593 and note; Hattenbach v. New York C. & H. R. R. Co. 18 Hun, 123.

Bruce, Ch. J. This is an action in equity to have decreed to be a nuisance and abated as such, a certain frame building of the dimensions of 14 by 20 feet with 8-foot posts, which was constructed in the village of Ashley in violation of the terms of the village ordinance—which created a fire district.

Although it seems to be conceded that the building was not in itself such a structure as would have been deemed a nuisance at the common law, the plaintiff and appellant contends that since the building was within the limits of the fire district and was constructed in violation of the village ordinance it could be properly decreed to be removed, and that the creation of the fire district made proof of the fact of an actual

nuisance unnecessary. The contention of the defendant and respondent is that in the first place the village of Ashley had not the power to pass the ordinance in question, and in the second that, if it had such power, the power had not been exercised in a reasonable and fair manner and without discrimination, and that, therefore, the ordinance was invalid, or that, at any rate, a court of equity should not enforce the provisions of an ordinance so enacted. He also maintains that the case is not in any event one of which courts of equity will take cognizance, since the remedies afforded by the courts of law are adequate to the situation.

The only express grant of power, as far as villages are concerned, seems to be contained, if contained at all, in ¶ 3 of § 3861, Compiled Laws 1913, which provides that:

"The boards of trustees shall have the following powers: . . . To organize fire companies, hook and ladder companies, to regulate their government and the times and manner of their exercise; to provide all necessary apparatus for the extinguishment of fires; to make owners of buildings provide ladders and fire buckets, which are hereby declared to be appurtenances to the real estate and exempt from execution, seizure or sale; and if the owner shall refuse to procure suitable ladders or fire buckets after reasonable notice, the trustees may procure and deliver the same to him; and in default of payment thereof may recover of said owner the value of said ladder and fire buckets, by suit before the justice of the peace of the village, and the courts accruing thereby; to regulate the storage of gunpowder and other material; to direct the construction of a place for the safe deposit of ashes; and may under any order by it entered upon the proper book of the board, visit or appoint one or more fire wardens to visit, and examine at all reasonable hours, dwelling houses, lots, yards, inclosures, and buildings of every description, *discover if any of them are in a dangerous condition, and provide proper remedies for such dangers;* to regulate the manner of putting up stoves and stovepipes; to prevent out-fires and the use of fireworks and the discharge of firearms within the limits of said corporation, or such parts thereof as it may think proper; to compel the inhabitants of such village to aid in extinguishment of fire and prevent its communication to other buildings, under such penalties as are in this chapter provided; to construct and preserve reservoirs, wells, pumps and other waterworks, and to regulate the use thereof and, *generally, to establish other measures*

of prudence for the prevention or extinguishment of fires as it shall deem proper."

This section is to be compared with § 3599 of the Compiled Laws of 1913, § 47 of which provides that a *city* shall have the power:

"To prescribe the limits within which wooden buildings shall not be erected or placed, or repaired without permission, and to direct that all and any buildings within said limits, which shall be known as the fire limits, when the same shall have been damaged by fire, decay or otherwise, to the extent of 50 per cent of the value, shall be torn down or removed and to prescribe the manner of ascertaining such damage and to provide for the removal of any structure or building erected contrary to such prescription, and to declare each day's continuance of such structure or building a separate offense, and prescribe penalties therefor; and define fire proof material and by ordinance provide for issuing building permits, and appointment of building inspectors."

Counsel for respondent argues from this comparison that not only was no power to create fire districts granted to villages, but the power was purposely and intentionally omitted. He argues that in a city permanency of location is practically guaranteed, and that property owners will be justified in constructing expensive buildings, and that the opposite is true of villages, and not only this, but in villages the board of trustees may combine with the favored business men to exclude competition by confining its fire areas to those portions of the village owned by their would-be competitors.

Counsel for appellant, on the other hand, contends that:

1. A village has the inherent power to create such districts independently of any statutes. 2. That the power may be inferred from the provisions of subdivision 3 of § 3861 of the Compiled Laws of 1913, which grants to the board of trustees the power to "establish other measures of prudence for the prevention or extinguishment of fires as it shall deem proper."

We agree with counsel for respondent that since the cities and villages of North Dakota are creatures of the statute and of the statute alone, they have no inherent powers, but such only as the legislature has granted to them either in their charters or in the general acts under which they have been incorporated, together with such other powers as are necessarily implied from or incident to those expressly granted or

which are indispensable to the declared objects and purposes of their creation. See 19 R. C. L. 768; Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336.

We are, however, none the less satisfied that the words, "to establish other means of prudence for the prevention or extinguishment of fires as it shall deem proper," necessarily imply, or rather expressly grant, the power to create fire districts.

It is not necessary for us to hold that the creation of a fire district belongs to any particular one of the classes or subjects before enumerated in the section, though there is much in support of this proposition. The case, indeed, is not one of an express enumeration followed by general words in a restrictive or penal act, as where certain acts or things or games or pursuits are made unlawful and other similar acts or things or games or pursuits are prohibited. The clause contains a general grant of power, and not a negation. This general grant follows, it is true, a specific enumeration; but it is a general grant of power none the less, and not a restriction on any power theretofore granted. It is to be noticed that the clause reads, "And generally to establish, etc." Clearly the section should be construed as if it had read, "Generally to establish measures of prudence for the prevention and extinguishment of fires as it shall deem proper, and among them to organize fire companies, etc." It, at any rate, expressly states that the other measures of prudence for the prevention or the extinguishment of fires shall be such as the village trustees deem proper. It does not limit these trustees to the particular classes enumerated. The general subject or genus of the enumeration is fire protection, and the establishment of a fire district certainly comes within this general genus. See State ex rel. Shaw v. Frazier, 39 N. D. 430, 167 N. W. 510.

We realize that no such power was held to have been granted in the case of Hudson v. Thorne, 7 Paige, 261, where "the city charter which authorized the common council from time to time to pass such ordinances as they should think proper to remove or prevent the construction of any fireplace, hearth, chimney, stove, oven, boiler, kettle, or apparatus used in any house, building, manufactory, or business which might be dangerous in causing or promoting fires; to regulate or prevent the carrying on of manufactures dangerous in causing or promoting fires; to adopt and establish such regulations for the prevention or

suppression of fires as might be necessary; and, generally, to make all such rules, regulations, by-laws, and ordinances for the good government of the city, and the trade and commerce thereof, as they might deem expedient, not repugnant to the Constitution and the laws of the state."

We cannot, however, believe that this decision should be followed by us or is controlling. Much more reasonable, indeed, appears to be that of the supreme court of Washington in the case of Olympia v. Mann, 1 Wash. 389, 12 L.R.A. 150, 25 Pac. 337, wherein the city was held to have the authority to prescribe fire limits under a charter which conferred upon it the power "to make regulations for the prevention of accidents by fire; to organize and establish a fire department and make and ordain rules for the government of the same; to provide fire engines and other apparatus, and to levy and collect special taxes for that purpose . . . to prevent by all possible and proper means, danger or risk of injury or damages by fire arising from carelessness, negligence or otherwise . . . to adopt proper ordinances for the government of the city, and to carry into effect the powers given by this act . . . and the city of Olympia shall have such other powers and privileges not herein specifically enumerated as are incident to municipal corporations of like character and degree."

We may also refer to the following cases; Alexander v. Greenville, 54 Miss. 659, wherein the court held that the power to establish fire limits was conferred upon a town by a charter which gave to it the authority "to provide for the prevention and extinguishment of fires and to organize and establish fire companies; to regulate the fixing of chimneys and flues thereof, and the manner of using stoves and stovepipes in dwelling houses, stores, offices, warehouses and other buildings in said town; to regulate and order parapet walls and partition fences, and to regulate the storage of gunpowder and other combustible materials."

Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336, wherein the power was implied under a charter which authorized the city "to make regulations for guarding against damage by fire." Hine v. New Haven, 40 Conn. 478, wherein the power was inferred under the authority "to protect said city from fire; to organize, maintain and regulate a fire department and fire apparatus; to regulate the mode of building and the materials used for building or altering buildings within said city or any

part thereof; and the mode of using any buildings therein and of heating the same, when such regulations seem expedient for the purpose of protecting said city from the dangers of fire."

Ford v. Thralkill, 84 Ga. 169, 10 S. E. 600, wherein the power was inferred from the authority "to make regulations for guarding against danger of damage by fire."

Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188, wherein the power was implied from the general authority "to ordain and establish such acts, laws, and regulations, . . . as shall be needful to the good order of said body politic."

Hubbard v. Medford, 20 Or. 315, 25 Pac. 640, wherein the power was inferred from the authority "to regulate the storage of gunpowder, tar, pitch, resin, and all other combustible materials, and the use of candles, lamps, and other lights in stores, shops, stables, and other places; to prevent, remove, and secure any fireplace, stove, chimney, oven, or boiler, or other apparatus which may be dangerous in causing fire; and to provide for the prevention and extinguishment of fires."

See also McQuillin, Mun. Ord. § 470.

The case of Hudson v. Thorne, supra, indeed, though decided in 1838, seems to have been criticized rather than followed, and to stand by itself. By some its announcement seems to be considered as *dictum* merely. See opinion in Hubbard v. Medford, supra. However that may be, we fail to find any other case where the power is denied under a statute or charter, which gives the authority "to provide for the prevention and extinguishment of fires."

Nor is there any merit in the contention that the establishment of fire limits would be unreasonable in villages, though reasonable in cities; and that the courts must give the legislature credit for a knowledge of the fact. The reverse condition really seems to exist in the state of North Dakota. Too many villages, indeed, have been swept away by fires on our wind-swept prairies for us to be blind to the fact that, where as a matter of necessity adequate water facilities and fire fighting apparatus are difficult, if not impossible, to be obtained, as they are in most of our villages, the danger from fire is even greater than it is in the larger cities, and that the need of proper precautions is even more necessary.

Nor is there any merit in the argument that the village trustees might

connive with and favor the first comers and established business men in the creation of fire districts. The court must presume honesty, and not dishonesty. This presumption of good faith, indeed, which with all our shortcomings is everywhere in America much more than a presumption, is the foundation of our democracy, and without it there would be no social progress.

Nor does the fact that the building in question was not in itself a common-law nuisance prevent the trustees or the court from ordering its removal. The limits of a fire district must necessarily be largely left to the sound discretion of the administrative or legislative body which is authorized to create it.

Nor should a negation of power be based on the fact that the power is granted in clear and specific terms to cities in the so-called Cities and Village Act of 1895 and in chapter 73 of the Laws of 1887, and that this is not true in the case of villages and of the act which is before us. The clause, "and generally to establish other measures of prudence for the prevention or extinguishment of fires as it shall deem proper," first appears in the territorial days and as a part of subdivision 3 of § 22 of chapter 14 of the Session Laws of 1867–1868. The title of the act is "An Act for the Incorporation of *Towns,* Defining Their Powers, Providing for the Election of Officers thereof and Defining Their Duties," and § 22 of the act is identical in words and in phrasing with paragraph 3 of § 3861 of the Compiled Laws of 1913, which is now before us for consideration.

It will be noticed that in the title of this Act of 1867–1868 the generic word "town" is used, and the act seems to apply to all incorporated municipal corporations, no matter of what size. It was not, indeed, until the year of 1887 that there was any general law for the incorporation of cities, and prior to that time all cities which were incorporated as such were incorporated under special charters.

Section 22 of the Act of 1867–1868 was again re-enacted, and in identically the same form, in chapter 10 of the Territorial Session Laws of 1875. Neither in this act nor in the Act of 1867 was the term, "village or city," used, but the generic term "town" merely.

We next come to chapter 24 of the Revised Codes of 1877. There the chapter bears the title, "Incorporation of Towns and Cities," the section before referred to is re-enacted as § 22, and, as before, nowhere

are the words, "city or village," used except in the chapter heading and in § 35, wherein it is provided that a provision regarding the collection of taxes by the marshal "shall not apply to incorporated cities, villages, or towns, for which a different manner is provided by their charter."

Again in chapter 31 of the Session Laws of 1885 we find an act "Providing a Method for Changing the Names of Towns and Villages," and throughout the act the phrase, "town or village," alone is used, and nowhere does the word "city" appear.

Next follows chapter 73 of the Territorial Laws of 1887, which is "An Act to Provide for the Incorporation of Cities," and the first general act as far as cities are concerned. This act appears as chapter 2 of the Political Code of the Compiled Laws of 1887, and begins with § 844. In it is contained the first specific reference to fire limits,—¶ 49 of § 1 of article 4 of the act being ¶ 49 of § 885 of the Code, giving the city council the power "to prescribe the limits within which wooden buildings shall not be erected or placed or repaired without permission, and to direct that all and any buildings within said limit, which shall be known as the fire limits, when the same shall have been damaged by fire, decay, or otherwise to the extent of 50 per cent of the value, shall be torn down or removed, and to prescribe the manner of ascertaining such damage." Nowhere in this act, however, is any general power "to establish other measures of prudence for the prevention or extinguishment of fires as it shall deem proper" granted. The purpose of the enumeration of power seems clearly to have been to define more clearly the general powers given in the prior acts.

At the same session of the legislature we find chapter 106, which amends § 22 of chapter 24 of the Political Code, entitled "Incorporation of Towns and Cities So As to Empower the Trustees to Authorize the Construction and Maintenance of Street Railways, Water Mains and Water Pipes, and Gas Mains and Gas Pipes Along through the Streets and Alleys within the Corporated Limits, etc." This act clearly recognizes the applicability of chapter 24 of the Compiled Laws of 1877 to cities as well as villages, and that the generic term "town" included both, and that chapter 73 of the Laws of 1887, which related to the incorporation of cities, merely applied to those which should thereafter seek to come within its provisions.

Next follows the Revised Codes of 1895, and in them a revision of the Territorial Laws of 1887.

In the act relating to cities and in ¶ 48 of article 4, chap. 28, thereof, being ¶ 48 of § 2148, ¶ 49 of § 885, Comp. Laws of 1887, is re-enacted.

It is also worthy of notice that in chapter 12 of the Session Laws of 1875 by which the city of Fargo was incorporated under a special charter, the same general term is used as in the act that is before us, and that all the council was authorized to do was to provide for the organization and support of fire companies and "to establish regulations for the prevention and extinguishment of fires." See ¶ 26, § 12, article 2.

The same is true of the act incorporating the city of Bismarck. See ¶ 27, § 12, article 2, chapter 11, Session Laws of 1875.

It has been quite common in the history of legislation to use the word "town" as a generic term and as including both cities and villages (see Dunn v. Whitestown, 185 Fed. 585; State ex rel. Hartford v. Craig, 132 Ind. 54, 16 L.R.A. 688, 32 Am. St. Rep. 237, 31 N. E. 352; Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466; 3 Bouvier's Law Dict. 3d Rev. p. 3289; 8 Words & Phrases, pp. 7026, 7817), and we are quite sure that it was so used by the legislatures of both the territory and state of North Dakota. It is, indeed, very apparent to us that during the twenty years which intervened between 1867 and 1887 the legislature did not intend to restrict the city councils of the incorporated cities such as Bismarck and Fargo, or of the growing towns, which, in fact, had assumed the dimensions of cities but had not yet assumed the name, to such an extent that they could not adopt the reasonable precaution of creating fire limits. It is clear to us, also, that when the legislature granted to these municipalities the general power to establish "other means of prudence for the prevention or extinguishment of fires as it shall deem proper," they intended that a general power should be conferred which should include the creation of fire districts, and that the reasonable discretion of the governing bodies should control. See Olympia v. Mann, 1 Wash. 389, 12 L.R.A. 150, 25 Pac. 337, and cases before cited.

Nor do we believe that there is any merit in the contention that the ordinance was arbitrary and unreasonable and discriminating in its nature. It is true that a large portion of the village is not included therein, but such a condition is only what is usual and to be expected.

It is true, also, that outside of the limits there are located a livery stable and a garage, which may, perhaps, communicate fire to the business portions of the city. No fraud, however, is shown in the passage of the ordinance, nor is there any proof of prejudice or ulterior motive, and the evidence is quite persuasive to the effect that the business portions of the city will probably not extend into the omitted territory. There must at any rate be some limits to every fire district, and what these limits shall be is largely a matter of legislative discretion. The trial court found that the ordinance was not discriminating, and we have no reason for interfering with his finding.

But was the court also justified in its conclusion of law that "the building in question not being a nuisance *per se*, this court is without jurisdiction and will not interfere or grant equitable relief by injunction or otherwise to restrain the violation of the ordinance in question, and that the plaintiff is therefore entitled to no relief and the action should be dismissed?" Should, in short, the prayer of the complaint be granted, which asks: "1. That the said building be held to be a nuisance, and that the same be abated according to law. 2. That it be adjudged herein that said building was constructed in violation of the provisions of said ordinance, and that said defendant by mandatory injunction be required to remove said building?" In other words, may a court of equity enforce the provisions of § 2 of the ordinance, which provides that:

"The outer walls of any building or structure hereafter erected within the aforesaid limits of said village of Ashley, which does not comply with the provisions of this ordinance, shall be condemned by the board of trustees of said village as unsafe and a menace to life and property, and shall be by said trustee ordered destroyed and removed under their direction?"

Or is ample relief to be found in § 4 of the ordinance, which provides that:

"It shall be the duty of the village marshal of said village upon his being informed of the fact that any person is erecting or constructing any building or structure of any nature which does not comply with the provisions of this ordinance, or upon being informed that any person is erecting structure of any nature within the said limits of the said village of Ashley without having obtained a building permit thereof as

herein provided for, to at once make complaint before the village justice of the peace of the said village of Ashley, setting forth the facts under oath, and the said village justice shall thereupon issue his warrant for the arrest of any such person, and deliver the same to the said marshal, who shall thereupon arrest such person and bring him before said village justice to be dealt with according to law and according to the ordinance of said village.

"Any person or persons violating the provisions of this ordinance shall upon conviction thereof, before the village justice of the peace of said village, be punished by a fine of ten (10) dollars for each offense, or by imprisonment in the village jail of said village, or such place as shall be provided by said village for such purpose, not exceeding ten (10) days, or by both such fine and imprisonment."

We are of the opinion that a court of equity may properly interpose in the premises.

We are aware of the fact that the trial court held that the building in question was not of such a nature as to make it a nuisance *per se* at the common law. We are also aware of the long line of authority which seems to generally hold that equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation, unless the act sought to be restrained is shown to be a nuisance *per se,* and this on the theory that the maintenance of a nuisance is an indictable offense, and if the laws be framed with proper penalties the measure of redress at law will be adequate, effectual, and complete so far as the public is concerned. See Parker & W. Public Health & Safety, § 223; St. Johns v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671; 2 Dill. Mun. Corp. 5th ed. § 650; 2 McQuillin, Mun. Corp. § 806.

In the case at bar, however, the ordinance merely provides for the punishment of one who erects a wooden building within the prescribed limits by a fine of $10, and there is no provision for the destruction or removal of the building except that found in § 2, which provides that the board of trustees may condemn such a building if erected, and order its destruction or removal. We realize, of course, that when a building is constructed in violation of the law and in violation of the mandates of a valid ordinance, it to that extent becomes a nuisance, and may be removed by the municipal authorities, even though it be not what may be known as a common-law nuisance. See First Nat. Bank v. Sarlls,

129 Ind. 201, 13 L.R.A. 481, 28 Am. St. Rep. 185, 28 N. E. 434. The penalty prescribed by the ordinance, however, does not extend to the maintenance of the nuisance but to the construction of the building merely, and only one fine of $10 seems to be imposed. The imposition of this fine would not remove the structure, and the only resort left would seem to be for the municipality to itself destroy or order the same to be destroyed or removed. The petition alleges that an order for removal was given. It is, of course, clear that the city could itself remove the building, and then sue the defendant and recover the cost incident to such removal. In the case at bar, however, this proceeding would have compelled the municipal authorities to have themselves incurred the risk of a suit in damages in case the building was not a nuisance *per se* or the ordinance prescribing the fire limits had not been held valid.

Surely, where there is doubt as to the existence of a power and the fact of a nuisance, the orderly and proper procedure is to have the matter first adjudicated, and to have the rights of the parties first determined, before the property is destroyed or removed. There can be no question that under the facts which are before us, and in view of the legitimate difference of opinion as to the real law of the case, a court of equity would have issued a preliminary injunction at the suit of the owner of the building, and restrained the destruction or removal of the property until the rights of the parties could be determined, and, if the ordinance had been held invalid, have permanently restrained the destruction or removal of the property. Parker & W. Public Health & Safety, §§ 105, 108.

We have held that the building in question was erected and is now maintained in violation of a valid ordinance, and is therefore a statutory if not a common-law nuisance. Surely equity requires that he who constructs such a building shall remove it, or he who maintains a nuisance shall abate it. It is true that "the only common-law remedy for the abatement of a public nuisance was by indictment, but it is now well settled that a court of equity may, in a proper case, take jurisdiction of public nuisances in civil actions for their abatement, and to enjoin their maintenance. This jurisdiction is grounded upon the greater efficacy and promptitude of the remedies administered in such actions, enabling the court to restrain nuisances that are threatened or in progress, as well

as to abate those already in existence, and effect their final suppression by injunction, which will often also prevent a multiplicity of suits." Mitchell, J., in Hutchinson Twp. v. Filk, 44 Minn. 536, 47 N. W. 255; Pine City v. Munch, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197; 20 R. C. L. 473, 474; 14 R. C. L. 379.

It is true that where the fact of the nuisance is in dispute a jury trial should be permitted and is the proper remedy. Where, however, the matter is one of law, and of law alone, and the only question is the validity of the ordinance defining the nuisance, no such considerations apply and the rule is otherwise.

The question involved is whether a village can maintain a fire district or whether it can not. Must it tolerate the existence of a building within that district which is erected in defiance of its laws? Building Commission v. Kunin, 181 Mich. 604, 148 N. W. 207, Ann. Cas. 1916C, 959.

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

BIRDZELL, J. I dissent.

ROBINSON, J. (dissenting). This is an action by the village of Ashley to compel defendant to remove a small office building on the ground that it is within the fire limits prescribed by the village ordinance. The court gave judgment for defendant, and the village appeals.

The building is used for a lumber office. It is 14x20 feet wide with 8-foot posts. There is no showing that it is dangerous to any building. Defendant avers that it is not in any way dangerous to any building, and that the ordinance is unreasonable and void, and that it unjustly discriminates against defendant by reason of the fact that it applies only to the south half and not to the north half of block 13. It is shown that on the north half there is a frame livery barn 50x128 feet, and a frame auto garage 32x100 feet in which gasolene and other inflammable materials are stored, while on the south half of block 13, there is only the small office building and the lumber yard of the defendant. The south half of block 13 is owned and occupied by defendant. It is bounded on the north by a 20-foot alley which separates it from the north half and

on the west by Sixth street, on the east by Seventh street, and on the south by Main street, which is 100-feet wide, and on those streets there are no buildings of consequence facing defendant's property.

The questions presented are: (1) Had the village power to pass an ordinance limiting the right to erect frame buildings? (2) When applied to the building in question and other buildings on block 13, is the ordinance fair and reasonable? (3) Do the facts present a case for equitable relief?

The history and origin of equity jurisprudence show that it was not extended to cats and dogs and other petty matters beneath the just consideration of a sovereign monarch. The original petitions were first addressed to the monarch himself, and then to the high chancellor, who acted as the direct representative of the Crown. The purpose of the monarch and the chancellor was to give relief only in cases of gross fraud, accident, or mistake, and to relieve from the hardships of certain penalties and forfeitures and from some severities of the law; to grant relief only on equitable principles and in cases appealing to the conscience of the chancellor as a court of equity and a court of conscience.

In this case the evidence fails to show any necessity for equitable relief, because the building is so small that it can hardly be called a building any more than a dog house, and then it is so far removed from other buildings that it is in no wise dangerous. The construction of so low and small a building at such a place was at most a technical disregard of the ordinance which does not call for equitable relief, and it should be considered that farmers coming into the little village to buy lumber should not have to go far into the country to find a lumber office. Then it appears that the statute does not, by express words or by necessary implication, give to villages the power to limit the construction of wooden buildings.

Cities are given power "to prescribe the thickness, strength and manner of constructing stone, brick and other buildings and the construction of fire escapes therein, and to provide for the inspection of all buildings within the city limits. To prescribe the limits within which wooden buildings shall not be erected or placed, or repaired without permission." Comp. Laws 1913, § 3599, subds. 46 and 47.

Villages have power "to organize fire companies, hook and ladder companies . . . to provide all necessary apparatus for the extinguish-

ment of fires to make owners of buildings provide ladders and fire buckets, . . . to regulate the storage of gunpowder and other material; to direct the construction of a place for the safe deposit of ashes; . . . to regulate the manner of putting up stoves . . . to prevent outfires and the use of fireworks and the discharge of firearms, . . . and generally to establish other [such like] measures of prudence for the prevention or extinguishment of fires as it shall deem proper." Comp. Laws 1913, § 3861, subd. 3.

Counsel for plaintiff places great strength upon the concluding phrase, "generally to establish other measures of prudence," etc., as if such words give to the villages the same powers given to cities; but, under a well-known rule of law, the concluding words following and enumerating list of powers refer only to other such like and similar powers.

Villages are often sparsely settled. The buildings are few and cheap and far apart, and, hence, it does not seem that the legislature thought it wise to give villages power to prescribe fire limits. The statute provides that any incorporated village having a population of not less than 500 inhabitants may become an incorporated city. § 3552. Hence, it is an easy matter for a village of over 500 inhabitants to throw off its swaddling clothes and to become a city. Till it does that, it cannot justly claim to exercise the powers of cities or any power not given it expressly or by necessary implication.

The judgment appealed from is clearly right, and it should be affirmed.

MRS. E. G. AUTH, Formerly Sophie Lien, Respondent, v. KUROKI ELEVATOR COMPANY, Appellant.

(169 N. W. 80.)

Thresher's lien — claiming and filing — statute — must be complied with — evidence — fails to show compliance.

Sections 6854 and 6855, Compiled Laws 1913, authorize and provide for the making and filing of a thresher's lien. Evidence examined and *held* to contain no proof showing a compliance with the requirements of said sections.

Opinion filed July 19, 1918. Rehearing denied September 25, 1918.

Appeal from the District Court of Bottineau County, North Dakota, Honorable *A. G. Burr,* Judge.

Affirmed.

W. J. Cooper (*H. S. Blood,* of counsel), for appellant.

In an action by the owner of grain for the conversion thereof, defendant may plead and prove by way of defense and in mitigation of damages, any lien on the grain which has been paid by defendant, or which is held by defendant. Comp. Laws 1913, § 6721; Force v. Peterson, 17 N. D. 220, 116 N. W. 84.

The payment of such lien is equally beneficial to the owner of the grain. It releases her grain therefrom and satisfies her obligations to that extent, and is a just protection to defendant. Cushing v. Seymour (Minn.) 15 N. W. 249.

"In estimating damages in cases like this, the value of property to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded, as would suffice with reasonable diligence for him to make such purchase." Comp. Laws 1913, § 7178; Pichert v. Rugg, 1 N. D. 230, 46 N. W. 446.

There is no merit in the claim that the grain which defendant sold and converted was not plaintiff's grain. Minneapolis Iron Store Co. v. Branum (N. D.) 162 N. W. 543.

J. J. Weeks, for respondent.

The payment of liens upon grain and the pleading and proving of such payment, by a defendant in conversion action, and the right to take advantage of such conditions, rest entirely in and with the lien holder. Rev. Codes 1895, §§ 4695, 6721.

The original statute was limited to cases of conversion by lien holders, and its scope cannot be enlarged by the added proviso unless it is clearly apparent that such was the intention of the legislature. It is the natural and appropriate office of a "proviso" to restrain or qualify particular preceding matter. Sutherland, Stat. Constr. § 223; 36 Cyc. 1161 and cases cited.

The damages in such cases are measured by the market price of the grain at the time and place of the demand, or the highest market value

between such time and the time of trial, where diligence appears. Conversion comes into existence only upon a proper demand for and a refusal to deliver the grain or a like quality and quantity of grain. Towne v. Elev. Co. 8 N. D. 200, 77 N. W. 608; Sanford v. Bell, 2 N. D. 6, 48 N. W. 434; First Nat. Bank v. Minn & N. Electric Co. 11 N. D. 280, 91 N. W. 436.

Replevin will not lie for grain received into an elevator in the usual course of its business and mixed with other like grain. Best v. Muir, 8 N. D. 48, 77 N. W. 95.

There was no proof of the execution of the claimed lien; no proof of the bushels threshed; no proof of amount due thereunder; no proof of when threshing was finished; no proof that claimant was a person entitled to such lien; and no identification of grain covered by it. Ibid.; Rev. Codes 1895, § 6721.

GRACE, J. This is an appeal from the district court of Bottineau county, North Dakota, Honorable A. G. Burr, Judge.

Facts in the case are as follows:

The respondent is the owner of 320 acres of land located near Kuroki, Bottineau county, North Dakota. In 1915, the land was rented to one Williams. K. Stack was the agent for the respondent. About November 1, 1915, respondent delivered to appellant 69 bushels and 20 pounds of No. 1 wheat to be held in general storage, the value of which was $.87 per bushel at the time. On the 15th day of March, 1916, respondent by her agent, Stack, attempted to sell the grain in question. Appellant refused to pay for the grain or deliver the same or a like quantity, claiming the grain had been sold and the money turned over to the People's State Bank of Westhope, which claimed to hold an assignment of a thresher's lien on the grain. Respondent brought suit in the justice court for the value of the wheat at the time of the demand, and recovered judgment for damages and costs amouting to $91.46. The defendant appealed to the district court, where the verdict was directed in favor of the respondent. A motion for a new trial was made and denied.

The first matter for consideration is: Was there any competent testimony tending to establish the making and filing of a valid and existing thresher's lien? We are clear the record contains no such testimony. It would be necessary to establish, by competent testimony, the facts

required by law to be established to entitle one to claim and file a thresher's lien. It would be necessary, among other facts, to show that there were a certain number of bushels of a certain kind of grain threshed, the price per bushel for threshing, the description of the land upon which such grain was growing, and that the lien which is claimed was filed within a specified time after said threshing was done; and such other facts as are required by the law to be established in such cases before a lien can be claimed or filed. There is no competent testimony to show that such lien was properly executed.

The offers of stipulation back and forth between the counsel relative to the lien being filed and assigned, and the assignment filed and the various matters referred to, fall far short of establishing the actual execution and filing of the lien in accordance with requirements of law relative to thresher's liens; and, further, such offers of stipulation such as they are do not appear to have been agreed to by the respective counsels representing the parties to the action. They really have no probative force and are really incompetent as testimony in this case.

In the cross-examination of Mr. Stack, a witness for respondent, the appellant's counsel asked the witness if Fred Jensen did the threshing on the place that year. Objection that the question was immaterial and not proper cross-examination was sustained by the court, and we think properly so.

If the appellant had competent evidence by which to establish the facts necessary to prove a valid and existing thresher's lien, he could have offered such testimony as direct testimony, and there would have been, in all probability, no objection to the introduction of such testimony. Whether or not there was a thresher's lien was a matter that was put in issue by the pleadings, and it was incumbent upon the defendant to prove, by competent testimony, the right to the execution and existence of such lien; and also the proper filing thereof. This the defendant has not done; he has made no competent proof of the lien or the proper execution and filing thereof.

The court, in its memorandum opinion, states that it knows of its own knowledge that Fred Jensen, the thresher, was not produced in court, and there is no attempt to claim that he was there or any attempt by the defendants to prove the lien by any other witness.

It is clear there was no competent evidence to establish the thresh-

er's lien in question by competent proof, and it is held there is no competent proof of such lien nor of the execution thereof.

In this case, there being no competent evidence of the execution or existence of the thresher's lien, it becomes entirely unnecessary to construe the provisions of § 6721, Compiled Laws 1913.

The court permitted the plaintiff to recover the highest market value of the grain in question from the date of the conversion. The time elapsing between the date of the conversion and the time of making the demand and bringing the action was approximately five months. It can not be said that the plaintiff was not diligent in prosecuting her action. Under § 7168, Compiled Laws 1913, it was proper for the plaintiff to offer testimony of the highest market value of the property at any time between the conversion and the verdict.

We have examined all assignments of error in all the records, and find no reversible error therein.

The order appealed from is affirmed, with costs.

CHRISTIANSON, J. (concurring specially). I concur in an affirmance of the judgment and the order denying a new trial. The defendant admits the delivery to it of the wheat involved in this controversy, and that such wheat belonged to the plaintiff. It also admits that the defendant failed to deliver to the plaintiff upon demand the wheat described in the complaint. But in justification of the failure to make such delivery the defendant avers as an affirmative defense that there was a valid and subsisting thresher's lien on said grain in favor of one J. F. Jensen, amounting to $152, which said lien exceeded the value of the grain, and that the defendant, upon the demand of the holder of the thresher's lien, sold said grain and paid the proceeds thereof to such lien holder. The only evidence adduced by the defendant to establish such lien was the lien itself as filed in the office of the register of deeds. No evidence was adduced to show that the matters recited in the lien claim were in fact true. The lien statement was merely evidence of its own existence and that it had been filed in the register of deeds office. Clearly this lien statement did not establish the matters therein stated, and it was incumbent upon anyone who sought to invoke the lien to establish its actual existence by competent evidence. Inasmuch as there was no evidence tending to establish a thresher's lien, it is unnecessary

to determine whether defendant could plead such lien in mitigation of damages. Under any view of the case, the trial court was right in directing a verdict, and I fail to find any error requiring a new trial.

MRS. E. G. AUTH, Respondent, v. FARMERS ELEVATOR COMPANY, Appellant.

(169 N. W. 82.)

This case is governed by the decision rendered in Auth v. Kuroki Elevator Co. ante, 533.

Opinion filed July 19, 1918. Rehearing denied September 25, 1918.

Appeal from the District Court of Bottineau County, North Dakota, Honorable *A. G. Burr,* Judge.

Affirmed.

J. J. Weeks, for respondent.

W. J. Cooper (*H. S. Blood,* of counsel), for appellant.

GRACE, J. This action is on the short cause calender, and was submitted at the same time as the case of Auth v. Kuroki Elevator Co. ante, 533, 169 N. W. 80.

The facts in the case are the same as in Auth v. Kuroki Elevator Co. In principle, this case is also identical with that.

On the authority of the case of Auth v. Kuroki Elevator Co. the judgment appealed from is affirmed, with costs.

J. U. HEMMI, Respondent, v. C. A. SHAW, Sole Survivor of the Copartnership of Shaw & Macdonald, Appellant.

(169 N. W. 32.)

District court — action in — verdict — directed for plaintiff — evidence — not clear, competent, decisive — new trial.

This case presents an appeal from a judgment on a directed verdict for $565.61. As the verdict is not sustained by clear, competent, and decisive evidence, the judgment is reversed and a new trial ordered.

Opinion filed July 25, 1918. Rehearing denied September 25, 1918.

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

Defendant appeals.

Reversed.

John A. Jorgenson, for appellant.

The court erred in directing the jury to return a verdict for the plaintiff. The evidence was in no manner clear or decisive, and in any event the matter of damages was a question for the jury. Kingsbury v. Joseph, 94 Mo. App. 298, 68 S. W. 93; Head v. Hargrave, 105 U. S. 45, 26 L. ed. 1028; Johnson v. Freeport, 111 Ill. 413; Aldrich v. Grand Rapids, 61 Minn. 531, 63 N. W. 1115; Ewing v. Goode, 78 Fed. 442; Andrews v. Frierson, 144 Ala. 470, 39 So. 512; Bonds v. Brown, 133 Ga. 451, 66 S. E. 156; Minchew v. Lumber Co. 5 Ga. App. 154, 62 S. E. 716; Wicks v. Loan, 150 Iowa, 112, 129 N. W. 744; Comm. Co. v. Aaron, 145 Mo. App. 307, 130 S. W. 116; Clothing Co. v. Transfer, 158 Mo. App. 481, 139 S. W. 242; Brennan v. R. Co. 230 Pa. 228, 79 Atl. 501; Mortg. Co. v. Campbell, 98 Tex. 372, 84 S. W. 424; Pierce v. R. Co. 137 Wis. 550, 119 N. W. 297; Jennings v. Stripling, 127 Ga. 778, 56 S. E. 1026; Sellers v. Knight, 185 Ala. 96, 64 So. 329; R. Co. v. Lowe, 139 Ga. 362, 77 S. E. 44; Gibbons v. R. Co. 98 Neb. 696, 154 N. W. 226; Wertheimer v. Rosenbaum, 146 N. Y. Supp. 177; Shuman v. Ruud (N. D.) 160 N. W. 507.

"The opinion of experts as to the value of services or anything not having a fixed and known marked value is not conclusive; and it is the province of the jury to weigh such testimony by reference to all the

other facts and circumstances in evidence, and judge of the weight and force of such opinions by their own common sense and general knowledge of the subject of inquiry." Stevens v. Minneapolis (Minn.) 43 N. W. 842; Kansas City Auto v. Holcker, 182 S. W. 759; Haldeman v. Berry, 42 N. W. 57; Canole v. Allen, 70 Atl. 1054.

The question of the rental value of the property was also one for the jury. Bonds v. Brown, 156 S. E. 156; Southern R. Co. v. Lowe, 77 S. E. 44.

The entire case on the material and major portion thereof is established by and rests upon expert testimony which is never conclusive. The case is one for the jury, and it is error to direct a verdict for plaintiff. Martin v. Martin, 135 Ga. 162, 68 S. E. 1095; Graham v. Graham, 137 Ga. 668, 74 S. E. 426; Jennings v. Stripling, 56 S. E. 1026; Baker v. Richmond, 105 Ga. 225, 31 S. E. 426; Brown v. Ga. Min. Co. 106 Ga. 516, 32 S. E. 601; Cross v. Coffin-Fletcher Co. 123 Ga. 820, 51 S. E. 704; Sweat v. Sweat, 123 Ga. 802, 51 S. E. 716.

F. G. Kneeland and *J. U. Hemmi* (*C. S. Buck,* of counsel), for respondent.

We have no quarrel with the law as announced in the Shuman Case. The rule there adopted does not go so far as to say that the uncontradicted testimony as to actual cost of materials and labor going into the construction of an ordinary dwelling house, in the necessary completion of a contract, must be submitted to the jury, in a suit on the contract, for damages resulting from its violation, in which action defendant offered no proof. Shuman v. Ruud, 160 N. W. 507; Stevens v. Minneapolis (Minn.) 43 N. W. 842.

Where damages are unliquidated and judgment is asked on default, plaintiff may prove such damages by secondary evidence. Naderhof v. Benz, 25 N. D. 165, 187, 141 N. W. 501.

The jury must be governed by the testimony and evidence, in determining any fact or facts in dispute.

"In those cases where there is no evidence tending to prove the defense or controverting the facts which entitles plaintiff to recover, the jury should then be instructed to find the issues for the plaintiff." 1 Brickwood's Sackett on Instructions to Juries, 3d ed. p. 190.

ROBINSON, J. This is an appeal from a judgment entered on a directed verdict for $565.61. The complaint avers that in May, 1916, at Jamestown in consideration of $3,100, defendant contracted to construct for the use of the plaintiff a dwelling house according to plans and specifications, and to complete the same within ninety days from May 10, 1916. That the defendant failed to complete the construction of the house and in effect abandoned its construction in November, 1916. That to complete the same in accordance with the contract, the plaintiff necessarily expended and paid several sums, stated in lump, amounting to $530.53. In addition he paid defendant $2,794.58. Plaintiff's loss of the use of the house was $120. Total $3,445.11. That he paid three sums, $179.35, $47.50, $27, amounting to $253.85. Total cost being $3,698.96. From that sum we subtract the agreed price of $3,100, and the balance is $598.96, for which the plaintiff demands judgment.

The plaintiff was the only witness, and in regard to several items he was not a competent witness, and his testimony was mere conjecture. It was based on hearsay. As stated in the brief of counsel for respondent: "Take, for instance, the item of $40 for painting. It was not shown the size, or surface to be painted, nor the various colors or kinds of paint used, nor the time or labor required, nor the usual wages of a painter." And the counsel is asking, How could the jury determine any other amount than that to which the plaintiff testified?

Of course the testimony gave the jury no basis for such determination, and the testimony was a mere conjecture. It was not evidence. It was a guess or estimate based on the hearsay or unsworn estimates of painters. If there were any guessing to be done, the court should have left the jury to do it; and of course the facts should have been proven by competent evidence so as to obviate the necessity of any guessing. The directed verdict is not sustained by clear and competent and decisive evidence. Hence, the judgment is reversed and a new trial granted.

ROBERT BAUER, a Minor, by Charles T. Bauer, His Guardian, Plaintiff and Respondent, v. GREAT NORTHERN RAILWAY COMPANY, a Corporation, A. J. Halliday, and Herbert Ridgedale, Defendants, and Great Northern Railway Company, a Corporation, Defendant and Appellant.

(169 N. W. 84.)

Railway company — apprentice in machine shop — personal injury of — action for damages — contributory negligence — negligence of foremen in charge of shop — verdict against railway company — foremen parties defendant — no verdict as to them — mistrial.

This is an action by an apprentice in a machine shop to recover damages for a personal injury resulting from his own negligence and from the alleged wrong and negligence of two foremen in charge of the shop. The verdict was against the railway company, and there was no verdict either for or against the foremen, who were parties defendant and the parties guilty of the alleged wrong. The result was a mistrial.

Opinion filed June 1, 1918. Rehearing denied September 25, 1918.

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

Defendants appeal.

Reversed and remanded.

Flynn & Traynor, and *Murphy & Toner,* for appellant.

The appellant was not guilty of negligence.

"Where the relations between two parties are analogous to that of principal and agent, or principal and surety, or master and servant, the rule is that a judgment in favor of either in an action brought by a third party, rendered upon a ground equally applicable to both, should be accepted as conclusive against the plaintiff's right of action against the other." Featherstone v. Newburg, 71 Hun, 109, 24 N. Y. Supp. 603; Warfield v. Davis, 14 B. Mon. 40; Kansas City v. Mitchner, 85 Mo. App. 36; Castle v. Noyes, 14 N. Y. 329; Emma Silver Mining Co. v. Emma Silver Min. Co. 7 Fed. 401; Doremus v. Root & Or. R. & Nav. Co. (Wash.) 63 Pac. 572; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; Ransom v. Pierre, 101 Fed. 665; Hill v. Bain, 15 R. I. 75, 23 Atl. 44; State v. Coste, 36 Mo. 437, 88 Am. Dec. 148; McKenzie v. Baltimore, etc., R. Co. 28 Md. 161; Lyon v. Stanford, 42 N. J. Eq. 411, 7 Atl. 869; Gallagher v. Monongahela, 34 W. Va. 730,

12 S. E. 859; Faust v. Baumgartner, 113 Ind. 139, 15 N. E. 337; Schweickhardt v. St. Louis, 2 Mo. App. 571; McGinis v. Chicago, etc., R. Co. 200 Mo. 359, 98 S. W. 590; Bradley v. Rosenthal (Cal.) 97 Pac. 875; Thompson v. So. P. R. Co. 161 Pac. 21; Portland Gold Min. Co. v. Stratton's Independence, 158 Fed. 68; Young v. Rohrbough (Neb.) 129 N. W. 167; O'Brien v. American Casualty Co. (Wash.) 109 Pac. 52; Hayes v. Chicago, etc., R. Co. 218 Ill. 417, 73 N. E. 1003; Indiana N. & T. Co. v. Lippincott Co. 165 Ind. 365, 75 N. E. 649; Stevick v. N. P. R. Co. 81 Pac. 999; Morris v. N. W. etc., Co. 152 Pac. 402; Sipes v. Puget Sound, etc., Co. 102 Pac. 1057; Chicago, etc., R. Co. v. McManigal, 103 N. W. 305; Munts v. Algiers, etc., R. Co. 40 So. 688; So. R. Co. v. Harbin, 135 Ga. 125, 68 S. E. 1103.

"It is not necessary that the servant should be warned of every possible manner in which an injury may occur to him, or of risks that are as obvious to him as to the master, or which are readily discoverable by him by the use of ordinary care, with such knowledge, experience, and judgment as he actually possesses, or as the master is justified in believing him to possess." 29 Cyc. 1169.

"Servants are expected to keep their eyes open and exercise such reasonable care for their own safety as their situation permits." 4 Thomp. Neg. § 4063; Woelflen v. Lewiston, 5 Pac. 497; and cases therein cited.

There was a verdict here against the railway company, but no finding by the jury for or against the two individual codefendants by whose negligence it is claimed the injury to plaintiff occurred. These two codefendants were employees of appellant railway company, and it was upon the theory of their negligence that the verdict against the company was given. The verdict as rendered and the subsequent judgment entered thereon acquit the two employee codefendants of any and all negligence. This actually resolves itself into an acquittal of the railway company of negligence, because no negligence can be attributed to the company, unless one or both of the codefendants were negligent, and by their verdict the jury have said they were not negligent. Therefore, there is no verdict in this case upon which to base a judgment. Howard v. Johnson, 18 S. E. 132; Kinkler v. Junica, 19 S. W. 359; Gulf, etc. v. James, 10 S. W. 744; Jones v. Gimmet, 4 W. Va. 104;

Westfield v. Abernathy, 35 N. E. 399; Lawson v. Robinson, 75 Pac. 1012; Doremus v. Root, 63 Pac. 572.

But plaintiff was guilty of such negligence as to bar a recovery, in any event. If the manner in which the work is to be done is left to the servant, he cannot complain, if injured while attempting to perform the work in a way obviously dangerous, there being a safe way at hand and known to him at the time. Woelflen v. Lewiston, 95 Pac. 493; Wormell v. Co. 10 Atl. 49; Ell v. N. P. 1 N. D. 336; N. P. v. Hogan, 63 Fed. 102.

Respondent assumed the risk of fellow servants as well as the ordinary risks of his employment. This law has not been abrogated. Comp. Laws 1913, § 6107; Beleal v. R. Co. 15 N. D. 318; Gunn v. R. Co. 34 N. D. 423.

"When a minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from working the machine, the fact that he is a minor does not alter the general rule that the employee takes upon himself the risks which are patent and incident to the employment." Buckley v. Co. 113 N. Y. 540; Probert v. Phipps, 149 Mass. 258; Man v. Morse, 33 Pac. 283; Labatt, Mast. & S. § 1251; Derringer v. Tattey, 34 N. D. 56; Cronin v. Co. 74 Atl. 180.

J. C. Adamson, and *H. S. Blood,* for respondent.

The railway company should not have applied to the court and procured an order on its own motion, for judgment to be entered against it. After such proceedings, it cannot be heard to complain. The company erred in not applying to the lower court for an order dismissing the action.

"It is the universal rule that a party upon whose motion an order is made cannot appeal therefrom." 2 Cyc. 650, and cases cited.

Where a young or inexperienced servant is injured while acting in obedience to the commands of, or under the compulsion of the master, he will not be held to have assumed the risks involved in doing so unless he knew and appreciated the danger. 26 Cyc. 1221, and cases cited; Hinckley v. Harazdowsy, 133 Ill. 359, 8 L.R.A. 490, 23 Am. St. Rep. 618, 24 N. E. 421; Brazil Block Coal Co. v. Gaffney, 119 Ind. 455, 4 L.R.A. 850, 12 Am. St. Rep. 422, 21 N. E. 1102.

A servant acting under the commands or threats of his master does not assume the risk incident to the command unless the danger incurred is fully appreciated and is such that no person of ordinary prudence would consent to encounter it. 26 Cyc. 1221 and cases cited; Stephens v. Hannibal & St. J. R. Co. 96 Mo. 207, 9 Am. St. Rep. 336.

These questions are all proper ones for the jury to determine. 2 Thomp. Neg. 975; Keegan v. Kavanaugh, 62 Mo. 230.

And in all such cases, the question of plaintiff's negligence is one for the jury. East Tennessee, V. & G. R. Co. v. Duffield, 12 Lea, 63, 47 Am. Rep. 319; Louisville & N. R. Co. v. Bowler, 9 Heisk. 866; Wood, Mast. & S. 378; 2 Thomp. Neg. 974.

All facts which are proper for the jury, and which are in dispute on the trial, and which have been submitted to and determined by the jury, are not proper matters for the court to consider. Rebillard v. Soo R. Co. 216 Fed. 506.

ROBINSON, J. In this case the defendant railway company appeals from a personal injury judgment against it for $2,200. At and prior to the time of the injury the railway company was engaged in the business of running a machine shop at Devils Lake. Defendant, a young man nearing eighteen years, entered the shop as an apprentice to learn the business of a machinist. He worked in the copper-smith department over a year, then he operated a machine, facing nuts and bolts. Then he operated a planer, then he worked on a rod bench, taking out brasses and filing them down and fitting them. Then he began operating a large wheel lathe, and in cleaning it he was injured, after an apprenticeship of two months on the lathe.

The injury was the direct result of a dare-devil stunt. An attempt to clean the machine when in operation. The complaint avers that on May 27, 1916, the plaintiff was in the employ of the railway company as an apprentice machinist, working under the supervision of defendants Halliday and Ridgedale, and that in obedience to their orders the plaintiff attempted to clean the machine while it was in operation, and in so doing his feet slipped from the frame, and in attempting to save himself from falling he threw his right hand forward, and it was caught in the running gears, and the fingers and thumb of his right

hand crushed off. The plaintiff attempted to clean the machine while in operation, and the complaint avers that he did so at the express direction of Halliday and Ridgedale, and that they stood watching the machine at the time of the injury.

Under the statute an employer must indemnify his employee for losses occasioned by the former's want of care. § 6107. 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, nor in consequence of the negligence of any other person employed by the same employer in the same general business, unless he neglected to use ordinary care in the selection of the culpable employee. There is no charge that the railway company was negligent in the selection and employment of the other defendants or that they were not entirely competent. However, it is charged that they expressly directed the plaintiff to do the cleaning while the machine was in operation, and looked on while he did it. If that is true, the verdict should be against them and probably against the company, but the jury found against the company and failed to make any finding either for or against the other defendants. They gave a half-way verdict, which should not have been accepted as a basis of a judgment against the company or in favor of the defendants. Since the alleged negligence of the company was based on the negligence of the other defendants, it could not be liable unless they were liable. A verdict for them would have been a verdict for the company. Hence the case presents a mistrial. The verdict should not have been accepted.

The plaintiffs cite this statute. "In all actions hereinafter brought against any common carriers to recover for damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury." Laws 1907, chap. 203, § 2.

However, in running a machine shop, a farm, or a coal mine, the liability of a common carrier is precisely the same as that of any other

party doing a similar business. For reasons above stated the judgment is reversed, and the case remanded without costs to either party.

Reversed and remanded.

ANDREW ODEGARD, Respondent, v. I. C. HAUGLAND, Appellant.

(169 N. W. 170.)

Personal property — chattel mortgage — subject to lien of — foreclosure and sale — agreement between purchaser and owner — privilege to owner to repay purchase price with stated price within stated time — purchaser becomes agent of owner — must deliver property to owner — on tender of amount within stated time — his failure and refusal constitute conversion.

1. Where personal property is subject to the lien of a chattel mortgage and such chattel mortgage is foreclosed and the personal property covered by such chattel mortgage is sold upon such foreclosure sale, and a purchaser at such sale agrees with the owner of the personal property sold at the chattel mortgage sale that the purchaser would purchase the personal property at such sale and pay for the same and that the owner might, within five days, repay the purchaser the amount paid out by him at such sale, such purchaser, under such an agreement, is the agent of the owner of the property and upon the payment or tender to the purchaser by the owner of the purchase price of said property for which the property was sold at said foreclosure sale within the time stipulated the purchaser must deliver such property to the owner, and failing and refusing to do so in accordance with the terms of the agreement he is liable for conversion for the value of the property purchased at such sale and converted.

Agent for another — executory agreement to act as — consideration — not needed where act is gratuitous — promise must be kept.

2. An executory agreement to act as agent for another is ordinarily not binding on either party unless based on sufficient consideration, but where one gratuitously agrees to act for another and enters upon the performance of the undertaking, he must complete performance according to his promise even though there is a lack of consideration.

Agency in such cases — question for jury — under appropriate instructions — verdict conclusive.

3. The question of agency was submitted to the jury under proper instructions and it found the agency existed and its verdict is conclusive in this regard.

Opinion filed July 16, 1918. Rehearing denied September 25, 1918.

Appeal from the District Court of Benson County, North Dakota, Honorable *C. W. Buttz,* Judge.

Affirmed.

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

Where the mortgagor gives a subsequent mortgage upon the same property, his purchase at sale under first mortgage will operate for the benefit of it in the same way as a discharge or a transfer to himself. 3 Jones, Mortg. § 1887 and cases cited; Ayer v. Phila. & B. Brick Co. 157 Mass. 57, 31 N. E. 717.

He cannot set up against his own encumbrance another one that he himself has given. In like manner the purchaser of an equity of redemption subject to two mortgages, purchasing at foreclosure of senior mortgage, cannot set up his title acquired at the sale, as against junior mortgages. Stiger v. Mahone, 24 N. J. Eq. 426; Hilton v. Bissell, 1 Sandf. Ch. 407; Thompson v. Halsted, 21 Wis. 118.

The right to redeem is given only to the mortgagee or his assigns. Comp. Laws 1913, § 8134.

There was no valid contract between appellant and respondent. A proposition made by one, and not accepted by the other at the time, does not constitute a contract, nor was there the slightest consideration. Ayer v. Phila. & B. Face Brick Co. supra; Murphy v. Hanna (N. D.) 164 N. W. 32; Bailey v. Austrian, 19 Minn. 525; Tarbox v. Gotzian, 20 Minn. 139; Stensgard v. Smith (Minn.) 44 N. W. 669; Ellsworth v. Southern Minn. R. Co. 18 N. W. 822, 825; Tucker v. Wood, 12 Johns. 190; Keep & Hale v. Goodrich, 12 Johns. 396.

All that was said and done by the parties before the sale does not make a contract. What passed between them after the sale is entirely immaterial and inadmissible. Re Novak, 111 Fed. 161, Am. Bankr. Rep. 27; Re Roger, B. & Co. 196 Fed. 758, 28 Am. Bankr. Rep. 336.

Flynn & Traynor, for respondent.

A bankrupt has an interest in his bankruptcy estate even though the legal title has passed to the trustee upon his appointment and qualification. 7 C. J. 417.

The mortgagee, his assigns, or any other person may, in good faith, become a purchaser of property sold under mortgage. Comp. Laws 1913, § 8130.

The contract between the parties was one of agency, and the violation of such agency contract entitles the injured party to damages. Schmidt v. Beiseker, 14 N. D. 587.

Such a case as this, where one gratuitously offers to perform a service for another, and agrees that such other shall have the benefit thereof, does not require any consideration. Where a person enters upon and performs such act for another, it is his duty, and the law will require him, to keep his promise. 2 C. J. 433, 717.

It is an established rule of law that an oral agreement to extend the time of redemption, or to even give a right of redemption when no such right existed, is a valid agreement, and not within the Statute of Frauds, and for its support needs no consideration. Sleeten v. First Nat. Bank (N. D.) 163 N. W. 534; Wade v. Major (N. D.) 162 N. W. 399; Bristol v. Hershey (Cal.) 95 Pac. 1040; Ogden v. Stevens (Ill.) 89 N. E. 741; 27 Cyc. 1818; Kenmare Coal Co. v. Riley, 20 N. D. 182; Bickel v. Wessinger (Or.) 113 Pac. 34.

Defendant bought in the property at the foreclosure sale for plaintiff, and as plaintiff's agent, and agreed that plaintiff could repay him and have the property at any time within five days. Plaintiff offered the money to defendant within such time. Defendant wrongfully refused to accept same and deliver to plaintiff the property. Such acts on his part constitute a conversion for which he must answer in damages. Schmittdiel v. Moore (Mich.) 79 N. W. 195; Rice v. Kahn (Wis.) 35 N. W. 465.

GRACE, J. Appeal from the judgment of the District Court of Benson County, North Dakota, Honorable C. W. Buttz, Judge.

This appeal is one where the defendant appeals from the judgment of the district court of Benson county, and from an order denying a

motion for a judgment notwithstanding the verdict. The plaintiff, Odegard, also appeals from a portion of the judgment, being a portion thereof which denies the right of Odegard, the plaintiff, to recover approximately $700 in addition to the amount of the verdict rendered by the jury, basing his right to recover such additional amount on the alleged error of the court in instructing the jury to deduct from the value of the machinery involved in the action, the amount of the liens of the Avery Manufacturing Company and John W. Orchard. The action is one where the plaintiff seeks to recover from the defendant the value of a certain threshing machine and engine, the value of which is alleged to be $4,000, subject to a mortgage lien in favor of the Minneapolis Threshing Machine Company for $662, which was foreclosed and the property sold on the 1st day of August, 1913. The plaintiff pleads and relies upon the contract alleged to have been entered into between plaintiff and defendant just prior to the sale of such property at such foreclosure sale.

Plaintiff further alleges that the terms, in short, of such contract being that the defendant was to be at such sale and bid in and purchase the said threshing machine and engine and pay for the same, and that plaintiff was to repay the defendant within five days after the day of sale; that the defendant was to have the use of the threshing machine and engine for two days of the five days as compensation for his services in purchasing the threshing machine and engine on behalf of plaintiff. Plaintiff further alleges that the defendant appeared at the time of sale, bid and purchased the threshing machine and engine for $750; that within five days, plaintiff tendered the defendant the sum of $750 with interest which was refused by defendant, which amount plaintiff deposited in the Farmers and Merchants Bank at Warwick together with $2 interest, payable to the order of the defendant and served notice on defendant of such deposit. The answer of the defendant is a general denial, except that it admits the mortgage to the Minneapolis Threshing Machine Company and that the defendant bought the threshing machine and engine at the sale for $750.

Some considerable period of time prior to August 1, 1913, Odegard purchased a certain Minneapolis threshing machine and engine complete and had possession thereof until about August 1, 1913. In the spring of 1913, Odegard became bankrupt, filed his petition in bank-

ruptcy and trustee was appointed. The Minneapolis Threshing Machine Company had a chattel mortgage lien on the machine. Default having occurred in the mortgage, the same was foreclosed and the machinery covered by said mortgage was advertised for sale on August 1, 1913, at the village of Warwick. The sale occurred at about two o'clock in the afternoon of that day. Odegard attended the sale. It is claimed by Odegard that a short time before the sale, and in the afternoon of the day of sale, Haugland came to Odegard who claimed to be then standing near the machinery on the street and asked Mr. Odegard if he intended to redeem the rig, and Mr. Odegard claims and testifies that Haugland said to Odegard: "I will bid it in for you and you can come in and settle afterwards." Odegard testifies: "I thought that would be good enough but I don't know as I said anything." This was just a few minutes before the sale. Haugland, in his testimony, denies any such agreement.

There were two conversations which may be considered as throwing some light upon whether the contract, which if a contract at all, was one of agency. Such conversations are testified to by the plaintiff and are as follows; the first conversation having taken place in the bank shortly after the sale:

Q. Was there some conversation between you and Mr. O'Hara and Mr. Haugland in the bank there at this time with reference to this sale?

A. Yes, sir.

Q. Just go ahead and state the conversation or the substance of it as near as you can.

A. With O'Hara?

Q. Tell it all.

A. Mr. O'Hara told me I had five days within which to redeem the rig if I wanted to.

Court. Was Mr. Haugland there when Mr. O'Hara was talking to you?

A. Yes, sir.

Court. Right close so that he could hear you?

A. Yes, sir, if he wanted to.

Mr. Cowan. I move to strike out the answer.

Court denied.

Witness. Mr. O'Hara told me I had five days within which to redeem if I wanted to. Twice he said that to him and Mr. Haugland stood right there and he says, "You can have five days, exclusive of to-day, in which to settle for the rig. All I want is a couple of days threshing."

The second conversation testified to was on the 6th day of August, 1913. The testimony is as follows:

Q. On the 6th day of August, 1913, did you have a conversation with Mr. Haugland about settling for the machine?

A. Yes, sir. I did.

Q. Where was that conversation?

A. At his own home.

Q. Who was with you at that time?

Q. Mr. Orchard.

Q. Just state to the jury the conversation you had down there with Mr. Haugland at that time. Tell the conversation as near as you can; what was said by you and by Mr. Orchard and by Mr. Haugland.

A. Mr. Orchard first spoke up and said he had come to settle for that rig, and Mr. Haugland said the time had expired at four o'clock banking hours this afternoon, and he spoke up again and they quarreled a while. They talked loud and I don't remember just what was said. Then I said I didn't come here to quarrel with you, I come to settle for that rig, and he said, "You are too late."

All of the testimony, with reference to such conversations, was admitted over the objections by defendant's counsel, which objections, we are of the opinion, were properly overruled and are equally clear there was no error in the admission of such testimony for the purpose for which it was intended. The appellant claims, in order for the plaintiff to recover, he must prove three things: (1) That he was the owner of the property; (2) that the contract which he alleges in his complaint was made; and (3) that there was an equity of value in the property over and above the mortgages there against it available to plaintiff of which he was wrongfully deprived by the refusal of the defendant to perform the contract alleged. The appellant further claims that if the plaintiff fails to prove any one of these three things,

he cannot recover in this case. We do not agree with this contention of the appellant, and we hold that the only one of such propositions necessary to establish, is the contract set out in the plaintiff's complaint. Such contract, if it were in fact made, was one of agency. As we view this case, it is immaterial whether the plaintiff was either the owner or had any equity in the property in question at the time of the sale thereof. It may be taken into consideration, however, that the plaintiff at one time was the owner of this threshing rig, having become bankrupt and filed his petition in a voluntary bankruptcy proceeding, and the trustee having been appointed, the legal title of all his property would vest in the trustee for the benefit of the creditors, subject only to the plaintiff's right of exemption. From the testimony, the property in question was not set off to the plaintiff as an exemption.

Whether the plaintiff considered he still had an interest in such rig or had a right of redemption from such sale, or was at the sale merely to make a bid on the property and try to get his threshing rig back, we cannot say, but we think it fair to assume, in view of his prior ownership of the threshing rig, and all the circumstances surrounding the case that he attended such sale for the purpose of, in some manner, protecting an interest which he must have assumed that he had in such threshing rig. It is apparent that he likely would not have attended the sale unless he had some such purpose. Whatever his purpose and intent may have been in this regard just before the time of the sale becomes, we believe, immaterial in view of the offer made by Haugland to the plaintiff when the defendant said, "I will bid it in for you and you can come in and settle afterwards." It is clear that if the plaintiff had intended to become a bidder at the sale, the statement of the defendant above recorded relieved him from the necessity after he acquiesced in the offer of the defendant and concluded to adopt this method of getting his threshing rig back.

It is in this regard that the two conversations which we have set out in full as testified to by the plaintiff become material, as they are conversations occurring at or near the time of the sale that are competent for the purpose of throwing light upon the matter of whether the minds of the parties actually met upon the contract of agency, and they were, for that purpose, properly considered by the jury in determining whether such a contract of agency had, in fact, been entered into be-

tween the parties and whether the minds had met upon such contract, and that the plaintiff relied upon the agency of the defendant to purchase the rig at the sale and permit plaintiff to settle for it afterwards. It is shown by the testimony that the plaintiff did, within the five-day period, procure the amount of money for which said threshing rig was sold at such sale, and brought it and offered it to the defendant who refused to accept it on the theory that the time was up at four o'clock on the fifth day after the sale.

If this testimony is true, the defendant must also have been of the opinion that the plaintiff had the right to repay the defendant the amount of money paid for such threshing rig on the sale any time within the five day period. If such an arrangement was made and such a contract of agency entered into, the plaintiff had the right any time within the five days after the day of sale, pursuant to the terms of the agreement, to repay his agent, the defendant, the money and thereby come into possession of the threshing rig, this not on the theory that the five days was a redemption period, but it was the period of time in which the principal had to reimburse his agent for the money paid out on the principal's account.

As we view this matter under the agreement made when the defendant bought the threshing rig, he bought it, not for himself, but for the plaintiff, and though the title to the threshing rig might be in the defendant by reason of he having purchased it at the sale the threshing rig, in fact, belonged to the plaintiff and was his property, the only condition being that he repay the defendant the money within the five days. This the plaintiff did offer to do. If the agreement was as claimed by plaintiff and as the jury found it to be, the defendant after his purchase at the sale, held the threshing rig in trust for the plaintiff until such time as the plaintiff's right to repay the money had expired. The following rule of law we think applies in this case. It is found in 2 C. J. 433:

"An executory agreement to act as agent for another is ordinarily not binding on either party unless it is based on sufficient consideration. Where, however, one who gratuitously promises to act for another enters upon performance of the undertaking, he is bound to complete performance according to his promise, notwithstanding the lack of consideration; and if the promise has been executed in pursuance of the

authority conferred, it is immaterial whether or not there was any consideration for the agent's undertaking, since the rule making consideration an essential element of a simple contract does not apply to executed agreements."

2 C. J. 717:

"If the agency is gratuitous the agent will not be liable for a nonfeasance if he never entered upon the service expected of him; but if the agent once enters upon the execution of the business and any loss results from his neglect or failure to carry out his instructions he may be held responsible."

The jury, in this case, determined the agreement was made, and testimony shows the defendant executed the agreement by purchasing the rig at the sale. He, therefore, entered upon his contract of agency and there was no need of any further consideration, the jury having decided in favor of the plaintiff and having established the making of the agreement and the defendant having entered upon the performance of the agreement and bought the threshing rig at the sale. It is proper that he should account for the value thereof, less the encumbrance to the Avery Manufacturing Company and Orchard, or, in other words, in the sum fixed by the jury in their verdict.

The contract being one of agency is not within the Statute of Frauds. Schmidt v. Beiseker, 14 N. D. 587, 5 L.R.A.(N.S.) 123, 116 Am. St. Rep. 706, 105 N. W. 1102. The appellant's contention is that the transaction is within the Statute of Frauds. The contract having been shown to be one of agency, the contention is not in point.

The respondent, in his appeal from the judgment, contends that his motion should have been granted to add to the verdict the sum of the Avery and Orchard mortgages. If it were permissible to do this in any case, which we do not believe it is, it could not be done in this case, for the reason that the contract having been determined to be one of agency the purchase of the property by the agent was for the principal, and not for the agent, and the principal was the actual owner of the property so purchased. In other words, the property was purchased at such sale for plaintiff and it was his property under the theory of the agreement. This being true, the mortgages to the Avery Company and Orchard, if they had not been paid or otherwise disposed of would still remain liens against the property in plaintiff's hands, and if plaintiff

in the meantime had paid such mortgages he has done only that which it was his duty to do under the circumstances in this case.

If the defendant still retains the property and has converted it to his own use, and if it be conceded that the amount of the two mortgages to Avery Manufacturing Company and Orchard aggregating $699.19 and that under the instructions of the court such sums were ordered to be deducted from the total value of the property, that would not authorize this court to add that sum to the verdict. The only thing that could be done would be to grant a new trial and that does not appear to have been requested, though, in all probability, the court has the inherent power to order a new trial in a proper case even though no request is made.

Instructions given by the court with reference to the Avery and Orchard mortgages are as follows:

"If you desire or find from the evidence in this case that such a contract was made as claimed by Mr. Odegard, then you will come to the question of damages in this case, and if you come to that subject and decide to allow damages, the first great question upon that matter for you to decide will be: What was the value of that threshing machine on the 6th day of August, 1913, the day on which Mr. Odegard offered to pay Mr. Haugland and Mr. Haugland refused to accept the money? What was the fair reasonable cash market value of the machine at that time and place? When you have found that, then you will deduct from that sum, first, the amount which Mr. Haugland paid for the machine and which you see Mr. Odegard would have to pay back in order to get the threshing machine, and also you will deduct further and in addition to that the amount of any liens or encumbrances or mortgages that are against that machine and which had before the 1st of August, before the time of sale, been given by Odegard against that machine."

It is clear from such instructions that the jury would deduct the liens to Avery Manufacturing Company and Orchard, which were clearly proven, from the purchase price, and also deduct the $750 paid by Haugland for the machine at the day of sale.

Haugland has retained the machine and it appears from the testimony that the plaintiff has paid the Avery and Orchard liens, and if the amount of such liens were deducted by the jury from the value of such threshing rig such deduction should not have been made. It

would be different if the plaintiff were getting the threshing rig back and had possession of it or should get possession of it, but this he cannot do as he has sued in conversion and the suit is for the value of the threshing rig. If the plaintiff is entitled to recover at all, he is entitled to recover the full value of the threshing rig less the $750 paid by Haugland.

It does appear from the testimony that Odegard has possession of the Avery notes and that he, in fact, has thus discharged the chattel mortgage lien and so it must be conceded that the Avery Company had no further lien upon said threshing rig. So was the Orchard lien partially if not wholly settled. The evidence would seem to show that there were no liens against the property in question, and if that is true there should not have been deducted from the damage allowed, which was the value of the threshing rig and the Avery and Orchard liens.

There is, however, another theory by which the jury might have arrived at the result which is shown in their verdict. It was the exclusive province of the jury to establish the value of the property in question from testimony given at the trial. The jury might have found the value of the property a great deal less than that contended for by the plaintiff, and have disallowed or not charged against the plaintiff the Avery and Orchard liens and may have found the actual value of the property in question after deducting the $750 which Haugland paid at the sale for the machine to be $700 as the actual remaining value of the property in question.

There is nothing definite or conclusive to show that the jury found the value of the property to be any specified amount and nothing to show that it deducted the Avery and Orchard liens nor that it found such liens to exist and charged the plaintiff for such liens. We are not inclined to send the case back for a new trial, and believe the verdict of the jury should stand. The question of exemption relied upon by the defendant, in the view we have taken in this case, is not material. If the whole transaction is one of agency, the question of exemption does not arise.

We have examined all the assignments of error by the defendant and find no reversible error.

Judgment appealed from is affirmed with costs.

CHRISTIANSON, J. I concur in the result.

ROBINSON, J. (specially concurring). This action is based on a breach of a contract of agency. The claim of plaintiff is that he had an interest in a threshing outfit—a 32 h. p. engine, separator, blower and self-feeder, which was about to be sold on a chattel mortgage for $750; that he agreed with defendant to bid in and purchase the property for plaintiff and that defendant did bid in and purchase the outfit for $750, which within five days plaintiff duly tendered him and that he refused to receive the same and held the property as his own. Defendant appeals from a verdict and judgment for $600 damages and from an order denying a new trial. He wants property well worth $2,000 for $750.

The case is governed by the law as stated by this court in Schmidt v. Beiseker, 14 N. D. 587, 5 L.R.A.(N.S.) 123, 116 Am. St. Rep. 706, 105 N. W. 1102. The complaint is based on a contract of agency, and not on a complaint for the conveyance of property exceeding $50 in value. The only question is as to whether or not there is evidence sufficient to sustain the verdict. The outfit was well worth $2,000. Actual possession of the property was held by plaintiff though his assignee in bankruptcy held the legal title subject to the chattel mortgage. The plaintiff felt that he had some real or equitable interest in the property which he desired to secure by a purchase of the same. He was present at the sale but apparently did not then have $750.

Mr. O'Hare was making the sale for the threshing machine company. Plaintiff testifies that just before the sale he had a conversation with defendant. He says: "Mr. Haugland told me he would bid it in for me and that I could come in and settle afterwards. Soon after the sale he conversed with Haugland at his bank. O'Hare was there and told me I had five days to redeem the rig. Haugland stood right there and said: You can have five days exclusive of to-day to settle for the rig. All I want is a couple of days' threshing. I said that would be $200. He said 'I will pay the crew.' "

The offer of defendant to bid in the property for the plaintiff was favorable to him and the jury found that he assented to it and relied on it, otherwise the plaintiff might have protected himself by a redemption or some other means. Doubtless for little or nothing he could have obtained a retransfer of the property from the assignee in bankruptcy, who did not care to protect the property. On the last day for redemp-

tion he tendered to the defendant the price of the property, $750 with $2 interest, and it was refused.

Now it is not the purpose of the law to aid one man in robbing another by a deceptive or smooth deal. There is no good reason for a banker going out and making false representations to a poor man whose property is about to be sold on a chattel mortgage. There is no good reason for setting aside the verdict of the jury except that it should be for a much larger sum, and yet the court may not substitute a larger verdict. There is no special finding by the jury. There is nothing for this court to do only to affirm the judgment or to grant a new trial, and probably an affirmance of the judgment is best for both parties. There should be an end to litigation.

H. W. BEEBE, Appellant, v. JACOB P. HANSON, Respondent.

(169 N. W. 31.)

Contract — exchange of property — specific performance — action for — terms of agreement — must be reasonably certain — act to be done must be clearly ascertainable — specific performance denied — when — court — discretion of.

This is an appeal from a judgment denying the specific performance of a contract to exchange three quarter sections of land in Benson county, North Dakota, for a stock of clothing at Emmetsburg, Iowa. The goods to be selected so as to make a *well balanced stock*. The contract gave no method of selecting the goods. The land was worth $7,000. The selected stock was less than half the land value.

Specific performance of an agreement must be denied when its terms are not sufficiently certain to make the precise act which is to be done clearly ascertainable. Also, when it is not based on an adequate consideration and when it is not in all respects just and reasonable. Even when a contract is fair and honest, specific performance is not a matter of course. It rests in the sound, legal discretion of the court.

Opinion filed July 19, 1918. Rehearing denied September 25, 1918.

Appeal from the District Court of Benson County, Honorable *C. W. Buttz,* Judge.

Plaintiff appeals.

Affirmed.

J. C. Adamson and *H. S. Blood,* for appellant.

Except for latent defects, the buyer of goods becomes bound to pay the purchase price, and cannot complain of the quality, if he accepts the goods after inspection. 35 Cyc. 229, and cases cited; Bullock v. Consumers Lumber Co. (Cal.) 31 Pac. 367.

"If the vendee receives the goods in discharge of the contract after having inspected them, or having had a fair opportunity of inspecting them, the terms of the contract are complied with and he has no action on account of the fact that the goods are not as stipulated." James v. McEwen, 91 Ky. 373, 12 L.R.A. 399; Williams v. Robb, 104 Mich. 242, 63 N. W. 352; Thompson v. Libby, 35 Minn. 443, 29 N. W. 150; McCormack v. Sarson, 45 N. Y. 265, 6 Am. Rep. 80.

In this case there was an acceptance of the goods after inspection, or full opportunity for inspection, and the contract was complete. Reed v. Randall, 29 N. Y. 358; Gillespie v. Torrance, 25 N. Y. 306; Hargous v. Stone, 1 Seld. 73; Sprague v. Blake, 20 Wend. 61; Hart v. Wright, 17 Wend. 267, 1 Wend. 185; 20 Johns. 196; Smith v. Coe, 170 N. Y. 162, 63 N. E. 58.

"If the buyer accepts the goods without objection, when sued for the price, he cannot be heard to allege that the contract has not been performed." Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 986.

Plaintiff was not defendant's agent to select the goods. Defendant was present and participated in the selection and segregation of the goods. He exercised his own judgment and will not be permitted to say that he relied upon plaintiff's judgment and actions in the matter. Kinkel v. Winne, 72 Pac. 548; Dickson v. Jordon, 53 Am. Dec. 403, 406; Towell v. Gatewood, 33 Am. Dec. 437.

Flynn & Traynor, for respondent.

Where a contract is not fair and just, and where there is inadequacy of consideration, and where consent or assent was obtained by concealment, misrepresentation, circumvention, or unfair practice, and where assent has been obtained under the influence of mistake, misapprehension, or surprise, and where one has not been fully and fairly informed,

specific performance will not be enforced. Comp. Laws 1913, §§ 7192–7201; Shoop v. Burnside (Kan.) 98 Pac. 202, 204.

"Specific performance is not a matter of right, but one of equity. A contract to sell or purchase may be regularly made, yet specific performance will not follow as a matter of course." Fowler v. Marshall, 29 Kan. 665; Baird v. Lagan, 35 Kan. 228, 10 Pac. 564.

The application is addressed to the sound judicial discretion of the court. Reid v. Mix, 63 Kan. 745, 55 L.R.A. 706, 66 Pac. 1021; Viele v. Troy & B. R. Co. 21 Barb. 381; Loosing v. Loosing (Neb.) 122 N. W. 707.

Where the contract is one-sided, and for any of the reasons here mentioned does not appeal to equity or to the conscience of the court, it will not be specifically enforced. 36 Cyc. 615.

"A marked and striking inequality in the business experience and capacity of the parties, resulting in a highly improvident contract, has furnished the chief or sole reason for defeating specific performance." Wilson v. Larson (Iowa) 116 N. W. 703; Steltzer v. Compton (Iowa) 149 N. W. 243; 36 Cyc. 602; O'Connor v. Lightizer (Wash.) 75 Pac. 643; Brandt v. Krogh (Cal.) 111 Pac. 275.

Inadequacy of consideration affords ample reason for a court to refuse specific performance. Phalen v. Neary (S. D.) 117 N. W. 142; Trapaagen v. Kirk (Mont.) 77 Pac. 58; Morril v. Everson (Cal.) 19 Pac. 190; Stein v. Archibald (Cal.) 90 Pac. 538; White v. Sage (Cal.) 87 Pac. 193; Cummings v. Roeth (Cal.) 101 Pac. 434; Hobbs v. Davis (Cal.) 143 Pac. 733; Wilson v. White (Cal.) 119 Pac. 895; 2 Warvelle, Vendors, §§ 741, 745.

Robinson, J. This is an appeal from a judgment denying specific performance of a contract to exchange land in Benson county for a stock of clothing at Emmetsburg, Iowa. In October, 1915, the plaintiff owned a stock of clothing at Emmetsburg, Iowa, and the defendant owned three quarter sections of good land in Benson County, North Dakota. His equity in the land was worth over $7,000. He agreed to exchange the land for a stock of clothing to be selected. The plaintiff agreed to pack, box, and deliver to defendant at Emmetsburg, Iowa, a part of his clothing stock kept at his store, consisting of men's, boys', and children's suits, pants, overcoats, and hats, caps, shoes, hats, under-

wear, sweaters, and such like to an amount in value equal the land and not less than $6,500, nor more than $7,000. The goods to be rated at wholesale prices less 2 per cent, and to be selected so as to make a well-balanced stock without a preponderance of any line or article. As the defendant had no experience in the dry goods business, he depended on the plaintiff to make the proper selections and to furnish him an invoice. When defendant received the invoice he knew enough to submit it to a good clothing expert, and was advised that the stock selected consisted of odds and ends; that it was not a well-balanced stock, and that its value did not exceed $2,000. Hence defendant promptly refused to receive the goods.

This action was commenced in November, 1915. It was brought to trial in August, 1916. Judgment against the plaintiff was entered in November, 1916. Appellant's brief was filed March 22, 1918, and the appeal was argued and submitted in June, 1918. Doubtless such delays in the prosecution of the action have not improved the value of the selected stock of goods, which have lain packed in boxes in defendant's store at Emmetsburg, Iowa.

The trial court found that the stock was an ill assortment of odds and ends, and not a well-balanced stock, and that its value did not exceed $1,750, and that defendant's equity in the land was over $7,000. The findings are well sustained by the evidence and there is no occasion for stating or arguing the same. The burden of proof was upon the plaintiff. It was for him to commence and prosecute his action with diligence and to appeal to the conscience of the court by alleging and proving a fair and honest contract. This he failed to do. Indeed, the complaint does not state a cause of action for specific performance. It merely gives a copy of the contract and avers that the plaintiff has performed all the conditions of the contract on his part and that defendant has refused to comply with the contract. Such facts make no appeal to equity. Even when a contract is fair and honest, specific performance is not a matter of course. It rests in the sound discretion of the court. 36 Cyc. 544, 548. But when a contract is not in all respects fair and honest, just and reasonable, and based on an adequate consideration, then specific performance must be denied. Comp. Laws 1913, § 7198. And specific performance of an agreement must be denied when its terms are not sufficiently certain to make the precise act which is to be

done clearly ascertainable. Comp. Laws 1913, § 7197. Here there was to be a selection of a well-balanced stock of clothing to the amount and value of $7,000 at wholesale prices, less 2 per cent, and clearly the contract gave no precise method or any method of making such a selection.

While plaintiff contends that such a selection has been actually made, it cannot be contended that proof has been made to the satisfaction of the court or that the action has been prosecuted with reasonable diligence. The complaint, the proof, and the prosecution make no appeal to equity.

Judgment affirmed.

L. B. GAGNON, Appellant, v. A. B. VEUM, Respondent.

(169 N. W. 174.)

Vendor — contract of sale — not entitled to rents — unless reserved — holding over — period of.

In an action of forcible entry and detainer it appeared that the plaintiff had leased the property in question to a tenant who had stipulated in the lease that his term might be terminated if the property were sold. The plaintiff proceeded to terminate the lease under this provision and in this action seeks to recover possession and the rents accruing subsequent to the serving of the notice to quit. *Held:*

1. There being no provision in the contract of sale whereby the vendor, the plaintiff, reserved the rents, he is not entitled to recover rent as damages during the period of holding over.

Sale of property — contract for deed — vendor and purchaser — latter considered owner — sustains risk of loss — right to rents and profits.

2. Upon the sale of property under a contract for deed, as between the vendor and purchaser, the latter is regarded as the owner of the property, sustains the risk of loss, and has the corresponding right to the rents and profits.

Contract of sale — vendor and purchaser — hotel — operation of — proceeds of — agreement for division — reservation of rents — does not amount to — property in wrongful possession of tenant.

3. Provisions in a contract of sale, whereby the vendor and purchaser agree upon a division of the proceeds of the operation of a hotel upon the property

embraced in the contract, do not amount to a reservation of the rents and profits while the property is wrongfully held by a tenant in possession.

Opinion filed September 26, 1918.

Appeal from order of District Court, *Frank E. Fisk*, J.

Affirmed.

McGee & Goss (*B. E. Crippen*, of counsel), for appellant.

Action to recover the rental value of property sold under a contract of sale. Such action cannot be brought in connection with any other except for rents and profits accrued or damages arising by reason of the defendant's possession. No counterclaim can be interposed except as a set-off to a demand made for damages or rents and profits. Vidger v. Nolin, 10 N. D. 353, 87 N. W. 593; Comp. Laws 1913, § 9072; McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 243.

The right of possession having been disposed of, the action did not abate so far as the issue as to the nonpayment of rent was concerned. The action is strictly one for possession based on a wrongful detainer, and a recovery for rent as permitted in connection therewith. Rev. Codes 1905, § 8409, Comp. Laws 1913, § 9072; 24 Cyc. 412 (4), 1172, 1400, 1414.

"There can be no liability for rent without privity either of contract or of estate." 24 Cyc. 1176.

So far as title to these rents and profits and right of possession of the leased property is concerned, it is in the plaintiff, and the defendant is a stranger. The plaintiff and Austin, the vendee, made their own contract, which provides that both title and possession shall remain in plaintiff. Defendant is a stranger and an intruder. Note in 35 L.R.A. (N.S.) 1066.

"A tenant cannot question the title of his landlord without surrendering possession of the property and thereby terminating the tenancy." 38 N. W. 963.

Greene & Stenersen, for respondent.

"A person to whom any real property is transferred or devised upon which rent has been reserved or to whom any such rent is transferred is entitled to the same remedies for recovery of rent for nonperformance of the terms of the lease or for any waste or cause of forfeiture as his

grantor or devisor might have had." Comp. Laws 1913, § 5345; Rev. Codes 1899, § 3366; N. P. Ry. Co. v. McClure, 9 N. D. 73; Winterfield v. Stauss, 24 Wis. 394.

In a contract like the one here, where the land is sold under a contract for future payments, and title is reserved in the grantor, the grantee becomes the equitable mortgagor, and the grantor the equitable mortgagee. Nearing v. Coop, 6 N. D. 345; Jones, Mortg. §§ 226, 1449 and cases cited; 39 Cyc. 1302.

"The purchaser is in equity actually seised of the estate and may sell or charge it before it is conveyed to him." Majors v. Maxwell, 120 Mo. App. 281, 96 S. W. 731; Sewell v. Underhill, 127 N. Y. App. Div. 92, 11 N. Y. Supp. 85; Clarke v. Long Island Realty Co. 126 N. Y. App. Div. 282, 110 N. Y. Supp. 697; 29 Am. & Eng. Enc. Law, 2d ed. 703; Clapp v. Tower, 11 N. D. 557, 93 N. W. 862; Nearing v. Coop, 6 N. D. 349, 70 N. W. 1044; Roby v. Bank, 4 N. D. 156, 5 Am. St. Rep. 368, 59 N. W. 719; Moen v. Lullestal, 5 N. D. 327, 65 N. W. 694; Lombard v. Chic. S. Cong. 64 Ill. 477; Warvelle, Vendors, 2d ed. 843.

Privity denotes mutual or successive relationship to the same property or right of property. 6 Words & Phrases, 5606.

Here, there existed privity in estate between the defendant and Austin, plaintiff's vendee. It arose from their contract. The equitable title went to Austin under their contract, but charged with the leasehold estate of defendant. Society v. Varney, 54 N. H. 376; Hartley v. Phillips, 198 Pa. 9, 47 Atl. 929; Mygatt v. Coe, 124 N. Y. 212, 11 L.R.A. 646.

True, a tenant cannot dispute his landlord's title, but in an action by the lessor to recover rent, the lessee may show that the lessor has sold and conveyed the premises to another without reserving the rent thereafter to become due. Rent is an incident to the reversion, and the right to it passes by assignment of the reversion. Allen v. Hall (Neb.) 92 N. W. 171; English v. Key, 39 Ala. 113; Franklin v. Palmer, 50 Ill. 205; Burden v. Thayer, 3 Met. 76, 37 Am. Dec. 117; Van Wicklen v. Paulson, 14 Barb. 654; Demarest v. Willard, 8 Cow. 206; Peek v. Northrup, 17 Conn. 217.

BIRDZELL, J. This is an action under the Forcible Entry and Detainer Statute to recover possession of certain hotel property, with damages for its detention. On the 17th of March, 1916, the plaintiff, Gagnon, leased the property in question to the defendant, Veum, at a rental of $100 per month. The term of the lease was one year from April 15th, 1916, and the lessee stipulated for the right to use the premises for "any respectable and legal business." It was agreed that the lessee should have the privilege of rerenting for another period of twelve months after the expiration of the lease, and upon the back of the form lease was a stipulation as follows: "It is hereby understood and agreed that in case the party of the first part disposes of the property leased by the party of the second part the term of this lease will expire November 15th, 1916, and if sold before that date the rent money will be paid at the place stated in this contract and to the credit of the new owner. It is also understood and agreed that in case of a sale of the property the privilege of rerenting the property will be null and void."

On November 13th, 1916, the plaintiff served notice on the defendant to the effect that he had sold the property, and that, under the provisions of the lease, the term would expire on November 15th, 1916. Veum refused to yield possession, whereupon the forcible entry and detainer proceedings were begun which have culminated in this appeal.

The action was originally begun in justice court, but after an appeal to the district court an amended complaint was filed, containing, among other allegations, an allegation of damages occasioned to the plaintiff by reason of the withholding of the possession from November 15th, 1916, to the date of the suit, at $200 per month less a credit at the rate of $100 per month for an advance payment of rent made by the defendant on November 10th, before the receipt of the notice of cancelation. In the district court a demurrer was interposed to the complaint which was overruled. The defendant then moved to strike from the complaint the above allegation of damages, which motion was granted. This appeal is taken from the order striking the foregoing allegation from the complaint.

The contract of sale upon which the plaintiff bases his right to cancel the lease is made a part of the complaint, and by it the plaintiff "sells and agrees to convey" to one Vern Austin, "by good and sufficient deed of warranty on the prompt and full performance" of the said contract

the property in question. The purchaser agrees to pay $7,000, $100 down and $6,900 deferred, and for the furniture and fixtures he is to pay invoice price plus 10 per cent and the freight. The contract contains other stipulations whereby the plaintiff vendor is to have general charge of and control over the hotel property to pay the expenses of operation, the purchaser to receive as his compensation for services in conducting the hotel one fourth of the gross receipts of which he "shall become the full and absolute owner." This arrangement was to continue until the furniture and necessary improvements had been paid for in full, after which time the party of the second part was to pay $300 and be given full control of the hotel and receive all the income therefrom, paying thereafter on the purchase price $300 per month on the first day of each month. The above is a sufficient statement of the provisions of the contract of sale to indicate the nature of the arrangement made between the vendor and the purchaser and the rights of the respective parties thereunder. It is clear from an examination of the contract that it was intended the hotel business should be continued on the premises; that the vendor was to receive three fourths of the gross receipts from which were to be paid the expenses of operation; and that this arrangement was to continue until a certain portion of the deferred payments to be made by the purchaser had been realized.

Whether or not the net portion of the three fourths of the gross receipts was pledged to the vendor for the deferred payments is not exactly clear from the contract, but it is perhaps a fair inference that it was to be applied. However this may be, it is clear that nothing was reserved to the vendor except three fourths of the proceeds of the operation of the hotel during the period when it was contemplated the business should be conducted by the vendor and the vendee jointly under the vendor's supervision. Nothing whatever is stated in the contract with reference to the right of possession as between vendor and purchaser prior to the time when the provisions of the contract governing the operation of the hotel become operative. It was, of course, contemplated that possession should be obtained on November 15th, in which event the provisions above referred to would have become operative immediately. Had the provisions of the contract become operative, obviously the question now before us could not have arisen. But, since the possession was not surrendered, and since it is impossible that the

provisions controlling the operation of the hotel business by the vendor and the purchaser could apply, the question as to whose is the right to recover damages for use and occupation or a reasonable rental of the property during the period of wrongful holding over, if shown to exist, must be determined by the application of the elementary principles affecting the rights of vendor and purchaser. Rents, in the absence of a contract to the contrary, belong to the owner. The contract of sale effects an equitable conversion of the property, the purchaser being henceforth regarded as the owner. The risk of loss is upon him and he has the corresponding right to the benefits accruing to the owner. The plaintiff in this case, having canceled the lease, has terminated the tenancy previously existing between him and the defendant, and from the date of the cancelation forward the defendant, so long as he retains possession, is deriving a benefit for which compensation must be made to the one entitled thereto. The rents have not been reserved to the plaintiff, for his contract embraces only three fourths of the receipts to be derived from operating the hotel business. This cannot, in any sense, be regarded as a reservation of rent while the property is in the possession of a third party. Since the plaintiff by his contract has not reserved such benefit to himself, it follows that it must accrue to the purchaser.

For the above reasons we are of the opinion that the order of the trial court, striking from the complaint the allegation under which the plaintiff seeks to recover the reasonable rental for the period referred to, is proper and the order is affirmed.

ROBINSON, J. (concurring). This is an action under the Forcible Entry and Detainer Statute to recover possession of certain hotel property with big damages. On March 17, 1916, at the village of Parshall in the county of Mountrail, Mr. Gagnon, the owner of the village hotel, leased the same to defendant Veum for one year from April 15th, 1916, with the right to hold for two years. The rental was $100 a month. On the back of the lease it was written that it should expire on November 15th, 1916, in case Gagnon had then sold the property and that the rent money should be paid to the credit of the new owner. Veum knew better than to think of buying hotel furniture and starting in the hotel business on a lease of six months. In case of a sale he counted on

paying rent to the *new owner*. However, it seems that in November, the hotel business was looking up and the plaintiff desired to cancel the lease and run the hotel himself, so on November 13, 1916, he served on Veum a notice to this effect: I have sold the hotel property. Your term will expire on November 15, 1916, and I will then be prepared to take over possession for the *new owner*. The money is on deposit in the bank of Parshall to take over the furniture as provided in the lease and to refund to you any rent money you may have paid which extends beyond the 15th of November, 1916.

On receipt of the notice it seems Veum suspected that Gagnon himself was the *new owner* for whom he desired to "take over possession," and that he had merely made a bogus sale to himself or to some one for the purpose of terminating the lease. Hence, he refused to quit possession. If the plaintiff had made an actual bona fide sale, there was no reason why he should take over possession for the *new owner*. He should have given the name of the new owner and allowed him to take over possession for himself, or to deal with the tenant in possession.

In the district court the plaintiff filed a supplemental complaint demanding $2,350 damages for the use of the property at $200 a month. The court made an order overruling a demurrer to the complaint by striking out all the allegations of damages, and plaintiff appeals. The complaint does not state a cause of action, and it does show affirmatively that the plaintiff has no cause of action, except it be an ordinary action for the recovery of rent at $100 a month, and he can have no such recovery in this action because it is not based on any failure to pay rent in accordance with the terms of the lease. The complaint fails to show a sale of the premises or a termination of the lease. It avers that the plaintiff leased to defendant the premises in question for one year from April 15, 1916, with the option of two years at $100 a month; that on November 15, 1916, the lease was terminated and canceled in accordance with its terms. The lease is made a part of the complaint and so is the alleged contract of sale, but the latter does not show a sale. It shows merely a conditional agreement to sell the property to one Austin for $7,000, the plaintiff to have control of the hotel property, to pay the necessary expenses of operating the same; to pay taxes, insurance, interest upon encumbrances, to make such improvements on the building as he may deem necessary; and to have general

supervision and control over the matter of hiring and discharging all help employed on the premises. And in case of death of either party, the contract is to become null and void.

Under the alleged contract of sale which becomes null and void in case of death, the plaintiff retains absolute control over the hotel property, the help employed in the hotel, and pays all expenses and receives the income. The purchaser works under the supervision of the seller and as compensation receives a per cent of the receipts. He must account for every penny he receives and must not pay out a penny without the approval of the plaintiff. Manifestly, as a matter of law, such an arrangement does not constitute a sale. It must have been made to give the plaintiff a pretense for terminating the lease and taking over the property for himself as the new owner.

The complaint shows no cause of action under the lease or the Forcible Entry and Detainer's Statute. Defendant is in possession under a valid lease which is good for two years from its date, unless the defendant fails or refuses to comply with its conditions, and unless a notice to quit is given and based on such failure; he cannot serve a notice to quit so as to make it of any force or effect in this action. There is no averment that defendant has refused to pay rent in accordance with the conditions of the lease. The action is not for any such failure or refusal.

The action is groundless and the litigation has been conducted in a vexatious manner. Hence, the order is affirmed with costs.

GRACE, J. I concur in the result.

ANTHONY WALTON, J. E. Erb, and Bert Solberg, Plaintiffs and Contestants, v. BEN OLSON, Guy Humphreys, O. N. Cleven, and George Reishus, Defendants and Contestees.

(170 N. W. 107.)

Error — acquiescence in — takes away right to object — certain procedure — consenting to — stipulation for admission of certain evidence — procedure erroneous — party is estopped to question — in appellate court — such evidence inadmissible.

1. Acquiescence in error takes away the right of objecting to it. And where a party consents to a certain procedure, and stipulates that certain evidence may be admitted, he is estopped from asserting in the appellate court that the procedure was erroneous and the evidence inadmissible.

Primary election — nominating conventions — takes place of — separate entity — of political parties participating in — preserved — party organization — means for maintenance — provided — legislature — intention — ballots — of each party — canvassed separately — separate declaration of result.

2. The primary election provided by our laws takes the place of the former nominating conventions; the separate entity of the several political parties participating in the primary election is preserved, and the means for the maintenance of party organizations provided, and it was the intention of the legislature that the ballots of each party should be canvassed separately, and a separate declaration of the result of the primary election made by the canvassing board as to each political party.

Nomination to office — person claiming to have received — ticket of one political party — upon — contest nomination — of another candidate — notice of — service of.

3. Where a person who claims to have received the nomination for some office upon the ticket of one of the political parties which participates in a primary election in this state desires to contest the nomination of another candidate or candidates, under § 881, Compiled Laws, 1913, he must serve a notice of contest upon the adverse party or parties within ten days after the county canvassing board, has completed, and officially declared the result of, the canvass of the votes of the particular party on whose ticket the contestant seeks nomination.

Nomination — contest of — statute providing for — summary remedy — secure speedy trial — notice of contest — must be given in certain time — requirement — is mandatory — compliance — essential — to maintain contest.

4. The purpose of a statute providing for the contest of a nomination or an election is to furnish a summary remedy and to secure a speedy trial. And a requirement that notice of contest be given within a certain time from the date of the happening of a certain event is mandatory and compliance therewith is an essential element of the right to maintain the contest proceeding at all.

Opinion filed October 1, 1918.

From a judgment of the District Court of Ward County, Honorable *K. E. Leighton,* Judge, dismissing an election contest, contestants appeal.

Affirmed.

Dorr H. Carroll and *W. H. Sibbald,* for contestants and appellants.

"The objection that the action was not commenced within the time limited can only be taken advantage of by answer." Comp. Laws 1913, § 7358.

The rules of practice, unless otherwise provided, are the same as provided by the Code of Civil Procedure. Comp. Laws 1913, § 1057.

Agents cannot delegate their authority without express permission from their principals. Pickert v. Rugg, 1 N. D. 230; 31 Cyc. 1425 et seq; Comp. Laws 1913, § 6362.

A contest on the nomination to office must be commenced within the time fixed by statute. Comp. Laws 1913, § 881; Olson v. Hoge, 23 N. D. 648.

In this case no separate canvass of the votes cast was ever made by the canvassing board and filed as by law provided, and therefore the canvass of the election was never completed and the statute had not even begun to run. Comp. Laws 1913, §§ 872 and 873.

The affidavit of contest is full and complete and meets all requirements of the law. Dobson v. Lindekudgel (S. D.) 162 N. W. 391; Griffin v. Wall, 32 Ala. 149; Sone v. Williams, 130 Mo. 530, 32 S. W. 1016; Marks v. Park, 7 Leg. Gaz. 55; Dobyns v. Weadon, 50 Ind. 298;

Hancock v. Hubbs, 98 N. C. 589, 3 S. E. 489; State v. Stimson, 98 N. C. 591, 3 S. E. 490; Oden v. Bates, 98 N. C. 594, 3 S. E. 491.

Because of no declaration by the canvassing board as to whom they decided were nominated to the various offices, as by law provided, the statute did not begin to run. Bowler v. Eisenhard (S. D.) 12 L.R.A. 705, 48 N. W. 136; Pol. Code, § 1998; Dobson v. Lindekugel (S. D.) 162 N. W. 391; 15 Cyc. 408; Barnes v. Gottschalk, 3 Mo. App. 111.

McGee & Goss, Palda & Aaker, and *F. B. Lambert,* for contestees and respondents.

After the official canvass was completed by the board, they issued and delivered certificates of nomination to these contestees, and the action of the board became a matter of public record, in the manner provided by law. Comp. Laws 1913, § 832.

The acts of this *de facto* board are conclusive upon contestants and upon the world. State ex rel. Bockmeier v. Ely, 16 N. D. 569, 14 L.R.A.(N.S.) 638; Lang v. Bayonne, 15 L.R.A.(N.S.) 93 and extensive note; 29 Cyc. 1390.

They cannot be attacked in a collateral proceeding like the one here. Cleveland v. McCanna, 7 N. D. 455; State ex rel. Bockmeier v. Ely, 16 N. D. 569; State ex rel. Erickson v. Burr, 16 N. D. 581.

The canvass of the votes was completed July 8th. This contest was not begun until eleven or twelve days thereafter. It came too late and the trial court was without jurisdiction to do other than to order its dismissal. Comp. Laws 1913, § 881; Oleson v. Hogy, 23 N. D. 648.

The primary election takes the place of nominating conventions under the former system. It operates like different elections or caucuses held throughout the state on the same day, for the purpose of using the same machinery, but remaining separate elections as to each party or principle. State ex rel. Miller v. Flaherty, 23 N. D. 313, 319, 41 L.R.A.(N.S.) 132; Johnson v. Grand Forks County, 16 N. D. 363; State ex rel. McCue v. Blaisdell, 18 N. D. 38, 40, 118 N. W. 141; State ex rel. Flaherty, 23 N. D. 313, 41 L.R.A.(N.S.) 132.

There must be a separate canvass of the separate returns as to each party. Comp. Laws 1913, § 873.

The statutory time limit is mandatory. Oleson v. Hogy, 23 N. D. 648; State ex rel. Anderson v. Falley, 9 N. D. 464.

CHRISTIANSON, J. This an election contest involving the nomination of the Republican candidates for members of the house of representatives for the 29th legislative district. The primary election was held on June 26th, 1918. In their notice of contest, the contestants state that the votes cast at such primary election for the parties to this contest were canvassed by the canvassing board, and that according to the report of said canvassing board the contestants and contestees herein received the following total votes at such election:

Anthony Walton	1154 votes
Bert Solberg	1124 votes
J. E. Erb	1021 votes
George Reishus	1505 votes
Ben Olson	1387 votes
Guy Humphreys	1244 votes
O. J. Cleven	1278 votes

It is, also, alleged as a ground of contest that approximately four hundred and fifty illegal votes were cast, and "that had such illegal votes not been counted as aforesaid the contestants herein would have received majorities and would have been declared nominated." The only allegation in the notice of contest relating to the time when the county canvassing board completed its canvass is as follows: "That on the 26th day of June, 1918, the primary election was held; . . . that thereafter the votes cast for the respective parties hereto were canvassed, said canvass being complete on the 11th day of July, 1918."

The contest was instituted by service of notice of contest upon the contestees on July 20th, 1918. The contestees thereafter appeared specially, and so appearing objected to the jurisdiction of the court and moved for a dismissal of the contest proceeding, upon the ground that the same was not instituted within the time required by law.

The motion to dismiss was based upon the affidavits of the four contestees, to the effect that the canvassing board of Ward county had completed its canvass of the votes cast for all Republican candidates at the primary election, on and prior to the 8th day of July, 1918; and that on said 8th day of July, 1918, said canvassing board "did

certify and return and officially find and declare" that said contestees were the nominees of the Republican party for the offices of representatives for the 29th legislative district. And that on the same day the county auditor of Ward county executed, and thereafter caused to be delivered to each of said contestees, the proper certificate of nomination in due form, as provided by law. The motion to dismiss came on for hearing on July 27th, 1918, pursuant to an order to show cause issued July 24th, 1918. Upon the return day, the parties appeared by their respective attorneys and proceeded to a hearing upon the motion to dismiss. No objection was made by either party to the procedure adopted. The contestants served and submitted in opposition to the affidavits of the contestees, the affidavit of Carroll, one of the attorneys for contestants, to the effect that he made inquiry from R. W. Kennard, the county auditor of Ward county, on July 13th, 1918, "as to the day of completion of the canvassing of the votes cast at the primary election held in said county and state, on the 26th day of June, 1918, and at said time was informed by the said R. W. Kennard that the canvass was completed on the 11th day of July, 1918." In such affidavit Carroll further states that he has made examination of the certificate of the county auditor wherein he certifies to the total votes cast by the Republican voters of Ward county at said primary election, and that such certificate bears date of July 13th, 1918; and that by inquiry from the members of canvassing board he has ascertained that "the books of said canvassing board were not returned to the county auditor's office until July 11th, 1918." It is further stated in said affidavit that one Tyler, who acted as a member of the canvassing board, as chairman of the Republican county central committee, was not in fact such chairman, or entitled to act as a member of the canvassing board.

Upon the hearing of the motion to dismiss, the contestees offered in evidence the original certificates of nomination issued to and received by each of them from the county auditor. All of said certificates bear date, July 8th, 1918. The contestees also offered in evidence the original abstract of the Republican votes cast at such primary election, and the following certificate of the county canvassing board attached thereto:

State of North Dakota, County of Ward.

Minot, N. D., July 8th, 1918.

We, the undersigned, do hereby certify that the within and foregoing abstract of votes cast at the primary election, held at the various election precincts of the county, is a true and correct abstract according to the returns made by the election boards of the various precincts. Witness our hands and seal of said county, the day and year first above written. [Signed] J. M. Rehe, Chairman County Commissioners. [Signed] W. W. Tyler, Acting Chairman Rep. Central Co. of Ward Co. [Signed] R. W. Kennard, County Auditor.

The record also contains a certificate from the county auditor of Ward county to the effect that this "certificate of the official canvassing board of Ward county, attached to and certifying the abstract of all Republican votes cast at the primary election within Ward county, North Dakota, according to the returns before said board . . . *was made, signed, and completed upon the completion of the canvassing of said votes and the returns by said county canvassing board on the date thereof, July 8th, 1918.*"

The contestants offered in evidence certified copies of the certificates attached to the abstract of Democratic votes, and the abstract of nonpartisan votes for judge of the supreme court, state superintendent of public instruction, and county superintendent of schools. These certificates are dated July 11th, 1918. These certificates are accompanied by, or rather made a part of, the certificate of the county auditor, who certifies that such certificates are attached respectively to the "abstract of all Democratic votes," and the "abstract of all the nonpartisan votes" cast at said primary election; and that each of said certificates "was made, signed, and completed upon the completion of the canvassing of said votes and returns by said county canvassing board on the date thereof, July 11th, 1918." The county auditor's certificate further states that the certificates of nomination were mailed to the respective nominees, including the contestees, on the 15th day of July, 1918.

The trial court made an order dismissing the contest, and contestants appeal from the judgment of dismissal.

Two errors are assigned on this appeal: (1) That the court erred in admitting in evidence any statement or evidence whatsoever tend-

ing to controvert the allegations of the affidavit and notice of contest; and, (2), that the court erred in ordering a dismissal of the proceedings.

With respect to the first error assigned, we deem it proper to say that we are not prepared to place our approval upon the procedure adopted in this case. We have grave doubts as to the propriety of trying the question of whether the contest was instituted within the time allowed by a motion to dismiss, unless the jurisdictional defect appears in the contest notice itself. It would seem that where such defect does not appear in the notice of contest, but must be established as a fact in controversion of the allegations of the notice of contest, that the question is one properly raised by answer. But in the instant case the question of procedure is not involved. For the record shows that no objection was made, and that both parties proceeded under and acquiesced in the method of trial adopted. The contestees accepted the issue tendered, and served a counter affidavit, and upon the trial both parties offered evidence in support of their respective contentions. In fact the record shows that appellants' attorney in open court dictated the following stipulation into the record: "The contestants herewith stipulate that exhibits 5, 6, and 7 are part of the records of the county auditor's office, and as such may be received in evidence in this action, and show on their face what they are." Our maxims of jurisprudence provide that "he who consents to an act is not wronged by it." Comp. Laws 1913, § 7249. And that "acquiescence in error takes away the right of objecting to it." Comp. Laws 1913, § 7250. See also 4 C. J. 717 et seq. Manifestly the contestants in this case are precluded from assailing the propriety of the procedure adopted, or the admission of evidence which they stipulated might be admitted.

The remaining question to be considered is whether the trial court erred in holding, upon the record before it, that the contest had not been instituted within the time allowed by law.

The contest was instituted under § 881, Compiled Laws 1913, which provides: "Any candidate at a primary election desiring to contest the nomination of another candidate, or candidates for the same office, may proceed by affidavit within ten days after the completion of the canvass." The section also provides for the method of trial

of the contest, the rendition of judgment therein, etc. It further provides that "appeals to the supreme court . . . must be taken within ten days after notice of entry of final judgment and the party appealing must immediately procure the transmission of the record on such appeal to the clerk of the supreme court and such appeal may be brought on for hearing before the supreme court at any time such court shall be in session, upon five days' notice from either party; and the same shall be heard and determined in a summary manner, except as otherwise provided in this article."

Our statute provides that "the county canvassing board shall be composed of the clerk of the district court, county auditor, chairman of the board of county commissioners and the chairman of the county committees of the two political parties that cast the highest votes for governor at the preceding general election. *The members of said board shall meet in the county auditor's office in the courthouse at 10 o'clock on the eighth day after any primary election, and shall proceed,* after taking the usual oath of office, *to open and publicly* canvass the primary election returns made to the county auditor. Any three members of said board shall constitute a quorum and are authorized to make the canvass therein provided and to certify to the results thereof." Comp. Laws 1913, § 872.

It is further provided that "the canvassing board shall make and prepare a statement, the same to be signed by said board and filed in the office of the county auditor," containing, among other things, the names of all candidates voted for at the primary election, with the number of votes received by each and for what office and the names of the candidates nominated by each political party. And it is expressly provided that said statement shall *"be made separately as to each political party."* Comp. Laws 1913, § 873.

These provisions were part of the Primary Election Law enacted by the legislative assembly in 1907. In 1909 the legislature provided for a nonpartisan judiciary primary. Laws 1909, chap. 82. And in 1913 it provided for a nonpartisan nomination of candidates for the offices of state superintendent of public instruction and county superintendent of schools. Laws 1913, chap. 153. All of these nominations are made at the same time. The same election machinery is used. But the primaries of the different political parties are entirely distinct.

And the nonpartisan primaries are separate from those held by the different political parties. The participation of disqualified voters in the nomination of Republican candidates can have no possible effect upon the result of the Democratic primary. The canvass of the votes cast for Democratic candidates can have no possible bearing upon the nomination of Republican candidates. The two matters are entirely separate and distinct. The statute expressly requires a separate statement to be made for each political party, thereby clearly manifesting not only that a separate canvass shall be made, but that a separate declaration of result shall be made as to each political party.

The purpose and character of a primary election held under these statutory provisions is not a new question in this court. In considering this question in State ex rel. Miller v. Flaherty, 23 N. D. 313, 41 L.R.A.(N.S.) 132, 136 N. W. 76, the court said: "In our state the primary is the means of nomination of all officers, state, district, and county, as well as the method of choice by election, instead of nomination, of all party committeemen and delegates belonging to the party organization of those parties entitled to participate at the primaries. The election is held at public expense and is state wide, all nominations occurring throughout the state at the same election. In one sense the state-wide primary is a state-wide election. As to time and method used to accomplish the results it is such. But as to purpose and results achieved, as to nominations made, it is in no sense an election, unless it be a party or partisan election. . . . The mere fact that all political parties entitled to recognition under the primary laws as parties hold their party nominating election at which their respective party adherents may on the same day participate in their proper political parties in no wise changes the construction or effect to be given thereto from what it would have been had the legislature provided instead that, on the first Tuesday in May, the Republican party of the state should hold a party primary at which Republican electors only should be eligible to participate, to be held for the purpose of nominating the nominees of that party to be by said party presented to the state-wide electorate in the general fall election; and that on the second Tuesday in May a similar Democratic state-wide primary should be held open only to Democratic electors, whereby Democratic nominees should be chosen as nominees on the general

fall election ballot; and that on the third Tuesday in May the Socialist party should choose its nominees for office for the general fall election. . . . And the case at bar is exactly parallel with the one above assumed."

In Lew v. Montgomery, 31 N. D. 1, 5, 148 N. W. 662, this court said: "But a primary election is not an election within the meaning of such constitutional provision." (Section 47 of the state Constitution, which provides that each house of the legislature shall be the judge of the election returns and qualifications of its own members), "nor within the common acceptation of the term. It merely takes the place of the former nominating conventions, and it is improper to say that the successful candidate at such primary is elected to any office. He is merely placed in nomination as a candidate for election to the office."

As indicated in State ex rel. Miller v. Flaherty, supra, the primary election statute also provides for the selection at such primary of a committeeman from each precinct. The men so chosen, together with one to be chosen at large by each of certain specified "county nominees of each party," constitute the county committee of the party. And it is provided that such committeemen shall meet at the courthouse in each county on the third Wednesday after each primary election and organize by selecting officers and an executive committee, and adopting rules and modes of procedure. Such committee also selects the member or members of the state central committee. The persons so chosen from the respective legislative districts as members of the state central committee are required to meet at the state capital on the first Wednesday in September to organize and select officers, and, also, to promulgate and publish a platform or principle upon which the candidates of the party shall stand. Comp. Laws 1913, § 890. So it will be observed that the separate entity of the different political parties is carefully preserved by the primary election law. This is true from the beginning to the end. The voters of the different parties are registered separately, cast separate ballots, which are deposited in separate ballot boxes, separate returns are made by the election officers as to each political party, and, as already stated, these returns must be canvassed separately and a separate and distinct declaration made as to each party. Separate party organizations are

also secured and maintained through party committees chosen at the primary election.

We are therefore of the opinion that when § 881, Compiled Laws 1913, provides that a candidate at a primary election may contest the nomination of another candidate "within ten days after the completion of the canvass," it has reference to the canvass of the votes of the particular political party on whose ticket the contestant sought nomination; or if the office involved is one to be filled by nomination and election upon the nonpartisan "judiciary ballot," or the "nonpartisan school ballot," that then it has reference to the completion of the canvass of the votes cast for the nomination of candidates upon such nonpartisan ballot. And while contestants in the court below and also in their brief on this appeal assert that the term, "the completion of the canvass," means the completion of the canvass of all votes cast for the candidates of all parties and upon all propositions submitted, and which the county canvassing board is required to canvass, this contention was not asserted with any degree of confidence on the oral argument. And it was frankly conceded that it was very doubtful if the construction contended for was correct.

It should be remembered that an election contest is a statutory proceeding, the purpose of which is to furnish a summary remedy and to secure a speedy trial. 15 Cyc. 399. The universal policy of laws providing for election contests is "to compel prompt action in hearing and disposing of contested elections, and statutory provisions requiring notice of contest to be given within a certain time from the date of the official count, or from the declaration of the result, or the issuing of the certificate of election or the like," are generally considered mandatory and jurisdictional. 15 Cyc. 399, 400; 9 R. C. L. 1169, § 157. It is suggested by contestants that the provision requiring a contest to be instituted within a certain time is in effect a statute of limitations, and hence must be asserted by answer, and if not so asserted will be deemed waived. The principle contended for has no application to a right of action created by statute. Ordinary statutes of limitations affect the remedy, and not the right of action. The statute before us created both the right and the remedy. And the institution of the proceeding within the time provided is an essential element of the right to maintain the proceeding at all. 25 Cyc. 1398.

As was said by the Supreme Court of the United States (Walsh v. Mayer, 111 U. S. 31, 37, 28 L. ed. 338, 340, 4 Sup. Ct. Rep. 260): "The provision requiring it to be asserted in a particular mode and within a fixed time are conditions and qualifications attached to the right itself, and do not form part of the law of the remedy. If it is not asserted within the permitted period, it ceases to exist and cannot be claimed or enforced in any form."

We have no hesitancy in holding that the contest must be instituted within ten days after the completion of the canvass within the meaning of that term as used in the statute, and that failure to institute the contest within that time is fatal to the right to institute a contest at all.

The question to be determined therefore is whether the evidence submitted upon the hearing, and the reasonable inferences which may be drawn therefrom, justified the trial court in holding that the contest had not been instituted "within ten days after the completion of the canvass."

We have already considered one of the appellants' contentions with respect to the meaning of the term "completion of the canvass," and found such contention to be without merit. It also appears from the record that in the court below the contestants further contended that the time in which to institute a contest did not commence to run until the certificates of nomination had been delivered to the different candidates nominated at the primaries. This contention is based upon subdivision 5, § 873, which provides that "it shall be the duty of the county auditor upon the completion of the canvass to mail or deliver in person to each candidate" nominated at such primary election a certificate of nomination.

In our opinion this contention is untenable, and is fully answered by what was said by the supreme court of South Dakota in disposing of a similar contention. The South Dakota court said: "The canvass of the vote and the issuance of the certificate of election are two entirely different acts and are performed by two different functionaries. The canvassing board has nothing to do but to canvass the vote and prepare and sign an abstract showing the number of votes cast. The certificate of election is issued by the county auditor after the canvassing board has determined who is entitled to such certificate,

and may not be issued until after the canvassing board has adjourned and gone out of existence." Dobson v. Lindekugel, 38 S. D. 606, 162 N. W. 391, 393.

Under the statute, the returns from the different election precincts are transmitted to, and filed in the office of, the county auditor, where they remain until the county canvassing board meets. Comp. Laws 1913, § 870. The county auditor is a member of the county canvassing board, and such board is required to meet *in his office* at a specified time for the purpose of openly and publicly canvassing the returns. Comp. Laws 1913, § 872. Hence, every person is afforded notice of the time and place of such canvass. In the case at bar, therefore, we have the following facts established by the record and the reasonable inferences to be drawn therefrom: Immediately after the primary election, the returns from the various precincts were returned to and filed in the county auditor's office. On the eighth day after the primary election, the county canvassing board met in the office of the auditor, and proceeded "to open and publicly canvass the primary election returns made to the county auditor." The county auditor was a member of the canvassing board. On the 8th day of July, 1918, the board had completed the canvass of the Republican votes, and on that day it promulgated its official declaration of the result of such Republican primary by signing the certificate provided for such purpose; on that same day, to wit, July 8th, 1918, the county auditor, basing his action upon the official declaration of the canvassing board, issued certificates of nominations to the various contestees as the nominees of the Republican party for the offices in question. Those facts are not denied, but admitted. It is presumed "that official duty has been regularly performed," and "that the law has been obeyed." Comp. Laws 1913, subds. 15 and 35, § 7936. The only reasonable inference which can be drawn from the facts recited is that the county canvassing board's returns as to the result of the canvass of the Republican votes were completed and certified to the county auditor on July 8th, 1918, and formed the basis for his action in executing the certificates of nomination dated on that day. It is true the county auditor has made no indorsement upon the abstract of Republican votes showing when it, and the certificates of the canvassing board attached thereto, was filed in his office. But it is equally

true that no such indorsement was made upon either the abstract of Democratic or the abstract of nonpartisan votes. And an examination of the abstracts of votes and certificates of the canvassing boards attached thereto which have been returned to the office of the secretary of state from several of the counties of the state show that not in a single instance was any such indorsement made.

Nor is the conclusion that the canvassing board had completed its canvass of the Republican votes on July 8th overcome by the statements in the affidavit of Carroll or the certificate of the auditor attached to such affidavit. Carroll, in his affidavit, says, that he made inquiry of the auditor, "as to the date of the completion of the canvassing of the votes cast at the primary election . . . and was informed by the said R. W. Kennard that the canvass was completed on the 11th day of July, 1918." The certificate of the county auditor attached to, and evidently intended to corroborate, the statement made in Carroll's affidavit, shows that on the 11th day of July, 1918, the county canvassing board signed the official certificates declaring the results of the canvass of the Democratic and nonpartisan votes. So far as the certificate shows, these were the only acts performed by the canvassing board on July 11th. In other words, the county auditors's certificate shows that on the 11th day of July, 1918, the county canvassing board signed the same certificates with respect to the Democratic and nonpartisan nominees, which it signed with respect to the Republican nominees on the 8th day of July, 1918. And it seems clear that if the certificate offered by the contestants is evidence of the fact that the canvassing board completed the canvass of Democratic and nonpartisan votes on July 11th, 1918, the certificate signed on July 8th, 1918, declaring the result of the Republican primaries, is evidence of the fact that the canvass of the Republican votes was completed on the 8th day of July, 1918.

Carroll's affidavit and the auditor's certificate attached thereto were evidently prepared on the theory which contestants then advanced that the canvass was not completed until the canvassing board had canvassed the votes and certified the results as to all tickets and all propositions submitted, i. e., completed all of its labors and gone out of existence. It will be noted that Carroll's affidavit makes no reference to whether the canvass of Republican votes was referred

to in the conversation between him and the county auditor. So far as the affidavit and the certificate of the county auditor are concerned, the county auditor might have specifically informed him (Carroll) that the Republican votes had been fully canvassed and the result declared on July 8th, 1918, and certificates of nomination executed by the county auditor on that day. In fact the record shows that, in the court below, contestants' attorney expressly disclaimed any intention of rebutting or disproving the auditor's certificates set forth in and made a part of the moving papers.

A careful consideration of the record leads us to the conclusion that the trial court was correct in holding that the contest had not been commenced within ten days after the completion of the canvass of the Republican votes.

The questions raised by the contestants with respect to whether there was in fact a canvassing board, or whether such board has ever completed a canvass, manifestly cannot be considered on this appeal. These questions are not raised in the notice of contest, nor could they very well be set up as grounds of contest. The contest is based upon the proposition that the canvassing board has completed the canvass and made its findings adversely to the contestants. The contest is an attack upon the determination of the canvassing board. By the plain words of the statute there can be no contest until the canvassing board has completed the canvass. Hence, it is manifest that if the contestants are correct in their contention that the canvass has not in fact been made or completed, then manifestly the contest is premature, and should be dismissed. Upon the record before us, however, and the allegations of the notice of contest itself it must be assumed on this appeal that the votes cast at the primary election held on June 26th last in Ward county have been properly canvassed by the canvassing board of that county. And, as we have already indicated, the record in our opinion justifies the conclusion reached by the trial court that the contest was not commenced within the time allowed by law. It follows from what has been said that the judgment appealed from must be affirmed. It is so ordered.

GRACE, J. (dissenting). Section 881, Compiled Laws 1913, provides that a candidate at a primary election may contest the nomina-

tion of another candidate "within ten days after the completion of the canvass." As I view this provision and this law, it applies to the primary election as a whole, that the words "completion of canvass" means the counting and canvassing of all the votes cast at the primary election. It means the completion of the work of the canvassing board. The work of the canvassing board is not complete until all votes are counted and canvassed. When the canvass is complete as to all the votes, that point of time is when the Statute of Limitation commences to run with reference to the time of bringing the contest, and the canvass of the votes is only completed when the canvassing board has done its whole work as a board, and completed the canvass of all the votes cast at the primary election the votes of which are canvassed by such board.

OSCAR R. ANDERSON, Appellant, v. S. L. PHILLIPS, C. A. Weeden, and F. H. Fernybough, Respondents.

(169 N. W. 315.)

Substantial evidence — in record — burden of proof — to sustain — verdict — will not be set aside — on ground that evidence is insufficient — new trial — motion for.

1. Where there is no substantial evidence in the record upon which a verdict in favor of the party holding the burden of proof can be based, such verdict should be set aside upon a motion for a new trial on the ground that the evidence is insufficient to justify the verdict.

Claim and delivery — action in — redelivery bond — repossession of property under — by defendant — offer by defendant to return property — in substantially same condition — not sufficient to sustain verdict in defendant's favor.

2. In an action against the sureties upon a bond, given under § 7521, Compiled Laws 1913, whereby the defendant in a claim and delivery proceeding obtained the redelivery of the property seized in such proceeding, the evidence is examined and held not to support a verdict in favor of the defendants based upon the ground that the defendants had returned or offered to return the property to the plaintiff in substantially as good condition as it was when delivered to the defendant under the bond.

Opinion filed October 25, 1918.

Appeal from the District Court of Towner County, Honorable *C. W. Buttz,* Judge.

Plaintiff appeals from an order denying an alternative motion for judgment notwithstanding the verdict or for a new trial.

Reversed.

J. C. Adamson and *H. S. Blood,* for appellant.

After judgment in claim and delivery directing a return of the property seized and rebonded by defendant, it is defendant's duty to at once return the property in the same condition as when taken. Cobbe, Replevin, § 1182; Capital Lumber Co. v. Learned, 30 Or. 544, 78 Am. St. Rep. 792; 34 Cyc. 1575 and cases cited.

After suit is brought on the redelivery bond, an offer to return cannot prevent a recovery. 24 Am. & Eng. Enc. Law, 536; Bradley v. Reynolds, 61 Conn. 271.

A tender must not only be unconditional but it must be kept good to have the effect of satisfying the judgment. Cobbe, Replevin, § 1190.

In order to satisfy a judgment for the return of the property in claim and delivery, the property must be returned in substantially the same condition as it was when taken under the redelivery bond. Vallancy v. Hunt, 26 N. D. 611, 145 N. W. 132 and cases cited; Farmers Nat. Bank v. Ferguson, 28 N. D. 347, 148 N. W. 1049; Larson v. Hanson, 21 N. D. 411, 131 N. W. 239.

Where plaintiff in an action on a redelivery bond alleges and proves the entry of the alternative judgment entered in the claim and delivery suit, and shows that the judgment remains unsatisfied, he has established the liability of the bondsmen. Clark v. Ellingson (N. D.) 161 N. W. 199.

C. A. Verret and *Wm. Bateson* (*Flynn & Traynor,* on oral argument) for respondents.

The evidence clearly shows that respondents made a valid, legal tender and offer to return the property, but was prevented from making a physical and manual delivery of the property by appellant's refusal to accept, or to indicate a place where respondents could make safe delivery to him. 34 Cyc. 1574 and 1575.

In making a tender of money it must be kept good in order to serve the purpose. This is not so of specific chattels. 38 Cyc. 159 and cases cited; McPherson v. Wiswell (Neb.) 21 N. W. 391.

CHRISTIANSON, J. The plaintiff Anderson brought an action to recover of the defendant Phillips the possession of the following farm machinery, to wit:

One Acme Queen binder, 8 ft. with trucks.
One Acme Giant mower, 5 ft. cut.
One Acme Lark rake.
One Deere & Webber wagon, gear 3¼.
One Rumely steel oil tank.
One wood water tank.
One Rumely Oil Pull Tractor, Type F.
One 18 H. P. Gaar Scott Engine No. 8929.
One Gaar Scott Separator 33″.

The plaintiff also instituted claim and delivery proceedings ancillary to the action and the property was taken from the defendant Phillips by the sheriff of Towner county under such claim and delivery proceedings. On July 8th, 1915, the defendant Phillips obtained a redelivery of the property by giving to the sheriff a written undertaking conditioned as provided in § 7521, Compiled Laws 1913. The undertaking was executed by the defendant Phillips as principal, and the defendants Weedon & Fernybough as sureties. The undertaking was conditioned in the sum of $4,000 for the delivery of the property in question, "to the said plaintiff if such delivery be adjudged, and for payment to him the said plaintiff of such sum as may for any cause be recovered against the said defendant." Said action came on for trial before a jury, and a verdict was returned on March 29th, 1916, in plaintiff's favor for an immediate delivery to him of the property involved, and fixing the value of the property at $1,882. Judgment was entered pursuant to the verdict on August 5th, 1916, for the total sum in $1,897.

The plaintiff, Anderson, thereafter brought the present action to recover upon the redelivery bond.

The complaint sets forth the seizure of the property by the sheriff under the claim and delivery proceedings in the former action, the execution of the redelivery bond, the redelivery of the property to Phillips under the bond, and the trial, verdict, and judgment in the former action.

It is also alleged in the complaint that after the property was re-

delivered to Phillips, under the redelivery bond, he used the machinery during the fall of 1915, and also leased the threshing rig to others; that the machinery was at all times "permitted to remain without shelter, exposed to the weather," and was so injured and damaged by such use and exposure and its value so diminished that it has become and is impossible to return said property in substantially the same condition as when it was turned over to Phillips under the redelivery bond. It is further alleged that the property has not been returned, nor has a return thereof been offered to the plaintiff.

The defendants in their answer admit that they gave the redelivery bond, and that the property was redelivered to the defendant Phillips, thereunder. They also admit that verdict was returned and judgment entered in favor of Anderson and against Phillips in the former action as alleged in the complaint. They also admit that the property involved "was permitted to remain without shelter," as alleged in the complaint; but they deny that the property has been diminished in value, and that they are unable to return it in substantially as good condition as it was when it was delivered to Phillips under the redelivery bond, on July 8th, 1915.

The defendants also admit that the property has not been returned to the plaintiff Anderson; but in that connection they assert as an affirmative defense that the defendant Phillips has been ready and willing to deliver all of said property to the plaintiff Anderson, at all times, and that he offered to return such property on March 29th, 1916, and again on September 4th, 1916, and that the plaintiff refused to accept it. The only questions at issue were those presented by such affirmative defenses. These issues were submitted to a jury which returned a verdict in defendants' favor. The plaintiff thereafter moved in the alternative for judgment notwithstanding the verdict or for a new trial. The motion was denied, and plaintiff appeals.

On his motion for a new trial, and on this appeal, plaintiff assails the sufficiency of the evidence to sustain the verdict. It is contended that the evidence: (1) Fails to establish that the defendant ever made a sufficient tender of the property; (2) fails to establish that the property at the time of the alleged tenders was in substantially the same condition as when it was delivered to the defendant Phillips, under the redelivery bond; and, (3) that the evidence affirma-

tively and indisputably shows that the defendant Phillips, at all times after the rebond, and both before and after the alleged tenders, used and treated the property as his own; that he materially altered it and left it exposed to the weather, and that the property has so greatly depreciated in value and usefulness that it cannot be returned to the plaintiff in substantially the same condition as when it was delivered to the defendant Phillips, under the redelivery bond.

It is clear that questions relating to the condition of the machinery, and the alleged offers to return it, are questions for the jury, providing there is any evidence from which reasonable men could reasonably draw a conclusion in favor of either party. Whether there is such evidence is, however, a question of law for the court. For "in every case there is a preliminary question for the judge, whether there is evidence upon which a jury may properly proceed to find a verdict." State Bank v. Bismarck Elevator & Invest. Co. 31 N. D. 102, 106, 153 N. W. 459. As the trial courts are invested with wide discretionary powers in dealing with motions for a new trial based upon the ground of insufficiency of the evidence, the appellate courts are especially reluctant to interfere with the trial court's ruling on such motions. Hence, if there is any substantial evidence to support the verdict, it should not be disturbed; but, if there is no substantial evidence to sustain the conclusions upon which the verdict must rest, the verdict must be set aside and a new trial ordered.

The question which presents itself to us upon this feature of the case therefore is, whether there is any sufficient or substantial evidence to support the verdict. In other words whether the evidence presented is such that reasonable men might reasonably reach different ultimate conclusions with respect to the questions at issue. From a careful examination of the evidence we have reached the conclusion that in this case there is no substantial evidence upon which the jury could base its conclusions. In our opinion the verdict is not supported by the evidence, and the trial court erred in denying plaintiff's motion for a new trial on the ground of insufficiency of the evidence.

The only evidence of a tender or offer to return the property is as follows: According to the testimony of one of the defendants' attorneys, he had a conversation with the plaintiff, Anderson, on March

29th, 1916, after the jury's verdict had been returned. The conversation as related by the attorney is as follows:

"Well, just before the train left, or while we were waiting for the train in the depot, I saw Mr. Anderson there in the waiting room and I told him, 'Mr. Anderson,' I says, 'we are ready to quit now, can't we fix up a deal for you fellows to take up that property, we are ready to turn it over to you?' 'Well,' he says, 'it is spring now and I will have to go and look it over before I could take the property.' That is the best I can recollect of the conversation. Of course I don't remember every word, but that is the best I can remember of that conversation."

This conversation was denied by the plaintiff. And of course it would be a question for the jury to determine whose testimony was correct. But manifestly the conversation as related by defendants' attorney does not show either a tender or a refusal of property tendered. The very language used by defendants' attorney indicates a proposed compromise of the litigation and the return of the property to, and the acceptance thereof by, the plaintiff as a part of "the deal" to be fixed up, rather than any intention to offer a return of the property in extinguishment of the obligation existing under the redelivery bond.

The second offer to return upon which defendants rely was as follows: Plaintiff made an application for a general execution against the property of the defendant, Phillips, under the alternative provision of the judgment. The application was heard before the court at chambers at Devils Lake, on September 4th, 1916. Upon such hearing the attorney for the defendant, Phillips, stated that "the defendant would redeliver the property in question," and that thereupon plaintiff's attorney stated that it was too late to make such offer and that the plaintiff would insist upon the motion.

Under our statute "an obligation is extinguished by an offer of performance made in conformity to the rules" prescribed by law relative thereto, "and with intent to extinguish the obligation." Comp. Laws 1913, § 5800. But, "an obligation for the delivery of . . . property . . . is not discharged by an offer of performance nor any of its incidents affected, unless the thing offered . . . is deposited for the creditor with some depositary of good repute at the

place of performance and notice of such deposit . . . given to the creditor." Comp. Laws 1913, § 5819. The obligation of the parties who signed the redelivery bond in this case is fixed by the provisions of that instrument, and under the evidence in this case such obligation has not been discharged.

As already stated the answer admits that the property has not been sheltered, but has remained exposed to the weather at all times since it was redelivered to the defendant Phillips. And the testimony clearly and indisputably shows that the machinery was permitted to stand, without absolutely any shelter of any kind, fully exposed to the elements. And it appears from the testimony of the witnesses for both the plaintiff and the defendants that at the time these witnesses examined the machinery the separator was so full of frozen snow that it was virtually impossible to examine it. It is conceded that Phillips used the engine and separator and also leased them to others for use in the fall of 1915. And Phillips admits that he used the separator in the fall of 1916, both before and after September 4th, 1916, on which date the last alleged offer to return the property was made. It would, to say the least, be unusual if machinery could be subjected to use and treatment such as that to which the machinery in question was subjected, and still remain in substantially as good condition as before. It seems that it would follow almost as a matter of course that there would be considerable deterioration in the quality and value of such machinery. It is true, Phillips claims to have made certain repairs of some of the machinery. The repairs, however, were of such nature as were rendered necessary in order that the machinery might be continued in use. The very fact that such repairs were required from time to time is of itself some evidence of the changed condition of the machinery. See Vallancy v. Hunt, 26 N. D. 611, 622, 145 N. W. 132.

The case was tried in the court below, and is submitted in this court, upon the theory that it was incumbent upon the defendants to "show a delivery or offer of delivery of the property within a reasonable time in substantially as good condition" as it was in at the time it was received under the redelivery bond. This is the rule announced by this court in Vallancy v. Hunt, 26 N. D. 611, 145 N. W. 132, and in our opinion the evidence in this case brings it squarely within the

rule announced in Vallancy v. Hunt, supra; for in our opinion there is no substantial evidence from which reasonable men could draw the conclusion that the defendant Phillips offered, or is able, to return the property to the plaintiff, in substantially the same condition in which it was when he received it.

It follows from what has been said that the plaintiff would have been entitled to a directed verdict, but no motion was made for a directed verdict. Hence, the district court properly denied the motion for judgment notwithstanding the verdict. Johns v. Ruff, 12 N. D. 74, 95 N. W. 440; West v. Northern P. R. Co. 13 N. D. 221, 100 N. W. 254. But the motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict was improperly overruled. The order appealed from is therefore reversed, and the cause is remanded for further proceedings in conformity with this opinion.

GRACE, J. I concur in the result.

ROBINSON, J. (concurring specially). This is a suit to recover judgment against the defendants on a replevin bond or undertaking. The bond was made on July 8, 1915, in a suit by Oscar Anderson against S. L. Phillips. It recites that by virtue of an order and requisition duly made in said action, and to him directed, the sheriff of Towner County did on July 2, 1915, take from the defendant S. L. Phillips certain personal property described as follows:

One Acme Queen Binder, 8 ft. with trucks,
One Acme Giant mower, 5 ft. cut,
One Acme Lark rake,
One Deere & Webber wagon, gear 3¼,
One Rumely steel oil tank,
One wood water tank,
One Rumely Oil Pull Tractor, Type F,
One 18 H. P. Gaar Scott Engine No. 8929,
One Gaar Scott Separator 33″
One Singer Piano,
One red cow with white face.

Then it recites that Phillips desires a return of the property and in consideration of such redelivery the defendants herein did under-

take and promise and bind themselves in the sum of $4,000 for the redelivery thereof to the plaintiff. If such redelivery be adjudged and for the payment to plaintiff of such sum as may for any cause be recovered against said Phillips.

As admitted by the answer on August 5, 1916, it was by the district court duly adjudged that Oscar Anderson recover from said S. L. Phillips the said property and in case an immediate return could not be had, then that the plaintiff do have and recover the value of the same with interest and $52 costs, making the sum of $1,897. In this action the jury found a verdict for the plaintiff for $52 and interest from August 5, 1916. The plaintiff moved for a judgment as demanded in the complaint or for a new trial. The motion was denied and plaintiff appeals.

On the trial the defense was, as alleged in the answer, that on the entry of judgment defendant Phillips offered to return the property in substantially the same condition that it was when he received it from the sheriff, and the plaintiff refused to accept the property. Phillips had possession of the property from July 8, 1915 to August 5, 1916. He has never delivered it to the plaintiff. The complaint avers and the proof shows that during the year 1915, Phillips used the tractor and separator and leased the same to one or more persons; that he used the mower, the binder, the wagon and water tank, and left all of said property exposed to the weather without any shelter and that by such use and exposure, it was greatly damaged. The answer expressly admits that the property was exposed to the weather and permitted to remain without shelter.

John Anderson is a machine man. He examined the property when it was taken by the sheriff and again about the time of the trial and his testimony forcefully shows that by use and wear and exposure and loss of parts, the separator and the tractor were greatly damaged, and the value of the same reduced from one third to one half. He shows that when Phillips offered to return the property, the engine was not in working condition. The testimony of Agarand is to the same effect. It shows that the engine was used by Phillips and leased to two different parties and Phillips himself admits that he used and leased the engine and the separator. He claims that by making repairs on the property to the amount of $100, he kept it in good con-

dition. Such property as that described in the complaint is of a perishable nature. Its yearly depreciation is very great; even with good care, its ordinary depreciation is from ten to twenty per cent and with bad care or no care, it is much greater. It is needless to review the testimony. It is generally known to the farmers of the state and to all persons using such property, and the court must take notice of the fact, that during a year such property wears out and depreciates very much and especially when it is left without cover and subjected to the action of the sun and the winds, the rains and the snows, the heat and the cold.

Manifestly, at the time of the trial and at the time of the judgment, it was in no way possible for defendant Phillips to return the property in the same, or substantially the same condition, that it was when he received it. The court should have allowed the motion of plaintiff for judgment regardless of the verdict. Hence, the judgment of the district court should be reversed and the court should enter judgment to the effect that the plaintiff have and recover from the defendants $1,897, with interest at 6 per cent from the 5th day of August, 1916, and the costs of this action and of the appeal.

LARS KLEPPE, Appellant, v. ODIN TOWNSHIP, McHenry County, North Dakota, et al., Respondents.

(169 N. W. 313.)

Highway — laying out — petition for — requirements of law — must be sufficiently definite — description of lands or route — to enable surveyor to locate.

1. All that the law requires of a petition for the laying out of a highway, which is filed under the provisions of § 1925 of the Compiled Laws of 1913, is that it shall be sufficiently definite as to description to enable a surveyor to locate the highway and to be reasonably intelligible to a reasonably intelligent man.

Board — jurisdiction of — order laying out road — filing — time of — failure to timely file — "deemed" — meaning of — disputable presumption.

2. The word "deemed" which occurs in § 1927 of the Compiled Laws of 1913

and in the phrase "and in case the board having jurisdiction shall fail to file such order within twenty days it shall be deemed to have decided against such application" refers to a disputable presumption.

Court of equity — public highway — existence of — right to question — order — failure to file — road in existence for sixteen years — used as public highway — public money used to maintain — worked — road taxes paid — person who has so used road — existence impliedly recognized — is in no position to question.

3. A person has no standing in a court of equity to question the existence and right of maintenance of a public highway on account of a failure to have the order locating the same filed with the county auditor, where such highway has been continuously used for sixteen years after the filing of the petition for the road, and during such time public money has been expended thereon and road taxes worked thereon, and during such sixteen years the said objector has impliedly recognized its existence, petitioning both the board of county commissioners and the board of township supervisors, and has, until the bringing of the suit, at no time otherwise questioned the validity of its creation.

Opinion filed October 25, 1918.

Action to enjoin the maintenance of a public highway.

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

Judgment for defendants. Plaintiff appeals.

Affirmed.

Statement of facts by BRUCE, Ch. J.

This is an action to have a certain highway decreed to have been illegally established and not to exist, and to restrain the defendant from in any way entering upon, working, or repairing the same. The defendant asserts the legality of the establishment and has also pleaded estoppel and title by prescription. The trial court found for the defendant township and the plaintiff appeals.

Two quarter sections of land which are owned by the plaintiff are affected by the highway. One was pre-empted from the government in 1902 and the other was purchased from the state at a school land sale in 1915. The road is what is called the Hogback road, and for the greater part if not all of its course, and, at any rate, where it passes through the plaintiff's land, runs along a natural backbone or

ridge or hogback, which was evidently once the dividing line between the two lakes, is well gravelled, and graded by nature, of an average height of from 10 to 15 feet and of an average breadth of from 20 to 50 feet, extends for a length of about 5 miles, and appears in every way to be a natural highway whose course is well defined and apparent to all. This highway appears to have been driven on in the early sixties, in 1881, and continually thereafter until the time of trial. There is also evidence that in 1882 the buffalo hunters claimed that it had been used as a cart trail as long as they could remember. The trial court has found and we believe correctly:

"That on or about July 2, 1900, there was filed with the board of county commissioners of McHenry county, North Dakota, a petition in due and legal form signed by a legal and sufficient number of citizens, voters, and taxpayers in the vicinity of the road to be opened praying for the opening of said Hogback road and described in said petition as follows: 'Leaving the county road on the half section line in § 29, township 154, range 78, and running south to where it strikes what is called the backbone or ridge running southeast to Soo railroad, then following the railroad to Main street at Balfour,' and thereafter such due and legal proceedings were had upon said petition, and the same having been legally posted and notice given in the manner provided by law of the hearing thereon, the said board of county commissioners of McHenry county, North Dakota, on April 1st, 1901, opened, and laid out said road by an order made in the form following, to wit: 'The board on motion resolved that the above described [road] be ordered opened and laid out as follows: That said road be running in accordance with petition as far south as the beginning of the organized township of Balfour. Further, that said road be surveyed at once, the survey to be paid by the several road districts through which the road runs. Motion carried.'

"That at the time said proceedings were had before said board of county commissioners the defendants, Odin township and Lake Hester township, were unorganized and the said board of county commissioners was a board of proper jurisdiction in said matter, and the petition so filed with said board was in sufficient legal form to confer upon said board of county commissioners of McHenry county, North Dakota, jurisdiction therein.

"That thereafter the said road was surveyed and a proper survey of the same made and a record thereof made and filed in the office of the county auditor in and for McHenry county, North Dakota, and it is now of record therein.

"That ever since said proceedings were so had before said board of county commissioners said road has been open to public use and has been continuously traveled and used by the public and the said defendants, McHenry county, Odin township and Lake Hester township have expended various sums of money in improving the same, and in maintaining the same in a proper condition for public use and travel.

"That the road so opened as a result of the petition so filed is peculiarly adapted to travel and of a condition which does not require a great amount of work or expense to maintain the same in condition for public use and travel.

"That said Hogback road was an established road in 1882, and has been in continuous use and travel ever since said time, and said road was used and traveled as early as 1861, and said road has been used and traveled continuously and included in a road district and road districts within McHenry county, North Dakota, for more than twenty years since the 29th day of March, 1897.

"That the said plaintiff came to McHenry county, North Dakota, after the said proceedings were so had before the said board of county commissioners, and at the time of acquiring the title to the land owned by him, and at the time of filing on the same under a homestead, he had knowledge and well knew that said road was located upon said land and was being traveled and used by the public as a public road and highway.

"That in the year 1909 the said plaintiff filed with the board of county commissioners of McHenry county, North Dakota, a petition in due and legal form requesting said board to discontinue said road and to vacate the same. That thereafter the said plaintiff filed a similar petition with the board of township supervisors of Odin township, which said board was a board of proper jurisdiction in said matter, asking and requesting said board to discontinue and vacate said road; that the board of county commissioners of McHenry county and the board of township supervisors of Odin township duly de-

nied the said petitions of the said plaintiff, and the said plaintiff took no appeal from the order of either of said boards, and did not appeal therefrom.

"That no appeal was taken by any person from the proceedings had before the board of county commissioners of McHenry county, North Dakota, opening and laying out the said road in the year 1901.

"That the plaintiff has for a great many years recognized said road to be a legal road, and has considered the same to be such, and the said plaintiff has had knowledge during all of said time and well knew that the said road was being used and traveled by the public continuously, and that the said defendants were expending work and money upon said road to keep the same in a proper condition of repairs for public use and travel.

"That the public road or highway involved in this action has been during all of the times referred to in the plaintiff's complaint, and for a great many years prior thereto, and as early as the year 1882, known and designated as the Hogback road, and the said road is located upon a ridge of a peculiar geological formation of ground, making the same well known to the citizens and residents of the county, and giving to the said road an identity and route which is fixed, and has been fixed during all of said times, and is a matter of common knowledge, and a place well known within the county of McHenry and state of North Dakota.

"That that certain public road or highway described in the plaintiff's complaint herein, commonly and well known as the Hogback road, is a public road and highway by virtue of public use and travel, and by virtue of having been laid out and opened by a board of competent jurisdiction, and by virtue of having been opened and laid out in accordance with law."

There can be no dispute in our opinion as to the correctness of all of these findings, with the possible exception of the last, and this will be discussed in the opinion.

Charles D. Kelso, for appellant.

In order to acquire prescriptive right the use must be twenty years before the repeal of the prescriptive statute. Thus to get this highway by prescription it must be shown it was travelled identically in

the present route continuously for twenty years prior to the repeal of the law. Burleigh County v. Rhud (N. D.) 136 N. W. 1082; 37 Cyc. 18.

The mere signing of a petition for a highway does not estop unless it can be shown that it acted in the nature of an estoppel *in pais*. It certainly cannot be said from the record here that this is an estoppel by record or by deed, and hence it must be by personal act. Wickre v. Independent Twp. (S. D.) 141 N. W. 973.

In order to effect an estoppel *in pais* there must not only be the act of the estopped party, but the one claiming estoppel must have been misled to his prejudice, and induced to take some position, or to have done some act, or to have refrained from performing some act, to his detriment. 2 Pom. Eq. Nos. 804, 805, §§ 812, 817; 16 Cyc. 733 (note 20), 742, 743; Skavdale v. Moyer (Wash.) 46 L.R.A. 481.

If a road was not legally created in the first instance an interested party may at any time thereafter have it so determined by the courts. It is the contention of appellant that this highway never had a legal existence. The board never filed its order laying out such highway. Semoras v. Dunn County, 160 N. W. 855.

In laying out a highway the provisions of the statute must be strictly followed. People v. Scioto Twp. Board, 3 Mich. 121; Ruhland v. Hazel Green (Wis.) 13 N. W. 877; 37 Cyc. 53, note 28; Semerad v. Dunn County (N. D.) 160 N. W. 855.

When the matter attacked is void, it may be assailed collaterally. 160 N. W. 855; Exwartzell v. Blue Grass Twp. (N. D.) 147 N. W. 727.

There can be no laches where the act sought to be set aside was void from the beginning. Galway v. Met. El. R. (Ill.) 28 N. E. 479; Burrell v. Am. Tel. & Tel. Co. (Ill.) 8 L.R.A.(N.S.) 1091; Lawrence Ry. Co. v. O'Hara (Ohio) 28 N. E. 175; Dailey v. State (Ohio) 37 N. E. 710; Waysata v. G. N. R. Co. (Minn.) 49 N. W. 205; Blew v. Ritz (Minn.) 85 N. W. 548; Woll v. Voight (Minn.) 117 N. W. 608; Red River Valley Brick Co. v. Grand Forks (N. D.) 145 N. W. 725; Davis v. Frankenlust Twp. (Mich.) 76 N. W. 1045; Shearer v. Hutterische Bruder Gemeinde (S. D.) 134 N. W. 63;

Gronna v. Goldammer (N. D.) 143 N. W. 394, 398; Quinn v. Tully (Mich.) 140 N. W. 492, 496; 16 Cyc. 777 and 778.

J. H. Ulsrud (*John C. Thorpe* of counsel), for respondents.

The title to the lands along the highway here in question was in the government when the road was laid out. The right to lay out such highway was granted by the government over public lands not reserved for public uses, and this grant was duly accepted by territorial act, and further accepted when the county commissioners established the road, or at the time the adverse use ripened into right by prescription. Koloen v. Pilot Mound Twp. 33 N. D. 529.

In laying out a highway it is true the statute provides for the filing of an order to be made and signed by the board of county commissioners, and unless such order is so made and filed the commissioners are deemed to have decided against the petition. This merely amounts to a disputable presumption. Corey v. Spencer, 75 Pac. 920; Lorence v. Sedligh, 50 Pac. 600.

Where it is shown that the way had its origin in the action of the town; that it has been in use as a highway by the public for many years; that money has been appropriated and used for its maintenance; that road taxes have been assessed and collected and that the objector not only signed the original petition but has been for years one of the users of such highway, all presumptions and inferences must be indulged in favor of the legality of the way, and such objector is in no position to question in equity its legality. Crimson v. Deck (Iowa) 51 N. W. 55; Gibbs v. Lariaver, 37 Me. 506; State v. Alstad, 18 N. H. 59; Clarke v. Mayo, 4 Call (Va.) 374; Commonwealth v. Logan, 5 Litt. (Ky.) 286; Semeras v. Dunn County, 160 N. W. 855; Ekwartzell v. Blue Grass Twp. 147 N. W. 727; 10 R. C. L. 700–702; State v. Wertzel, 22 N. W. 150; Ross v. Thompson, 78 Ind. 90; Freetown v. Bristol County Comr. 9 Pick. 46; Re Woolsey, 95 N. Y. 135; Stronsky v. Hickman, 88 N. W. 825.

The description as found in the petition is full and complete and amply sufficient to enable the surveyor to locate the route. Yankton County v. Klemisch (S. D.) 76 N. W. 312; Miller v. Porter, 75 Ind. 521; 37 Cyc. 128 and cases cited.

The plaintiff's grantor was estopped to question the legality of the highway for he took title to the land after the highway was estab-

lished by the grant and its acceptance, and the grantee of one who is estopped is also estopped. Wells v. Pennington County, 48 N. W. 305; Koloen v. Pilot Mound Twp. 33 N. D. 529; Miller v. Shink, 78 Iowa, 372, 43 N. W. 225; 37 Cyc. 130 and cases cited.

BRUCE, Ch. J. (after stating the facts as above). We are satisfied that in this case there is no ground for the interposition of a court of equity and that the learned trial judge properly denied the injunction which was prayed for. The facts in this case are in many respects similar to those under consideration in the case of Rothecker v. Wolhowe, 39 N. D. 96, 166 N. W. 515 and Semerad v. Dunn County, 35 N. D. 437, 160 N. W. 855, and the same statutes are involved. Although the petition for the highway might have been more specific, we think that under the evidence the description "backbone or ridge" is sufficiently definite, followed as it was by a survey which was properly made and filed. All that the law requires is that the description shall be sufficiently definite to enable a surveyor to locate the highway and be intelligible to a reasonably intelligent man. Semerad v. Dunn County, supra; Yankton County v. Klemisch, 11 S. D. 170, 76 N. W. 314.

The evidence shows conclusively that the backbone or ridge referred to was otherwise known as the Hogback road, and was a natural backbone or ridge or hogback, which at an early period was evidently the dividing line between two lakes, or, at any rate, the shore of a lake, was well gravelled and graded by nature, of an average height of 110 feet and an average breadth of from 20 to 50 feet and extended for a length of about 5 miles, was in every way a natural highway, which was well defined and apparent to all, had been used for such for many years and for 16 years since the filing of the petition for the road, and had been driven on in the early '60's, in 1881, and continuously thereafter until the time of the trial. There is also evidence that in 1882 the buffalo hunters claimed that it had been used as a cart trail as long as they could remember. The evidence also shows that the petitioner himself had used the highway for many years; that during these years some four or five hundred dollars was expended thereon and road taxes were worked thereon; that at no time until the beginning of the present action did he object to the same or claim that it was not a highway; that, on the contrary, he on

two occasions filed petitions for its discontinuance, one with the board of county commissioners, and one with the board of township supervisors, and by this very fact tacitly admitted the existence of the road.

The case can be distinguished from that of Rothecker v. Wolhowe, by the fact that in that case there was not only no proof of an order for the highway being made, but there was testimony to the effect that it was "the custom of the board to quit when they got that far;" that is, when the petition was filed and acted upon. Here there is proof in the record that an order was actually made, and a survey made in accordance therewith, and properly filed and recorded, and, though there is no proof of the filing of the order with the county auditor, we do not believe that the petitioner can at this late date take advantage of the fact. We do not, indeed, construe the word "deemed" which occurs in § 1927 of the Compiled Laws of 1913 and in the phrase "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," to refer to an indisputable presumption, but to a disputable one, and to have been enacted largely for the purpose of fixing the time in which either party might appeal from the decision of the board under the provisions of § 1935 of the Compiled Laws of 1913. There is authority, indeed, for the proposition that at this late date the plaintiff cannot question the fact of the filing, but it will be presumed, though we do not pass upon this point. Crimson v. Deck, 84 Iowa, 344, 51 N. W. 55; Gibbs v. Larrabee, 37 Me. 506; State v. Alstead, 18 N. H. 59; Clarke v. Mayo, 4 Call (Va.) 374; Com. v. Logan, 5 Litt. (Ky.) 286.

Mindful, indeed, as we are of our decisions in the cases of Rothecker v. Wolhowe and Semerad v. Dunn County, supra, we are satisfied that under the particular facts of this case the petition has no standing in a court of equity. Ekwortzell v. Blue Grass Twp. 28 N. D. 20, 147 N. W. 726.

The judgment of the District Court is therefore affirmed.

GRACE, J. I concur in the result.

CHRISTIANSON, J., being disqualified, did not participate, F. E. FISK, District Judge, sitting in his stead.

FISK, District Judge. I fully concur in the foregoing opinion, prepared by Mr. Chief Justice BRUCE.

GEO. B. CLIFFORD & COMPANY, a Corporation, Respondent, v. JESSE HENRY, Appellant.

(169 N. W. 508.)

Purchase price mortgage — legally foreclosed — rents and profits — use and occupation — action to recover — sale of premises — sheriff's certificate — purchaser — holder of certificate — same right to rents and profits — as though foreclosed by action.

In an action brought by the holder of a sheriff's certificate of sale to recover rents, or the value of the use and occupation, under § 7762 of the Compiled Laws of 1913, where a purchase-price mortgage had been legally foreclosed, it is *held:*

1. Following Clement v. Shipley, 2 N. D. 430, § 7762 of the Compiled Laws of 1913 gives to a purchaser at foreclosure sale, under a foreclosure by advertisement, the same right to rents or the value of the use and occupation as though the foreclosure had been conducted by action.

Purchaser — entitled to rents and profits — from tenant in possession — holder of certificate — has same rights against mortgagor in possession.

2. Section 7762 of the Compiled Laws of 1913, which provides that the purchaser, from the time of sale until redemption, is entitled to receive from "the tenant in possession the rents and profits from property sold, or the value of the use and occupation thereof," is construed and *held* to give to the certificate holder the right referred to, whether the premises are in the possession of the mortgagor or of a tenant of the mortgagor.

Mortgagor may remain in possession for one year — rights of — statute — does not fix terms of occupancy.

3. Section 6740 of the Compiled Laws of 1913, which gives to the mortgagor the right to remain in possession during the year for redemption, does not fix the terms or conditions of occupancy.

Rents and profits — action to recover — from mortgagor in possession — answer — equitable defenses interposed by — such issues heard first by court — abandonment of.

4. Where, in an action to recover rents and profits, the defendant interposes an answer which constitutes an equitable attack upon the foreclosure proceedings, and where the plaintiff moves for a trial of the equitable issues before the court, the trial judge reserving his ruling and indicating that the admissibility of testimony in support of the equitable allegations would be determined as presented, no testimony being offered in support of the allegations, the equitable defense to the foreclosure must be considered as abandoned.

Use and occupation — value of — right to — accruing to certificate holder — owner's rights — share of crops — rental value of land for entire season — proof of — in such cases — circumstances under which same becomes proper.

5. Where the right to the value of the use and occupation is shown to have arisen in April, and where the testimony shows that the value to the owner of the farm property is that which he derives from a share of the crop and that it is generally considered advantageous to him to have the buildings occupied during the portion of the year when the crops are not growing, it is not error to receive testimony going to establish the rental value of the land for the entire season.

Reference under statute — party — examination of — purpose — costs taxable.

6. Where there is a reference, under § 7864 of the Compiled Laws of 1913, for the purpose of examining a party to the suit, costs may properly be taxed under § 7793 of the Compiled Laws of 1913.

Opinion filed November 2, 1918.

Appeal from the District Court of Nelson County, *C. M. Cooley*, J. Affirmed.

Frich & Kelly, for appellant.

The foreclosure by advertisement of a real estate mortgage containing the power of sale carries to the purchaser all the rights and benefits accorded to a purchaser under foreclosure by action and sale of the land under execution. Code § 7762; Code, art. 1, chap. 30.

Unlike our Code and practice, in California mortgages are foreclosed by action, and the sale is made under execution issued upon the decree. The law and rules of procedure there in this respect are not applicable here. Cal. Code Civ. Proc. §§ 675a, 684, 726, et seq.; Kerr's Codes (Cal.) pt. 1, p. 1154; Koch v. Briggs, 14 Cal. 256; Comp. Laws 1913, § 7330; 1 C. J. 927; Stevens v. Osgood, 18 S. D. 247, 100 N. W. 161; Golcher v. Brisbin, 20 Minn. 453; McCann v. Bank, 3 N. D. 172.

The statute relating to executions generally has no application to sales made under mortgage foreclosure. Rudolph v. Herman, 4 S. D. 283, 56 N. W. 901; Mayo v. Woods, 31 Cal. 268.

The foreclosure here is void. When a mortgage is given securing the payment of instalments, it is a separate and distinct mortgage for each instalment, and in case of foreclosure, it should only be had as

to the instalments past due, and not upon a declaration that the whole secured debt is due. Briggs v. Briggs, 135 Mass. 306; Clark v. Simmons, 150 Mass. 357; Hedlin v. Lee, 21 N. D. 495; Wade v. Major, 36 N. D. 331; Bank v. Lansing, 2 Wend. 261; Stacy v. Smith (S. D.) 68 N. W. 198; Bailey v. Hendrickson, 25 N. D. 500.

The phrase, "tenant in possession," as found in our Code, includes within its meaning only persons who have leased the mortgaged lands from the mortgagor or owner; and an action like this is maintainable by the mortgagee, if at all, against such tenant, and not against the mortgagor or owner. 3 Kent, Com.; Tiedeman, Real Prop. § 25.

In this state, ownership of real estate carries with it the absolute dominion of the thing owned, subject only to the burdens of taxation and the right of eminent domain. Civ. Code, chaps. 38, 45, 47.

A tenant is "one who holds real property by some form of title from a landlord." 26 Ency. Brit. title "Tenant;" Webster's Dict. p. 1136; Black's Law Dict. p. 1141.

Our statute makes no exception to this rule or definition, and many cases uphold it. Lightbody v. Truelson (Minn.) 10 N. W. 67; 3 Jones, Mortg. 7th ed. §§ 1659, 1661; Comp. Laws 1913, § 7762; Reynolds v. Lathrop, 7 Cal. 43; McDevitt v. Sullivan, 8 Cal. 592; Kline v. Chase, 17 Cal. 596; Webster v. Cook, 38 Cal. 423; Walker v. McCusker, 65 Cal. 360, 4 Pac. 206; Pendola v. Alexanderson, 67 Cal. 337, 7 Pac. 756; Clark v. Cobb, 121 Cal. 595, 54 Pac. 74; Harris v. Foster, 97 Cal. 292, 32 Pac. 246; Knight v. Truett, 18 Cal. 113; Harris v. Reynolds, 13 Cal. 514; Shores v. Scott River Co. 21 Cal. 135; Hill v. Taylor, 22 Cal. 191; Walls v. Walker, 37 Cal. 424; Walker v. McCusker, 71 Cal. 594, 12 Pac. 725; 36 Cyc. 1123, and cases cited; Bank v. Swan, 2 N. D. 225; Clement v. Shipley, 2 N. D. 430; Whithed v. Elev. Co. 9 N. D. 224; Little v. Worner, 11 N. D. 382; Folsom v. Norton, 19 N. D. 722; Patrick v. Knapp, 27 N. D. 104; Rudolph v. Herman, supra.

The mortgagor in possession of the premises after foreclosure sale is entitled to the crops produced thereon, as against the purchaser. Mau v. Kearney, 143 Cal. 506, 77 Pac. 411; Aldrich v. Bank (Neb.) 57 L.R.A. 920; Aultman v. O'Dowd (Minn.) 75 N. W. 756; 3 Jones, Mortg. 7th ed. §§ 1659, 1651 and cases cited; 27 Cyc. 1729 and cases cited.

"He (the purchaser) did not become the owner by purchasing at the sale. His title was not at all changed by that fact, except that the amount of his debt was fixed, and his right to a deed, or a sum paid to redeem within six months, absolute." Pacific Mut. Ins. Co. v. Beck (Cal.) 35 Pac. 169; Hokanson v. Gunderson (Minn.) 56 N. W. 172; Farr v. Semmler (S. D.) 123 N. W. 835; 3 Jones, Mortg. § 1661; Sutherland v. Long, 273 Ill. 309, 112 N. E. 660.

The common-law action for use and occupation is founded on contract, express or implied, and, to sustain the action, it must appear that the relation of landlord and tenant existed between the parties. 47 Cent. Dig. col. 2051; 19 Dec. Dig. p. 2008, § 1 and cases cited.

In general, rent does not accrue as a debt until the tenant has enjoyed the use of the land for the period for which it is payable. Consequently, in the absence of some agreement or understanding between the parties to the contrary, rent is not due until the expiration of the term; and this is true whether the rent is reserved in gross or on later payments. 24 Cyc. 1170, 1198; Duryee v. Turner, 20 Mo. App. 34; Boyd v. McCombs, 4 Pa. 146; Dixon v. Niccolls, 39 Ill. 372, 89 Am. Dec. 312; McFarlane v. Williams, 107 Ill. 33; Ridgley v. Stilwell, 27 Mo. 128; Nicholes v. Swift, 118 Ga. 922, 45 S. E. 708; Watson v. Penn, 108 Ind. 21, 8 N. E. 636; Cowan v. Henika, 19 Ind. App. 40, 48 N. E. 809.

This is true in all cases where the value of the use and occupation is sought to be recovered. Shores v. Scott River Co. 21 Cal. 135; West v. Conant (Cal.) 34 Pac. 705; Walker v. McCusker, supra; 1 C. J. 1145, 1146, and cases cited.

Where defendant's entry or possession is rightful and lawful and the actual income can be shown, this will determine the extent of liability. 39 Cyc. 870, 871 and cases cited; Sanford v. Johnson (Minn.) 4 N. W. 245; Clark v. Cobb (Cal.) 54 Pac. 74; Bigham v. Alexander (Okla.) 153 Pac. 644.

The respondent established the actual income and showed that no profits had accrued. This fixed his liability. Walker v. McCusker, 71 Cal. 594; Jones v. Byington, 155 Pac. 1118.

Murphy & Toner, for respondent.

Our statute here under consideration was adopted from California, and with it was also adopted the construction placed upon it there,

and it has been followed so long that its doctrine has become a rule of property in this state.

The purchaser at foreclosure sale by advertisement is entitled to the full benefits accruing under the law. Comp. Laws 1913, § 7762; Clement v. Shipley, 2 N. D. 430; Whithed v. Elevator Co. 9 N. D. 224; Little v. Warner, 11 N. D. 382; Martin v. Royer, 19 N. D. 504; Hodgson v. Finance Co. 19 N. D. 139; Folsom v. Norton, 19 N. D. 723; Bailey v. Hendrickson, 25 N. D. 511; Patrick v. Knapp, 27 N. D. 103; Reynolds v. Lathrop, 7 Cal. 43; McDevitt v. Sullivan, 8 Cal. 592; Harris v. Reynolds, 13 Cal. 514; Hill v. Taylor, 22 Cal. 191; Page v. Rogers, 31 Cal. 293; Walker v. McCusker, 71 Cal. 594; Kline v. Chase, 17 Cal. 596; Knight v. Truett, 18 Cal. 113; Walls v. Walker, 37 Cal. 424; Webster v. Cook, 38 Cal. 423.

A provision in a mortgage giving the right to declare due, upon any default in the mortgage, is not a penalty or a forfeiture, but is a valid and enforceable one, and that a court of equity will not relieve against the foreclosure of a mortgage under those conditions in the ordinary way. 37 Cyc. 1101; 27 Cyc. 1522, and cases cited; Lewis v. Lewis, 58 Kan. 563, 50 Pac. 454; McCormack Mfg. Co. v. Evans, 84 Va. 717; Iowa Co. v. Yeager, 54 N. Y. Supp. 99.

A sufficient declaration of the intention to declare all sums due under the mortgage is a foreclosure. In this case the specific statement was inserted in the notice to that effect. 27 Cyc. 1524, and cases cited.

This is a suit to recover money,—not property. The object of the suit is to recover the value in money of the use of the land during the year of redemption. Whether the mortgagor actually formed the land himself, or just what amount of crop he raised thereon, is wholly immaterial. If he prevented the purchaser from using the land during such period of time, he is liable for the value of such use. Reynolds v. Lathrop, 7 Cal. 43; McDevitt v. Sullivan, 8 Cal. 592; Harris v. Reynolds, 13 Cal. 515; Kline v. Chase, 17 Cal. 596; Knight v. Truett, 18 Cal. 113; Hill v. Taylor, 22 Cal. 191; Wall v. Walker, 37 Cal. 427; Walker v. McCusker, 12 Pac. 725; Webster v. Cook, 38 Cal. 423; Harris v. Foster, 32 Pac. 246; Patrick & Co. v. Knapp, supra; Comp. Laws 1913, § 7751; Clement v. Shipley, and Whithed v. Elev. Co. supra; Page v. Rogers, 31 Cal. 294.

This right in the purchaser to receive the rents and profits, or the value of the use and occupation of the property sold, is not limited to cases where there has been a redemption. The right begins at the time of the purchase and continues until redemption is made, or, if there is no redemption, then until the time allowed therefor has expired. Reynolds v. Lathrop, 7 Cal. 43; McDevitt v. Sullivan, 8 Cal. 592; Harris v. Reynolds, 13 Cal. 514; Hill v. Taylor, 22 Cal. 191; Webster v. Cook, 38 Cal. 423; Page v. Rogers, 31 Cal. 293.

The action for use and occupation is founded on privity of contract. But it will lie upon an implied as well as upon an express contract. Osgood v. Dewey, 13 Johns. 240; Stockett v. Watkins, 2 Gill & J. 326; Code Civ. Proc. § 369; Duss v. Randall, 48 Pac. 66; Yndart v. Den, 57 Pac. 761; Code Civ. Proc. § 707; Walker v. McCusker, 71 Cal. 594; Bennett v. Wilson, 55 Pac. 390; Hardy v. Herriott, 39 Pac. 958; Judge Engerud, No. 712, N. D. Banker, for Feb. 1916.

The rule of *stare decisis* applies here with all its force, for the doctrine for which we contend has become a fixed rule of property in this state. 13 Cent. Dig. title, "Courts," § 318; Scale v. Mitchell, 5 Cal. 401; Stout v. Grant Co. 107 Ind. 343, 8 N. E. 222; New Orleans v. Herman, 31 La. Ann. 529; Davis v. Holberg, 59 Miss. 362; Sedalia v. Gold, 91 Mo. App. 32; Wood v. New York, 73 N. Y. 556.

Crops growing on the land at the time of sale pass to the purchaser. Not so, if the crops are harvested. 27 Cyc. 1729; Duff v. Randall, 48 Pac. 66; Bennett v. Wilson, 55 Pac. 390; Lawton v. Loan Co. 57 N. W. 1062.

Tenancy under the law may be implied as well as the contract; and where the mortgagor remains in possession after a sale, he having merely the legal title, if the mortgage conveys the hereditaments, these pass by the sale to the purchaser, and both a contract and tenancy will be implied, to sustain a recovery. Dunton v. Sharpe (Miss.) 11 So. 168; 27 Cyc. 1729, and cases cited.

This is an action under and by virtue of the statute, and therefore appellant's contention that no action is maintainable until the time for performance of a contract has expired, has no application. Comp. Laws 1913, § 7477; Iselin v. Simon (Minn.) 64 N. W. 143; State v. Mickelson, 24 N. D. 175.

In any event the action was maintainable when brought. A demand was made on appellant before suit, and he took issue with respondent on his claim of right in any part of the crops, and asserted that respondent had no rights at all. Thereupon a cause of action at once arose under the rule that where a promisor expressly renounces his contract, the promisee may treat this as a breach and bring action at once. James v. Adams, 16 W. Va. 245; Howard v. Daly, 61 N. Y. 362; Lamoreaux v. Rolfe, 36 N. H. 33; Dugan v. Anderson, 36 Md. 567; Kennedy v. Rodgers, 44 Pac. 47; Holloway v. Griffith, 32 Iowa, 409; Crabtree v. Messersmith, 19 Iowa, 179.

Where it is claimed that causes of action have been split the objection is waived if not made in the lower court and at the proper time. 23 Cyc. 436 and cases cited.

As to value of the use in this case, the evidence related to the value of the use when land is farmed personally, and also on the rental value. This ought to be the proper method, since in this state farm lands are either personally worked and operated or rented out. Cornell v. Dean, 105 Mass. 435; Hellams v. Patton, 44 S. C. 454, 22 S. E. 608; Ry. Co. v. Griffith (Ark.) 39 S. W. 550; Richardson v. Penny (Okla.) 61 Pac. 584; Holmes v. Stockton, 26 N. J. L. 93; Walker v. Houghteling, 107 Fed. 619; McLennon v. Lemen, 59 N. W. 628; Isaac v. McLean, 64 N. W. 2.

In such cases evidence covering the entire season or term based upon the crop was competent. The fact that some plowing and sowing was done before the foreclosure sale is immaterial. The value of the use is the crop, and the time to determine the value of the use for the year of redemption is when the crops are severed and secured,—when they cease to be real estate, and become personalty. 1 Wiltsie, Mortgage Foreclosures, § 587, p. 706; Mont. Eastern R. Co. v. Lebeck, 32 N. D. 162.

Appellant went on to this land and farmed it with a full knowledge that, if he did not timely redeem, he would get nothing for its use and occupation.

He became and was a voluntary trustee during the year of redemption and was subject to the duties of such trustees. Comp. Laws 1913, § 6290; Berry v. Evendon, 14 N. D. 1; Cotton v. Butterfield, 14 N. D. 465.

BIRDZELL, J. This is an appeal from a judgment entered in the district court of Nelson county in an action brought to recover the value of the use and occupation of certain lands. The plaintiff had judgment for $960 damages and for costs. The case arose upon the following facts:

On August 6, 1912, the defendant and appellant purchased from T. C. and W. W. Smith, of Springfield, Illinois, the east half of section 20 and the west half of section 21, township 153 N., range 59 W., of the P. M., Nelson county. The agreed price was $22,400, $5,000 of which was paid in cash and the remainder was to be paid in instalments of $1,000 a year, commencing December 1, 1913, and terminating December 1, 1929. Notes drawing 6 per cent interest were given for the deferred payments, and were secured by a first mortgage on the land. On November 25, 1916, Smith Brothers, the vendors, assigned the notes and mortgages to the plaintiff and respondent, George B. Clifford & Company, and on March 7, 1917, foreclosure proceedings were started in an attempt to realize the sum of $18,855.80, this representing the principal and interest due to the date of sale. On April 23, 1917, the land was sold at a sheriff's sale for $19,297.28 and a certificate of sale issued to George B. Clifford & Company. In 1917 the defendant and appellant planted a crop upon the land embraced in the foreclosure proceedings, consisting of 380 acres of wheat, 100 acres of barley, 80 acres of oats, and 10 acres of flax. While the crop was being threshed, the plaintiff and respondent made a demand for it, which demand was refused. This action was then brought, and, to support the recovery, reliance is had upon § 7762 of the Compiled Laws of 1913. In fact, the action is based on the statute. The section referred to provides that the "purchaser from the time of the sale until a redemption . . . is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof."

The principal questions raised upon this appeal arise upon the interpretation of that portion of the statute quoted above. Two main propositions are advanced by the appellant. It is contended: First, that the statute does not apply in favor of a purchaser at a sheriff's sale held in pursuance of a foreclosure by advertisement; and, second, that if the statute is held applicable to such a purchaser, a recovery there-

under cannot be had against a mortgagor who remains in possession during the period of redemption.

It is conceded by the appellant that the exact proposition first contended for was decided contrary to his contention in the early history of this court in the case of Clement v. Shipley, 2 N. D. 430, 51 N. W. 414. But it is urged that this decision should be overruled, and that the rule adopted in Rudolph v. Herman, 4 S. D. 283, 56 N. W. 901, should be accepted as a correct interpretation of the statute in question.

The case of Clement v. Shipley, supra, was well considered, and the interpretation adopted therein has both reason and authority to commend it. Furthermore, the rule therein laid down has so long been settled in this state, with the apparent sanction of the legislature, that we are in no wise disposed to disturb it at this date. If the judicial interpretation of the statute made thus early in the history of the court did not conform to the true intention of the legislature, it would seem that the statute would have been amended.

The next contention is predicated upon the wording of the statute. It is argued that where the mortgagor remains in possession after the sale, he is entitled to all the benefits accruing from such possession; that, in fact, these benefits are secured to him by § 6740 of the Compiled Laws of 1913; also that in no event can he be considered as the "*tenant* in possession" within the statute quoted. It is conceded that the purchaser or a redemptioner would be entitled to receive the rents or the value of the use and occupation accruing during the period of redemption, if the premises, during such time, were in the possession of a tenant of the mortgagor; and the correctness of the previous decisions of this court to that effect is admitted. But it is claimed that the statute does not warrant an action in favor of a purchaser or redemptioner against the mortgagor in possession.

The effect of the sale is merely to continue the lien of the mortgage and to cut off the equity of redemption at the expiration of the statutory period allowed for redemption. See State ex rel. Forest Lake State Bank v. Herman, 36 N. D. 177, 161 N. W. 1017. Also Jones, Mortg. § 1661. As the holder of a lien evidenced both by the mortgage and by the sheriff's certificate of sale, the purchaser or redemptioner is not entitled to rents and profits save as such right is given by statute. Jones, Mortg. § 1659. Since such a right is clearly given in this state

under § 7762 of the Compiled Laws of 1913, where the premises are in possession of someone other than the mortgagor, there is no apparent reason why any distinction should be made based upon the circumstance as to whether or not the premises are leased. Neither is there any satisfactory evidence that such a distinction was in the mind of the legislature. Had it been intended to give to the purchaser the benefit of the rents and profits or the value of the use and occupation only in case the premises were leased, it would seem that the legislature would have clearly manifested its intention to that effect. To use the language of the supreme court of California, in the case of Harris v. Reynolds, 13 Cal. 514, 515, 73 Am. Dec. 601, in interpreting a statute identical with ours: "It is not very easy to see the reason for such a distinction as that contended for. It would give but little help to the purchaser, since the debtor, on the eve of judgment, might change a possession by tenancy . . . so as to make of little or no value the purchaser's right; and why should a debtor be any more inhibited from getting profit from rent than getting profit from use?"

The appellant's counsel severely criticizes the above expression of the supreme court of California, and particularly the last clause thereof, but the expression seems to us logically correct. We are not concerned with the reasons why a debtor should be "inhibited from getting profit" either from rent or from use. That is not a judicial question, but a legislative one. But it would seem that if the legislature determines that a purchaser or a redemptioner is entitled, during the year of redemption, to the rents and profits or to the value of the use and occupation which ordinarily accrues to the owner, it would not be concerned in making a distinction based upon the consideration as to whether or not the premises are in the actual physical possession of the mortgagor or of his tenant. The only basis for a contention that such a distinction was intended is in the statutory designation of the one from whom the purchaser is entitled to receive the rents, etc., the language of the statute being "from the tenant in possession." It seems to us that it would require a strained and highly technical construction of the statute to find therein evidence that the legislature intended to make the distinction contended for. This statute, like all others which are designed to confer rights, should be so construed as to make the rights effective, and distinctions based upon artificial considerations

should be avoided. The term "tenant" here was clearly used in its generic sense, and in this sense it embraces any or all persons who stand in such a relation to the premises as to render them subject to the right conferred. See Harris v. Reynolds, supra; Knight v. Truett, 18 Cal. 113. The clear meaning of the statute is that the purchaser or redemptioner is entitled to the rents and profits or the value of the use and occupation of the premises during the year for redemption, and that the amount received from this source is to be credited to the debtor in case of a redemption. As to the policy of a statute that makes the right of the purchaser or a redemptioner to retain the rents, etc., to depend upon the contingency of a redemption, it is not, as above indicated, a judicial question.

It is true that, under § 6740 of the Compiled Laws of 1913, the mortgagor is entitled to continue in the possession of the premises during the year for redemption, and that he has the right to control the possession during that period, but that section does not fix the terms of occupancy. Nor is there any provision of law whereby a mortgagor could be ousted of his possession at the suit of a certificate holder during the period of redemption.

The foregoing opinion covers all of the assignments of error which go to the merits of the appeal, but there are some minor questions argued by the appellant which require brief mention. At the beginning of the trial, plaintiff's counsel moved to strike out all allegations in the answer relating to the foreclosure proceedings on the ground that the facts alleged were not sufficient to constitute a defense, and that, if matters of defense were alleged, they were such matters as were cognizable only in equity. In presenting the motion, counsel insisted that if the answer was regarded as alleging an equitable attack upon the foreclosure proceeding, the issues presented should be tried to the court. The trial court reserved a ruling, but indicated that the admissibility of testimony in support of the allegations would be determined as the same was presented. No evidence was offered in support of the allegations in the answer, so it must be assumed that the attack upon the foreclosure proceedings was abandoned. Futhermore, the answer admits that the defendant was in default, and no circumstances warranting equitable relief from the fore-

closure are alleged, so it must be assumed that the foreclosure was in all ways legal.

It is also urged that, as the plaintiff's action must be considered as one for the value of the use and occupation, it cannot be maintained without alleging and proving that the relation of landlord and tenant existed between the plaintiff and defendant, and that error was committed in allowing testimony to go before the jury going to establish the reasonable rental value of the land for the entire farming season. In reply to this contention, it need only be said that the statute, § 7762 of the Compiled Laws of 1913, is the source of the plaintiff's right, and it need only allege and prove such facts as bring it within the statute. This was done.

The testimony of the various witnesses went further than to establish the reasonable rental value for the entire farming season. It was to the effect that the value that the owner got out of the land is in the crop, and that he would ordinarily prefer to have the land and buildings occupied for the remainder of the season than to have them vacant. In this view of the testimony, considering that the right to the value of the use and occupation arose in April and that the action was begun after the crop had matured, the testimony objected to went to establish the proper measure of damages.

Objection is made to two items allowed by the court in the retaxation of costs. These items embrace the fees and expenses of a referee and the mileage allowed the witnesses. It appears that the reference was for the purpose of examining one of the parties before the trial and was made under the provisions of § 7864 of the Compiled Laws of 1913, and that the costs which are objected to were taxed under the provisions of § 7793 of the Compiled Laws of 1913. It is clear that the latter section authorizes the taxation of the costs that were taxed in this action, and that the provisions of § 7646 of the Compiled Laws of 1913, relied upon by the appellant, apply only to cases referred to a referee, either by consent of the parties or by the court when the issues are triable by the court.

Finding no error in the record, the judgment is affirmed.

GRACE, J. I dissent.

ROBINSON, J. (dissenting). In August, 1913, Jesse Henry purchased a section of land in 153–58, paying in cash $5,000, and giving a mortgage to secure the balance, $17,400, in sixteen annual payments of $1,000 each and one payment for $1,400, with interest at 6 per cent, according to seventeen promissory notes. The mortgage was transferred to the plaintiff November 25, 1916, and on March 7, 1917, the plaintiff published a notice of foreclosure by advertisement, claiming that default had been made in the payments, and that the mortgagee elected to declare due the sum secured by the mortgage, amounting to $18,855.80. On April 23, 1917, the land was bid in by the plaintiff for said sum, with attorneys' fees $412.11, and other costs, making the total sum $19,297.82. During the year 1917, defendant remained in possession of the land as the owner of the same, and in September, 1917, this action was commenced to recover from him $5,000 as the value of the use and occupation during the year. On November 20, 1917, the jury gave a verdict in favor of the plaintiff for $960, on which judgment is duly entered and defendant appeals.

Manifestly the foreclosure is a Shylock or a cut-throat procedure. It should be held void. It was not made fairly and in good faith. It was made for the purpose of taking an unconscionable advantage of the defendant, and obtaining title to his land under the forms and technicalities of the law, and not to obtain the purchase money. When defendant paid his good $5,000 on the price of the land, he contracted to pay the balance of $17,400 in equal annual payments, with interest at 6 per cent. He agreed to pay an extra price for the easy terms and the low rate of interest. He did not count on such a snap foreclosure for fifteen notes which had not become due and the advance of the rate of interest from 6 per cent to 9 per cent.

The suit to recover from defendant $5,000 for the use of his land during the summer of 1917 is in keeping with a foreclosure proceeding. A mortgage is a mere lien on property, and does not entitle the mortgagee to possession of the property unless authorized by the express terms of the mortgage. Comp. Laws 1913, §§ 6738, 6740.

The mortgage in question did not give the mortgagee any right to the possession of the land either before or after foreclosure. In manner provided by statute, the mortgage may be foreclosed by adver-

tisement and a sale of the mortgaged premises, and at his own foreclosure sale a mortgagee may fairly and in good faith purchase the premises. § 8083. The sale is made subject to a redemption within one year. § 8085. On paying the purchaser the amount of his purchase, with 9 per cent interest. Laws 1915, chap. 223. The sale does not convey title nor devest the title of the mortgagor nor make him the tenant of the mortgagee. The transfer of title is by a deed. §§ 8087, 8106. When a foreclosure is by action the court may appoint a receiver "when it appears that the mortgaged property is in danger of being lost, removed, or materially injured or that the . . . property is probably insufficient to discharge the mortgage debt." § 7588.

The claim asserted for the use and occupation of the land is based on a statute relating to sales of real property on executions. § 7762. It provides: The purchaser from the time of sale until a redemption is entitled to receive *from the tenant in possession* the rents of the property sold or the value of the use and occupation thereof. This he is entitled to receive from the *tenant in possession* and from no other person, and it is from the *tenant in possession after an execution sale.* Now from the statute it is manifest that the word "purchaser" and all of the section relates to execution sales, and it in no way refers to a sale on foreclosure, and it in no way confers the right to receive rents in any case except *from a tenant in possession.* The same statute on execution sales provides: "Upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto; and when the estate is . . . a leasehold of two years, . . . the sale is absolute. In all other cases the real property is subject to redemption as provided in this chapter." On Execution Sales, § 7751. Thus in the chapter on execution sales, when the word "purchaser" is used, it relates to a purchaser at an execution sale. In § 7762, the word "purchaser" must have precisely the same meaning as in § 7751, providing that "upon a sale of real property the purchaser is substituted to and acquires . . . the . . . title . . . of the judgment debtor." The two sections of the statute go together and they are in perfect harmony. If a purchaser at a foreclosure sale is entitled to the rents and profits during the year of redemption then, "upon a foreclosure

sale of real property, the purchaser is substituted to and acquires the title of the mortgagor."

Assuredly, it is not so provided in the statute on foreclosures, and, on the contrary, it is provided that a mortgage is a mere lien, and does not entitle the mortgagee to possession. We need not argue to show that the owner of property cannot be deprived of possession of the same unless by force of his own deed or contract, by force of the statute, or by due process of law.

It is true that in early days Justice Corliss wrote an ill-considered decision to the contrary (2 N. D. 431, 51 N. W. 414), and it has been followed in some cases, but there is no reason why this court should not decide the case according to reason and the plain words of the statute. The foreclosure sale did not make the defendant a *tenant in possession of his own land.* It did not transfer any title to the plaintiff, and, as the sale was not made fairly and in good faith, it should be held void. In any event the judgment should be reversed.

DORA SPATGEN, Respondent, v. JOE O'NEIL, A. H. Nieter, and John Wolf, Sr., as Individuals, and Joe O'Neil, A. H. Nieter, and John Wolf, Sr., as the Election Board of the Village of New Leipzig, North Dakota, Appellants.

(169 N. W. 491.)

State Constitution — elective franchise — limitations — to male persons — legislature — not precluded from authorizing women to vote — for village officers.

Section 121 of the Constitution of North Dakota, which limits the elective franchise to male persons of the age of twenty-one years or upwards, does not preclude the legislature from authorizing women to vote for village officers.

Opinion filed November 2, 1918.

NOTE.—For authorities passing upon the question of right of women to vote, see notes in 21 L.R.A. 662; 27 L.R.A.(N.S.) 512; and L.R.A.1915B, 247.

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

Jacobsen & Murray, for appellants.

The statute under which this action is brought is squarely in conflict with the Constitution of the state.

"No law extending or restricting the right of suffrage shall be in force until adopted by a majority of the electors of the state voting at a general election." N. D. Const. § 122.

Vincent Hogen, for appellee.

The word "elections" as used in the Constitution has been held to have reference to the choice of officers alone. Coggeshall v. Des Moines, 117 N. W. 312; Seeman v. Ballman, 47 N. W. 1091.

The courts can decide only whether the legislature has overstepped the limits prescribed for it by the Constitution. Pennsylvania R. Co. v. Riblett, 66 Pa. 164; Fairbanks v. United States, 181 U. S. 283.

BIRDZELL, J. This is an appeal from an order overruling a demurrer to the complaint. The action is one for damages occasioned by the alleged illegal acts of the defendants, as members of the election board of the village of New Leipzig, in excluding the plaintiff from participation in a certain election held on March 19, 1918, for the election of certain local officials, to wit: three village trustees, a treasurer, a clerk, and an assessor. Aside from the formal allegations in the complaint, it is alleged that the plaintiff is a woman, a citizen of the United States and of the state of North Dakota, and a resident of the village of New Leipzig for a sufficient period of time to entitle her to the right to vote for the above officers under the provisions of chapter 254 of the Session Laws of 1917. That the plaintiff duly presented herself at the polls in said village where the election was being held, and requested of the defendant board that she be given a ballot in order that she might exercise the privilege of voting. That the defendant officers refused to give to the plaintiff a ballot and to allow her to vote, and that "said election board insolently and contumaciously refused to give to this plaintiff a ballot upon which she could express her will and preference for the candidates for the different offices except justice of the peace, and refused to permit her to vote at said election, for any candidate, giving as a reason for such refusal

and stating to this plaintiff that it was the only reason that Senate Bill No. 12 (Sess. Laws 1917, chap. 254), under the provisions of which the plaintiff was desiring to exercise her right to vote for the candidates for certain offices, was unconstitutional, void, and of no effect."

The only question presented upon this appeal is the constitutionality of that portion of chapter 254 of the Session Laws of 1917 which purports to authorize women possessing the requisite qualifications to vote for certain village officers. The statute is as follows:

"Section 1. All women, citizens of the United States of the age of twenty-one years or upwards, who shall have resided in the state one year and in the county six months, and in the precinct ninety days next preceding any election, shall be allowed to vote at such election for Presidential electors, county surveyors, county constables, and for all officers of cities, villages and towns (except police magistrates and city justices of the peace) and upon all questions or propositions submitted to a vote of the electors of such municipalities or other political divisions of this state.

"Section 2. All such women may also vote for the following township officers: Township clerk, assessor, treasurer, overseer of highways and constables, and may also participate and vote in all annual and special township meetings in the township in which such election shall be.

"Section 3. Separate ballot boxes and ballots shall be provided for women, which ballots shall, to the extent to which such women may vote, as aforesaid, be the same as those provided for male voters, both as to candidates and special questions submitted. At any such election where registration is required women shall register in the same manner as male voters."

We are only concerned with the constitutionality of the foregoing statute in so far as it affects the right of the plaintiff to vote for the officers known as village trustee, village treasurer, village clerk, and village assessor, and we shall consequently refrain from expressing any opinion as to the constitutionality of the law as it might affect the right of women to vote for officers and upon questions other than those involved in this action. It is a well-established rule of constitutional law that the constitutionality of an act of the legislature

cannot be judicially determined except at the instance of one who is a member of a class as to which the act has an unconstitutional application. The provisions of the Constitution which are alleged to have been transcended in adopting the legislation above quoted are found in article 5, governing the "elective franchise." Section 121 of article 5 provides that every male person of the age of twenty-one years or upwards, belonging to any one of certain defined classes (which exclude women generally), who shall have resided in the state one year, in the county six months, and in the precinct "ninety days next preceding any election, shall be a qualified elector at such election." Section 122 expressly gives to the legislative assembly power to make extensions of the suffrage to all citizens of mature age and sound mind without regard to sex, but provides that "no law extending or restricting the right of suffrage shall be in force until adopted by a majority of the electors of the state voting at a general election." Other sections protect electors from arrest on election days during their attendance at the election, exempt them from the performance of military duties on election day (with certain exceptions), fix the time of holding general elections, provide for the residence of persons in the military and naval service of the United States, and for a secret ballot. Section 128 gives to women possessing the qualifications of an elector as to age, residence, and citizenship, the right to vote "for all school officers and upon all questions pertaining solely to school matters," and makes them eligible for any school office. It is admitted that chapter 254 of the Session Laws of 1917 was not referred to the electors of the state at a general election.

It is contended on behalf of the defendants and appellants that the provisions of the Constitution above referred to comprise a complete definition of the qualifications of an elector and of the rights of women to participate in all elections which may be authorized by the legislature: also that a law which purports to authorize their participation in any election, other than a school election, is a law extending the right of suffrage within § 122, which cannot be in force until adopted by a majority of the electors.

On behalf of the respondent it is contended that the qualifications of an elector, as stated in the Constitution, are defined with reference to such elections as are contemplated by the Constitution either to

choose the officers enumerated therein or to decide matters that might be submitted according to some method authorized thereby. It is contended that when construed in their true light the constitutional provisions referred to do not limit the power of the legislature to regulate municipal matters generally, and particularly with reference to the method of selecting municipal officers.

We are not concerned here with the power of the legislature to give to women the right to participate in the selection of nonconstitutional officers generally, and with respect to constitutional officers and all elections contemplated by the Constitution it is admitted that the legislature cannot extend the suffrage without a referendum as provided in § 122. We are only concerned with the right of the legislature to authorize women to vote for the named village officers. On the general question, in its broad aspect, the authorities are in irreconcilable conflict. For authorities holding that the legislature may authorize women to participate in the selection of all but constitutional officers or otherwise depart from the constitutional qualifications of electors in particular elections, see Scown v. Zarnecke, 264 Ill. 305, L.R.A.1915B, 247, 106 N. E. 276, Ann. Cas. 1915A, 772; Hanna v. Young, 84 Md. 179, 34 L.R.A. 55, 57 Am. St. Rep. 396, 35 Atl. 674; State ex rel. Harris v. Hanson, 80 Neb. 724, 115 N. W. 294, 117 N. W. 412; State ex rel. Lamar v. Dillon, 32 Fla. 545, 22 L.R.A. 124, 14 So. 383; Buckner v. Gordon, 81 Ky. 665. For contrary holdings, see Election Comrs. v. Knight, — Ind. —, 117 N. E. 565; People ex rel. Bokkelen v. Canaday, 73 N. C. 198, 21 Am. Rep. 465; Coffin v. Thompson, 97 Mich. 188, 21 L.R.A. 662, 56 N. W. 567; also dissenting opinions in Scown v. Zarnecke, supra, and State ex rel. Taylor v. French, 96 Ohio St. 172, 117 N. E. 173, Ann. Cas. 1918C, 896.

It is generally held, however, that constitutional provisions such as those referred to do not limit the power of the legislature to authorize participation by women in elections for the determination of local matters in which they may have a legitimate interest in common with men. Thus, in Iowa, where the supreme court has held that women may not be authorized to participate in the selection of officers not named in the Constitution, it is held that they may be authorized to vote upon questions of municipal indebtedness. Coggeshall v. Des Moines, 138 Iowa, 730, 128 Am. St. Rep. 221, 117 N. W. 309. The

Constitution of Iowa fixes the qualifications of electors who "shall be entitled to vote at all elections which are now or may hereafter be authorized by law." Iowa Const. art. 2, § 1. This, the court held, to prescribe qualifications only for those voting at elections for choosing officers.

To what extent § 6 of article 2 of the Iowa Constitution, which fixes the time for holding the general election for state, district, county, and township officers, is responsible for the broad definition of the term "election" (making it applicable to all elections for the selection of officers), as used in the provision defining the qualifications of electors, does not appear, but it would seem that in the Iowa Constitution it was clearly contemplated that only electors should be permitted to participate in any election for the selection of officers, and such is the holding of the Iowa court. See Coggeshall v. Des Moines, supra. In the Constitution of North Dakota there is no provision, such as is contained in the Iowa Constitution, with reference to the election of local officers, and the Iowa decisions, for this reason, lose some of their force as precedents touching the question in hand. For a similar reason the case of State ex rel. Kimball v. Hendee, 57 N. J. L. 307, 30 Atl. 894, is not a strong precedent; for in New Jersey the Constitution fixed the qualifications of voters "for all offices that now are, or hereafter may be, elective by the people."

It has been quite generally held that legislative authority, conveyed in general terms, to deal with certain subjects, carries with it a power to determine the means through which the authority may be best exercised. Thus, where authority has been given to establish a common-school system, it is held that the legislature is free to prescribe the qualifications for school officers and of those who may vote for such officers and upon matters pertaining to schools. It is held that in so doing the legislature may authorize women to participate in school elections and to hold school offices, and this notwithstanding the usual constitutional provisions limiting the elective franchise to males. See Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191; Kelso v. Cook, 184 Ind. 173–184, 110 N. E. 987, Ann. Cas. 1918E, 68; Wheeler v. Brady, 15 Kan. 26; Opinion of Justices, 115 Mass. 602; Belles v. Burr, 76 Mich. 1, 43 N. W. 24; State v. Cones, 15 Neb. 444, 19 N. W. 682; State ex rel. Mills v. City Bd. of Elec-

tions, 9 Ohio C. C. 134, 6 Ohio C. D. 36, 54 Ohio St. 631, 47 N. E. 1114; State ex rel. Eastern & W. School Dists. v. Cincinnati, 19 Ohio, 178; Harris v. Burr, 32 Or. 348, 39 L.R.A. 768, 52 Pac. 17. Upon like reasoning it has also been held that a constitutional provision authorizing municipalities to frame charters for their government enables them to confer upon women the right to vote for municipal officers. State ex rel. Taylor v. French, 96 Ohio St. 172, 117 N. E. 173, Ann. Cas. 1918C, 896. We are unable to perceive any distinction based upon the source of the power to authorize the participation by women in the local election; that is, as to whether it be authorized by the legislature acting under a provision of the Constitution giving it plenary power over municipalities (see § 130, N. D. Const.), or whether it be directly and locally authorized under a constitutional provision permitting the framing of home rule charters as in the Ohio case. In either case the real source of the power to authorize a degree of participation by women in local affairs is the Constitution. It has been generally recognized that the power of the legislature to regulate municipalities may be exercised within a broad domain. Thus, it has been held that the legislature may depart from the qualifications of voters as defined in the Constitution in authorizing votes upon matters of public improvements. Spitzer v. Fulton, 172 N. Y. 285, 92 Am. St. Rep. 736, 64 N. E. 957. See also Valverde v. Shattuck, 19 Colo. 104, 41 Am. St. Rep. 288, 34 Pac. 107; Callam v. Saginaw, 50 Mich. 7, 14 N. W. 676; Coggeshall v. Des Moines, supra; Buckner v. Gordon, 81 Ky. 665, supra. We can see no fundamental difference between a legislative regulation of municipal matters that allows women to participate in elections that bind municipal officers to a given course of conduct, and one that allows them to vote for the municipal officers themselves. One method of directing the conduct of municipal affairs is as permissible, from a legislative standpoint, as the other, and, in the absence of constitutional provisions which expressly or by fair implication forbid resort to one or the other of these methods, either or both may be employed according to the legislative will. We are satisfied that the legislature in the exercise of its control over minor municipalities may authorize women to participate in the selection of local officers whose election is not provided for in the Constitution. We do not, however, express any opinion as to the

soundness of the general proposition supported by the authorities hereinbefore cited, to the effect that the legislature may prescribe qualifications for electors different from those contained in the Constitution, which shall be applicable to the election of all officers whose election is not expressly sanctioned by the Constitution.

It would seem almost superfluous to add that we recognize the force of the principle, which, so far as our observation goes, is universally adhered to, that where the Constitution prescribes the qualifications of electors the legislature is powerless to add to or subtract from those qualifications. Cooley, Const. Lim. 559, 5th ed. 753. From this it follows that it cannot admit to the defined class persons not possessing the constitutional qualifications. This principle is not decisive of this case, however, for the reason that it is clear to us that the legislature, in the exercise of its plenary power to regulate the affairs of municipalities, is not bound to respect electors as an exclusive class in providing for the selection of municipal officers, any more than it is bound to respect them as a class in providing for a vote upon matters of municipal indebtedness, improvements, or policies generally.

The order appealed from is affirmed.

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

J. I. CAHILL, Appellant, v. THOMAS McDOWELL, William Eastman, William E. Wade, Constituting the Board of County Commissioners of Grant County, North Dakota, Respondents.

(169 N. W. 499.)

County seat — temporary location — county commissioners — permanent location — general election — preliminary expression of choice by voters — primary election.

1. Section 3208 of the Compiled Laws of 1913, which provides for the temporary location of county seats by the county commissioners and for the permanent location at a general election, and chapter 101 of the Session Laws of 1917, which amends the above section by adding a proviso authorizing a preliminary expression of preference by the voters voting at a primary election, are held to be applicable to the location of the county seat of Grant county.

Legislature — providing method for contesting result of primary election — result of such election — cannot be questioned in contest proceedings.

2. The legislature having failed to provide a method for contesting the result of a primary election at which the voters are authorized to express a preference between the various towns contending for the county seat, the result of such an election cannot be questioned in a contest proceeding.

Validity of election — contesting — place declared selected as county seat — application of law — primary election — preliminary expression of choice by voters — law does not apply.

3. Section 1051 of the Compiled Laws of 1913, which provides for contesting the validity of an election as to the right of a place declared and selected as the county seat, is construed and held to be applicable to an election which determines the location of a county seat, but not to one which merely amounts to an expression of preference preliminary to a final vote and selection at a general election.

Opinion filed November 2, 1918.

Appeal from District Court, Grant county, *W. C. Crawford,* J. Affirmed.

Nuchols & Kelsh, for appellant.

The right of suffrage is not an inherent one, nor a necessary incident of citizenship, but is merely a privilege granted by the sovereign power, and subject to the restriction of the Federal Constitution. 15 Cyc. 280 and cases cited; 9 R. C. L. 1023 and cases cited.

The enlargement, by the legislature of constitutional requirements and qualifications of voters, as well as the abridgment of the same, is obnoxious to the Constitution. Wilson, The State, chap. 12; Everett, Address on History of Liberty; Gougar v. Timberlake, 148 Ind. 48; Minor v. Happersett, 21 Wall. 162; 15 Cyc. 281, 398 and cases cited; Coggeshall v. Des Moines, 138 Iowa, 137, 117 N. W. 309; Cooley, Const. Lim. 599; Merris v. Powell, 125 Ind. 281; People ex rel. v. Canaday, 73 N. C. 198; Election Comrs. v. Knight (Ind.) 117 N. E. 565; McCafferty v. Guyer, 59 Pa. 109; Coffin v. Election Comrs. 97 Mich. 188, 56 N. W. 567.

The law of this state provides for and fully authorizes contests like the one here involved. Comp. Laws, 1913, § 1046; Troat v. Morris (S. D.) 137 N. W. 554; Truelson v. Duluth (Minn.) 61 N. W. 911; State v. Gates (Minn.) 28 N. W. 927.

Sullivan & Sullivan, and *I. N. Stern,* for respondents.

An amendatory act takes effect only from the time of its passage and has no application to prior transactions, unless an intent to the contrary is expressed in the act or clearly implied from its provisions. The county seat of Grant county was fixed as by law provided at Carson, long before the enactment of such amendment. Comp. Laws 1913, 7937, subd. 18, § 7938, subd. 58; 26 Am. & Eng. Enc. Law, 2d. ed. 712 and cases therein cited.

There is no authority for this contest. The result of a preliminary vote by the electors at a primary election, merely expressing their choice of a county seat town, cannot be contested. It is not final, and does not permanently locate the county seat, but is merely expressive of a choice. 9 R. C. L. p. 1157, § 147; State v. Superior Ct. 14 Wash. 604, 33 L.R.A. 674; Comp. Laws 1913, § 881.

There is nothing in the act of the legislature which authorizes a contest of the result of a primary election to choose a temporary county seat.

A primary election is a special election, merely to place before the voters certain matters to be determined at the general election following. Lane v. Fern, 20 Haw. 290, Ann. Cas. 1913B, 155; Scown v. Czarnecki, 264 Ill. 305, L.R.A.1915B, 247, 106 N. E. 276; State ex rel. Gilson Co. v. Monahan, 7 Ann. Cas. 661 and note, 72 Kan. 492, 115 Am. St. Rep. 224, 84 Pac. 130.

BIRDZELL, J. This is an appeal from an order sustaining a demurrer to a notice of contest in which it was sought to question the validity of an election held under the authority of chapter 101, of the Session Laws of 1917. This act provides for an election to be held, in connection with the primary election, for the purpose of locating the county seat in counties where it has not previously been permanently located. The facts necessary to an understanding of the questions presented are as follows:

At the primary election held in June, 1918, the question of the location of the county seat of Grant county was voted upon and the votes were canvassed, showing the result to be as follows: In favor of the village of Elgin, 1,000 votes; in favor of the village of Carson, 785 votes; in favor of the village of Leith, 752 votes. The vote in favor

of the village of New Leipzig, which was also upon the ballot, is not material to this proceeding. In this election the women of the county were allowed to participate under the authority of chapter 254 of the Session Laws of 1917. It appears from the notice of contest that the number of women voting in favor of the village of Carson exceeded the number voting in favor of the village of Leith by 76 votes; so that, should the votes cast by the women be disregarded, the village of Leith would be second in the election returns and, under the provisions of chapter 101 of the Session Laws of 1917, would be entitled to a place upon the ballot at the general election to be held in November, 1918. Following the election a notice of contest was served under § 1046 of the Compiled Laws of 1913, the contestant relying for the authority to contest the election upon § 1051 of the Compiled Laws of 1913. The only questions arising upon this appeal are: First, the applicability of chapter 101 of the Session Laws of 1917, to the location of the county seat of Grant County, and second, the existence of authority for the contest proceedings.

Section 3208 of the Compiled Laws of 1913 authorizes the county commissioners of a newly organized county to fix temporarily the county seat, and it is therein provided that "such location shall remain the county seat until the first general election thereafter, when the qualified voters of such county are empowered to vote for and select the place of the county seat by ballot as provided by law." The legislature in 1917 amended the foregoing section by adding the following proviso: (Sess. Laws 1917, chap. 101), "Provided, however, that in counties where the county seat has not been permanently located, the question of location of such county seat may be voted on at any primary election upon a petition or petitions, each to be signed by at least 10 per cent of the qualified voters of such county, voting for the office of secretary of state at the last general election, stating the date of signing and the residence of each qualified voter, designating therein the proposed county seat, which said petition shall be filed with the county auditor at least thirty days prior to the holding of any primary election, and if more than two towns are contesting for the location of the county seat at such election, then the two towns receiving the highest vote at such . . . election, and these two towns only, shall be placed on the official ballot at the first following

general election. . . . " It is contended by the respondent that the foregoing amendment has no application to the location of the county seat in Grant county, this by reason of the fact that the county seat had been temporarily located at Carson, under § 3208 before it was amended, but we are of the opinion that the amendment clearly applies to the location of the county seat in any county where, previous to the adoption of the amendment, it had been only temporarily located. Such was the character of the location of the county seat at Carson previous to the adoption of the amendment.

Section 3208 of the Compiled Laws of 1913, as it originally stood and as amended, contains no express provision for the contesting of an election held thereunder. The section, however, in its arrangement in the Political Code is a part of chapter 42, which is entitled "Counties and County Officials," and in the same article it is provided in § 3210 that, "all elections under this article, where not otherwise provided, shall be conducted in the same manner as required by law for general elections. . . . " This refers only to the manner of conducting the election. The authority to contest elections for the location of county seats is found in § 1051, of the Compiled Laws of 1913, which provides that "in any county where there is a vote for the election or for the removing or changing of the county seat of such county, or changing the county lines thereof, any elector of such county on leave of the district court may contest the validity of such *election as to the right of the place declared and selected as the county seat.* . . . Such elector shall give notice in writing of such contest to the county commissioners or a majority of them, of the county in which such vote was taken, by serving a notice as provided in § 1046, within thirty days after the result of such vote is canvassed. Such notice shall specify the grounds of such contest, and shall be filed with the clerk of the district court within ten days after the service thereof upon the county commissioners as aforesaid, and such contest shall be tried and determined by the district court or by a jury as provided for in this article for the contest of county officers." Section 1046 of the Compiled Laws of 1913, providing for the notice of contest, is sufficiently broad to comprehend a contest by an elector to determine the validity of an election locating a county seat.

The principal question in this connection arises upon the interpreta-

tion of § 1051. Does this section authorize the contesting of a primary election at which the question of locating the county seat is voted upon and the preference of the voters expressed for different contesting towns, all of which is but preliminary to a final vote and the final location of the county seat? There can be no question but that at the time § 1051 was adopted the language referred only to elections at which the county seat would be definitely and finally selected. This is the language of the statute, and when it was adopted there was no means of obtaining an expression of preference by vote between two or more locations as a preliminary to a final and definite location. Does it follow, however, from the modification of the location statute, permitting the preliminary expression of preference, that it was intended to make applicable to this expression all of that portion of the article regulating election contests? In order to determine whether this was in the contemplation of the legislature, it is proper to examine the procedure which is provided in the article entitled "Contesting Elections" in order to determine the extent to which such a procedure would be appropriate and applicable. It is to be noticed that under § 1051 the notice of contest is to be served within thirty days; that there are ten days after the service in which to file it in the district court. Thereafter, the matter is to be tried by the district court or by a jury or it may be referred to a referee. After the final determination of the contest in the district court and after the service of the notice of the entry of final judgment, a party adversely affected by the judgment has sixty days within which to appeal therefrom (§ 1055), and after the appeal is perfected the respondent is entitled to ten days' notice of the hearing in the supreme court. It will be seen that the procedure above outlined with reference to contesting the result of elections makes allowance for a period of time aggregating more than three months and a half, without allowance for trial, all of which might elapse before the contest proceeding would be submitted to the supreme court on appeal. The legislature has allowed ample time for a full trial of all of the issues involved and for the deliberate preparation and presentation of the whole matter. An entirely different procedure, however, has been provided for primary elections in general. Section 881 of the Compiled Laws of 1913 gives any "candidate" desiring to contest the nomination of another candi-

date ten days after the completion of the canvass, within which to proceed by affidavit. An expeditious hearing is provided for, and, after the final determination of the contest in the district court, ten days are allowed for appealing to the supreme court and in the supreme court the matter may be brought on for a hearing at any time after five days' notice. Thus, it will be seen that, in providing for the contesting of the results of primary elections affecting candidates, the legislature has deemed it wise to create a much more expeditious procedure and one that is calculated to give to the litigants the benefit of a final determination upon review in the supreme court within a comparatively short time after the election is held. The election in question is a primary election and it is so obvious that the contest provision, § 881 of the primary election statute, does not cover that counsel for the contestant has not even attempted to avail himself of its provisions. It is likewise clear to us that the machinery for contesting general elections is so far inappropriate to such a primary election that we cannot hold the legislature adopted it by implication. A contest proceeding is statutory and the matters involved are only judicial to the extent the statute makes them so. 9 R. C. L. 1157. We are not called upon to express an opinion as to the existence or nonexistence of other remedies.

Appellant has called to our attention the cases of Treat v. Morris, 25 S. D. 615, 127 N. W. 554; State ex rel. Diepenbrock v. Gates, 35 Minn. 385, 28 N. W. 927, and Truelson v. Duluth, 60 Minn. 132, 61 N. W. 911, in which it was held that a general law prescribing a mode of contesting elections is applicable to general and special elections, and even to elections held to determine questions of policy, such as that of prohibition or license. The general provisions construed in the cases referred to are analogous to § 1046 of the Compiled Laws of North Dakota for 1913 and we do not question the propriety of giving a broad construction to a law of that character for the purpose of making the remedy provided available. But, it is one thing to construe such a statute as being applicable to an election at which a question is finally determined or an officer elected, and quite another thing to hold it applicable to a mere preliminary expression of preference in anticipation of a final expression at a later time. None of the cases referred to goes to that extent. For the reasons above given, we are

of the opinion that the legislature has failed to provide a method of contesting an election such as the one in question. From this it follows that the order appealed from must be affirmed. It is so ordered.

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

EDGAR ANDERSON, Appellant, v. JOHN KAIN and MATTIE S. KAIN, Respondents.

(169 N. W. 501.)

Debtor — new note to creditor — to take place of a past due note — debt for which given — not necessarily paid.

1. Where a debtor gives to his creditor a note with the understanding that it is to take the place of a past due note which it was agreed should be redelivered to the debtor, it does not follow that the parties regarded the debt for which the first note had been given as paid.

Trial de novo — mortgage foreclosure — action for — debt — evidenced by renewal note — secured also by chattel mortgage — renewal note and mortgage — to operate as payment — of indebtedness and satisfaction of mortgage — findings to that effect — not supported by evidence.

2. In a trial *de novo* of an action to foreclose a real estate mortgage securing indebtedness which is evidenced by a renewal note secured by a chattel mortgage, as well as by the note and real estate mortgage upon which the action is brought, the evidence is examined and held not to support the findings of the trial court that the renewal note and mortgage were to operate as payment of the indebtedness and as a satisfaction of the real estate mortgage.

Mortgage on homestead — holder of — final proof not made — security of such mortgage — protection of — advancements made to homesteader — of government purchase price — mortgagor receives benefit — obtains patent — advancements may be added to mortgage debt — subrogation to rights — land security for payment.

3. Where the holder of a mortgage upon a homestead on which final proof has not been made, in order to protect the security of his mortgage, advanced, on behalf of the homesteader, the government purchase price of the homestead, and where the mortgagor avails himself of the benefit of the payment and receives the patent with full knowledge thereof, the amount so advanced may be added to the mortgage and the mortgagee becomes subrogated to the right of the government to treat the land as security for the payment.

Note and mortgage — indorsed and assigned — assignee may maintain action — foreclosure — in own name — though accountable to others — for part or all of recovery.

4. Where a note and mortgage have been, respectively, indorsed and assigned, the indorsee and assignee may maintain an action in his own name to foreclose the mortgage for the amount of the lien, though he may be accountable to others for a portion or all of the recovery.

Opinion filed July 6, 1918. Rehearing denied November 16, 1918.

Appeal from the District Court of Eddy County, Honorable *K. E. Leighton,* Judge.

Reversed.

Siver Serumgard and *F. R. Stevens,* for appellant.

The burden of proof is upon defendant to show that the original note was paid by the renewal note, and that therefore the mortgage securing the original note indebtedness was satisfied. First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867; Bank v. Flath, 10 N. D. 275.

It is the law that a change of form of a debt or renewal of a mortgage note, or even the return of the old note itself to the maker, does not vitiate the mortgage so long as the mortgage debt remains unpaid and can be traced. 27 Cyc. 1410; 2 Jones, Mortg. 7th ed. p. 501, § 924.

Where an entryman borrows money with which to pay the government price of the land and used it for such purpose, and the debt was secured by a mortgage given by the entryman, the mortgage was a purchase price mortgage and a valid lien upon the land, a homestead, whether executed by the wife or not, and was prior to any right she might have in the land. Keene v. Haven, 59 Pac. 15; Prout v. Bruce, 70 N. W. 512; Irvin v. Gay, 91 N. W. 197; Jackson v. Phillips, 57 Neb. 193, 77 N. W. 684; Converse v. Barnard, 72 N. W. 611; Curry v. Boyle, 11 N. W. 47; 1 Jones, Mortg. 7th ed. 469; 4 N. D. 156; Comp. Laws 1913, §§ 5607, 6718, 6861; Rev. Codes 1905, §§ 5051, 6141, 6281.

The holder of an inferior lien may take up a superior lien by payment, and be subrogated to all rights thereunder. Comp. Laws 1913,

§ 6702; Rev. Codes 1905, § 6126, and cases cited; Foster v. Furlong, 8 N. D. 282; Bank v. Tufst, 14 N. D. 247.

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

Unless the findings of the trial court are clearly against the preponderance of the evidence, they should be sustained. Bergh v. John Wyman Farm Land & Loan Co. 30 N. D. 158.

BIRDZELL, J. This is an appeal from a judgment in favor of the defendants entered in an action to foreclose a mortgage. The facts are as follows:

The defendants, John Kain and Mattie S. Kain, on December 17th, 1909, gave to A. C. Anderson a promissory note for $518 which was due approximately two years after its date and was secured by a real estate mortgage on the east half of the northwest quarter and the northeast quarter of the southwest quarter of Section 27, Township 150 N., Range 64 W. of the 5th P. M. The land described in the mortgage was government land upon which John Kain had filed but upon which he had not, as yet, earned a patent. The note and mortgage were afterward transferred and assigned to the State Bank of Warwick, the Farmers' & Merchants' Bank of Warwick, and to the plaintiff in this action. In so far as the circumstances in connection with these transfers are material to a consideration of the questions raised on this appeal, they will be later considered.

In December, 1911, there was a settlement of mutual accounts between A. C. Anderson and the defendants, as a part of which the defendants gave some notes to Anderson, among which was a new note for $622.23. All the notes given as a part of this settlement were secured by a chattel mortgage. Following the settlement, Charles Anderson, attorney in fact for A. C. Anderson, gave the defendants a statement showing that the $622.23 note was a renewal of the $518 note above referred to.

In the fall of 1912, some conferences were had between representatives of the Andersons and defendants at which the question of raising the necessary money to enable the Kains to make final proof on their homestead was discussed. The plaintiff contends that at these conferences an understanding was reached whereby Siver Serumgard, who represented the Andersons, was to endeavor to raise an amount

of money sufficient to enable the Kains to make their final proof and obtain their patent. The defendants contend that such an agreement was not reached; but that, on the contrary, Mr. McClory, who represented them at the conference, was to raise the money, and that they definitely refused to accept the money that had been obtained for them by Serumgard and preferred to let the matter of the final proof go for another year. In this respect there is a clear conflict between the testimony of Serumgard and that of the defendants. It appears, however, that final proof was made in December, 1912, and that the money required to make the necessary payment to the government Land Office was raised by the Andersons under the direction of Serumgard. The defendant John Kain received the patent and accepted it with knowledge that the proof money was supplied by Charles Anderson, or by Serumgard as agent for Anderson and his wife, A. C. Anderson. A further fact of some significance is that, though the pleading in the case foreshadowed the issue as to the source of the money with which final proof was made and the authority to apply it on behalf of defendants, the record does not account for the failure of the defendants to procure the testimony of P. J. McClory who represented them in the conference which was had with Serumgard.

Among other findings, the trial court found that the Farmers' & Merchants' Bank of Crary, of which the plaintiff, Edgar Anderson, is an officer, advanced to Charles Anderson $300 on a note executed by him, and as security the bank held the oral guaranty of Edgar Anderson, the plaintiff; that Edgar Anderson took an indorsement and assignment of the notes and mortgage in suit; that at the time the renewal note for $622.23 was given it was given with the express understanding that "Charles Anderson would return to the said defendant, John Kain, the note sued upon in this action." From these findings the court concluded "that the defendants, by the payment of the said notes and mortgage in December, 1911, extinguished the lien of said mortgage as to the plaintiff, Edgar Anderson," and "that the defendants are entitled to a judgment canceling and satisfying said mortgage of record. . . . That the plaintiff does not have any lien on the lands of the defendants for the sum of $323 paid into the United States Land Office at Devils Lake as the government price of said lands, nor for any portion of the sum."

The vital question presented upon this appeal is whether or not the indebtedness represented by the $518 note and secured by the mortgage sought to be foreclosed has been paid. The findings of the trial court are favorable to the respondents as to this question, and in support of these findings upon this appeal the respondents' main argument is from the testimony which tends to support the finding. The testimony principally relied upon is that of the defendant, John Kain, Sr., and John Kain, Jr. Upon direct examination, John Kain, Sr., testified that Charles Anderson had requested him to give a new note in place of the original $518 note; that the subject of his indebtedness to Charles Anderson and the security given therefor was discussed, and that Charles Anderson, as agent for A. C. Anderson, had expressed the desire to have chattel security in view of the questionable nature of the mortgage security upon the homestead upon which final proof had not been made or patent earned. He testified that it was the understanding that the old notes were to be given back and that after the new notes were given, Anderson, being unable to find the old notes about the store, gave him, at his request, a receipt showing for what the new notes had been given. On cross-examination he testified in answer to questions as follows:

Q. Did you ever make a demand on Charles Anderson or anyone else for the satisfaction of the real estate mortgage securing exhibit 1?

A. We made a demand on Charles Anderson and he tried to get it for me but said he couldn't find it, he didn't know just where it was but he would get it for me and give the notes to me the next time I came in.

Q. You never asked for a satisfaction?

A. When I saw that he could not produce the notes or didn't produce the notes I asked for a receipt for those notes.

Q. You never asked for a release of the mortgage on this piece of land?

A. I asked for a release of everything and he was to record his new notes and hold them in the place of the old notes. That was the agreement.

There is nothing in the testimony of John Kain, Jr., going to establish an understanding that the mortgage was to be satisfied. His

testimony fully corroborates that of his father to the effect that it was agreed that the new notes should operate as a renewal of the old notes and that the old notes should be surrendered up. The testimony above quoted, together with that which goes to establish the understanding with which the new notes were given, does not satisfactorily establish that it was any part of the understanding that when the new notes were given the mortgage was to be satisfied. In the receipts that the Kains took the new notes were referred to as renewals of the $518 note and there is no showing that they ever attempted to have the mortgage satisfied. Even though it were the understanding that the old notes were to be surrendered, it does not necessarily follow that it was also agreed that the debt was to be regarded as paid. The debt is the principal thing and the notes are but the evidence thereof. The law is that the taking of a new note does not operate to discharge the indebtedness unless it is agreed that the indebtedness should be discharged. The burden of establishing such an agreement is upon the party who asserts it. 22 Am. & Eng. Enc. Law, 555–563. This rule is not altered by the fact that additional security is given for the new notes. 22 Am. & Eng. Enc. Law, 558. The receipt which Anderson gave in January 1912, following the settlement and the execution of the notes in December 1911, shows that the Kains were indebted to A. C. Anderson in an amount exceeding $2,000, and for this indebtedness the chattel mortgage security was apparently inadequate. We do not know to what extent it was inadequate, but it appears that an attempt has been made to realize upon the chattel security by foreclosure, and it is not established that the amount realized upon the foreclosure sale was adequate to discharge the indebtedness. In view of the amount of the indebtedness and the character of the security, it would seem quite improbable that the creditor had agreed to discharge the security that he already held. Furthermore, if it was any part of the understanding that the real estate security was to be satisfied, it would seem that the Kains, instead of merely refusing, as they claim they did refuse, to accept the aid of the Andersons in procuring money with which to make final proof, would have insisted upon the mortgage being satisfied and would have definitely told the Andersons that they had no interest whatever in the making of the final proof. It is difficult to believe that any person possessed of even the slightest

business ability would interest himself to the extent of raising over $300, as the Andersons did in this case, with which to enable another to make final proof upon a homestead, if it were understood, as the Kains contend it was, that the mortgage, which is responsible for the interest manifested was satisfied. In our judgment, the defendants have failed to sustain the burden which is upon them to establish that the mortgage was satisfied.

If the indebtedness for which the mortgage is security has actually been paid, it would apparently be an easy matter to establish that fact and there would be no occasion for counsel to argue, as respondents' counsel do, that the indebtedness was paid by virtue of the fact that the $622.23 note was included in the chattel mortgage foreclosure advertisement. In this argument, respondents rely upon the fallacy that the foreclosure of the security wipes out the indebtedness for which the security is given. It is elementary that a foreclosure only extinguishes the security and that the indebtedness is affected only to the extent that payment is realized through the foreclosure sale.

It is contended that the plaintiff has no lien for the final proof money amounting to $323. This contention is based upon the fact that this money was supplied by the Farmers' Bank of Crary and upon security furnished by Charles Anderson. It is claimed that these facts show conclusively that the plaintiff, who is indorsee of the $518 note and assignee of the mortgage in suit, has no interest in the lien, if there is one, for the advancement made to protect the security of the mortgage. It is undisputed that the Kains have received a patent for the land and consequently enjoy the full benefit of the payment made to the government as owners of the land. Neither is there any question as to the right of the plaintiff, as indorsee of the note and assignee of the mortgage, to maintain the suit in question. He is the party who holds the legal title to the security and to the indebtedness, and is in the position of one in whose name a contract is made for the benefit of a third person, within § 7397 of the Compiled Laws of 1913. See Hays v. Hathorn, 74 N. Y. 486. It may be that the plaintiff is under obligation to account to others for the recovery in this action, but there can be no doubt as to his right to recover in so far as there may be an enforceable lien. The question, as respects the lien for the advancement of the purchase money, narrows down to this: May a

secured creditor who advances money to enable the giver of the security to perfect his title and right to the property which forms the security, add to the mortgage indebtedness the amount so advanced? This identical question has not, so far as we are aware, been decided by any court of last resort, but cases involving analogous situations and identical in principle are of more or less frequent occurrence.

The amount that the homesteader must pay in order to make proof is regarded as the purchase price and, so far as the holder of a preliminary mortgage is concerned, the amount required to be paid to perfect the proof is in every way analogous, if, in fact, it does not amount to, a superior lien. Section 6718, Compiled Laws of 1913, gives to the holder of an inferior lien a right to satisfy a superior lien, when necessary for the protection of his interest, and the further right to be subrogated to all the benefits of the superior lien. It seems to us that when money has been advanced for a mortgagor by a mortgagee, under the circumstances shown in this case, and when the mortgagor has received all the benefits that could possibly accrue from the discharge of his purchase price obligation to the government, as have the Kains in this instance, he should be precluded from denying the right of the mortgagee to be subrogated to the creditor's right to treat the land as security for the payment. In the case of Beyer v. Investors' Syndicate, 31 N. D. 247, 153 N. W. 476, the equitable doctrine of subrogation was held applicable to the payment of taxes by a stockholder in a corporation upon the property owned by the corporation. It was there held that there was nothing in the nature of the county's lien for taxes that would prevent the application of the doctrine of subrogation where it was relied upon in order to effect justice. For similar reasons we can see nothing in the nature of the interest of the government to have the purchase price paid that will prevent the doctrine of subrogation from applying where its application is necessary in order to safeguard the interests of justice.

The judgment of the District Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

ROBINSON, J. I dissent.

GRACE, J. (dissenting). Appeal from the judgment of the district

court of Eddy County, North Dakota, Honorable K. E. Leighton, Judge of the eighth judicial district, sitting at the written request of Honorable C. W. Buttz, Judge of the second judicial district.

This is an action to recover on a promissory note for $518 with interest at 10 per cent per annum, dated December 17, 1909, payable November 1, 1911. The action is also brought to foreclose a certain real estate mortgage on certain land given to secure said note. The complaint states the cause of action upon the promissory note, also for the foreclosure of the said real estate mortgage. Plaintiff further alleges assignment of the note and mortgage for value in good faith and in due course before maturity by A. C. Anderson to the State Bank of Warwick with further allegation that the State Bank of Warwick for value in good faith and in due course assigned the note and mortgage to the Farmers' & Merchants' Bank of Warwick, and further alleges the assignment prior to the commencement of this action of said promissory note and mortgage by the Farmers' & Merchants' Bank of Warwick to Edgar Anderson, who, it is alleged, is the present holder and owner of said note and mortgage.

Complaint further alleges that at the time of the execution of the said note and mortgage, John Kain held the premises described in said mortgage as a government homestead, and had not made final proof and payment for the same; that on or about the 8th day of January, 1913, said John Kain offered final proof for his homestead entry for said premises; that at his request and as the equitable owner of said note and mortgage, the plaintiff paid to the register and receiver of the United States Land Office at Devils Lake, $323 as purchase money and fees and commission to the United States Land Office for the purchase of said land; that final receipt subsequently and prior to the commencement of this action was issued to John Kain and also the patent.

The defendant, in his answer, alleges that the note became due December 1, 1911, and denies that the said note and mortgage was assigned to the State Bank of Warwick prior to the maturity of said note and alleges that such assignment by A. C. Anderson to the State Bank of Warwick was not made until the 13th day of January, 1912, and not recorded in Eddy county until the 6th day of January, 1916, and alleges that the said mortgage was not assigned to the plaintiff

until the 22d day of January, 1914, and said assignment was not recorded until the 16th day of January, 1916. Defendant further alleges that after said note and mortgage became due and before any assignment of said note or mortgage was made or recorded, the defendants executed other notes to the said A. C. Anderson without any knowledge by the defendants of any assignment being made by said A. C. Anderson of said note and mortgage to the State Bank of Warwick or to anyone else, and without any knowledge of any assignment of said note and mortgage by the State Bank of Warwick to the Farmers' & Merchants' Bank of Warwick and without any knowledge of the assignment from the Farmers' & Merchants' Bank of Warwick to the plaintiff, and that said other notes executed by the defendants to the said A. C. Anderson, evidence the same indebtedness as the note and mortgage sued upon, in this action, together with other indebtedness, and the defendant secured said notes by executing a chattel mortgage on the chattels of said John Kain; that the said A. C. Anderson converted the said chattels covered by said chattel mortgage securing said notes, to a value far in excess of the amount of the indebtedness represented by said notes, and prior to the bringing of this action and prior to any attempt to foreclose the said mortgage, the defendants instituted an action in the district court of Benson county against A. C. Anderson and Charles Anderson, for the value of said chattels so converted by the said A. C. Anderson and Charles Anderson counterclaimed against the value of said property so converted by them the said other notes executed by these defendants to the said A. C. Anderson and representing the said indebtedness together with other indebtedness as is evidenced by the note sued upon, and the plaintiff seeks to foreclose this action; and said action between these defendants and the said A. C. Anderson and Charles Anderson was tried in the district court of Benson county with a jury and, in said action, the jury returned a verdict in favor of these defendants and against said A. C. Anderson on the 15th day of December, 1915, for the sum of $603.85, the same being the excess of the value of the chattels converted over and above the amount found by the jury to be due on said note and all of the other notes executed by these defendants in lieu of the note sued upon, and the mortgage which the plaintiff seeks to foreclose,

including other indebtedness, have been thus paid and their payment has been thus adjudicated prior to the bringing of this action.

Plaintiffs further, in substance, allege that after the note sued upon in this action became due, and before the defendant or either of them had any knowledge of any assignment of said note and mortgage, and before any assignment thereof was recorded, and while the defendant supposed that the plaintiff, said A. C. Anderson, was the holder of the note and mortgage, that the defendants executed other notes for the indebtedness represented by the note and mortgage sued upon in this action, and allege that it was specifically agreed between the defendants and the said A. C. Anderson that these defendants, by the execution of the said other notes and securing the same by chattel mortgage, paid the said indebtedness, note and mortgage sued upon in this action, in full, and that the same was not due and owing from the defendants and plaintiff or to any other person. The defendants deny that the plaintiff on the 8th day of January, 1913, or at any other time, was the equitable owner of the note and mortgage sued upon in this action, or that he, at the request of the said John Kain, paid to the register and receiver of the United States Land Office at Devils Lake the sum of $323 or any other sum as the purchase money, fees and commissions to the United States Land Office at Devils Lake for the purchase price of said land and further alleged that on the 8th day of January, 1913, plaintiff was not the owner of said note and mortgage, equitably or otherwise, and that the said A. C. Anderson was the owner and holder of said note and mortgage, and further alleged that John Kain specifically refused to accept any payment of commissions and fees to the United States Land Office at Devils Lake for the purchase price of said land from the plaintiff, and that, if the plaintiff paid such fees to the register and receiver of the United States Land Office at Devils Lake, he did so without the knowledge of these defendants or either of them, and contrary to the wish and desire and against their specific order for him not to pay the same. Defendant further alleged that prior to the 8th day of January, 1913, at which time the plaintiff claims to have paid the register and receiver of the United States Land Office at Devils Lake the said $323, that the note and mortgage sued upon had been fully paid by the defendants to the said A. C. Anderson. Statement of facts is as follows:

On the 7th day of December, 1909, the defendants, John Kain and Mattie S. Kain, gave their note to A. C. Anderson and secured it by mortgage on the homestead which had just been previously filed upon. The defendants were indebted to the International Harvester Company for the sum of $518 and they gave said note and mortgage to A. C. Anderson at the request of Charles Anderson who agreed to pay the International Harvester Company for them, which he afterwards did. It is claimed by the defendants that Charles Anderson put this note and mortgage up as collateral security to the State Bank of Warwick for a pre-existing indebtedness of A. C. Anderson to the bank. Plaintiff claims that on December 6, 1911, a statement was had between A. C. Anderson and John Kain, Sr., and John Kain, Jr., at Warwick, North Dakota, in which statement Charles Anderson represented to Kain that he owned the $518 note. It is further claimed at said time, that an agreement was made between John Kain, Sr., and John Kain, Jr., and Charles Anderson, acting for his wife, A. C. Anderson, that a new note of $622.22 was executed and secured by chattel mortgage, and was accepted in payment of the old note for $518 and the mortgage securing same, and that the $518 note secured by the mortgage on the homestead was to be returned and the mortgage released.

The first question which we consider is: Was the $518 note and mortgage paid by the giving of the new note for $622.22 by John Kain, Sr., and John Kain, Jr., December 6, 1911, which note was secured by the chattel mortgage and which new note was claimed to have been given by the Kains not as a renewal note but by a specific agreement, as they claim, in payment of the $518 note and for a release of the mortgage upon the homestead? If the renewal note was given under the agreement as claimed by the defendants and the $518 note at the time of the giving of the new note was in the possession or under the control of A. C. Anderson, or afterwards came into his possession, then the new note of $622.22, under such specific agreement, was not a renewal note in the ordinary sense but, by reason of the specific agreement, operated as a discharge of the original note of $518, and the mortgage securing the same.

It is the law, in this state, that where a renewal note is given and nothing is said and no special agreement had, it does not operate as a

discharge in payment of the original obligation, but the rule would be different where there is a special agreement that the original obligation would be discharged.

Anderson claims that he turned the $518 note over to the State Bank of Warwick as collateral security to A. C. Anderson's indebtedness to such bank about the 10th day of January, 1910. It is claimed that about two years after this date the note was turned over to the Farmers' & Merchants' Bank of Warwick. It does not appear that the State Bank of Warwick owed the Farmers' & Merchants' Bank of Warwick, or, in any manner, turned the note over to the Farmers' & Merchants' Bank of Warwick in due course of business for value. It does not appear that the Farmers' & Merchants' Bank of Warwick paid the State Bank of Warwick anything for said note. It does appear that A. C. Anderson made an assignment, in writing, of both the note and mortgage to the Farmers' & Merchants' Bank of Warwick on January 13, 1912, which assignment was made by her attorney in fact, Charles Anderson, and it appearing nowhere that the Farmers' & Merchants' Bank of Warwick paid anything for said note or that they took it in the ordinary course of business for value, it cannot be said that in their hands they are innocent purchasers for value in due course of business, and in view of these circumstances, the written assignment of A. C. Anderson of the note and mortgage in question, whether the note was passed directly from the State Bank of Warwick to the Farmers' & Merchants' Bank of Warwick would really not be any different than if the note were returned to A. C. Anderson by the State Bank of Warwick and indorsed by her or her attorney in fact to the Farmers' & Merchants' Bank of Warwick. If this is true, and it is also true, as the trial court found that the $622.22 note was given in payment of the $518 note, or given with the understanding and agreement that the $518 note was to be returned together with the real estate mortgage securing the same, then at the time the Farmers' & Merchants' Bank of Warwick took the $518 note and mortgage securing same, said note and mortgage were of no effect and were, in fact, paid by the renewal $622.22 note and the chattel mortgage given to secure such note; but even if it were assumed that the Farmers' & Merchants' Bank of Warwick came into the possession of the $518 note in due course of business for value, which, under the circumstances above stated, we do not

believe they did, it appears from the record they afterwards indorsed said note and turned it over to Charles Anderson which indorsement was as follows:

"Without recourse to us to pay to Charles Anderson or order.

"Farmers' & Merchants' Bank, Warwick, North Dakota, Morton Anderson Pt."

Charles Anderson must be held to be the attorney in fact and the agent of A. C. Anderson in all these transactions. He desired to use said paper for the purpose of borrowing money from Edgar Anderson, plaintiff in this case, for the purpose of furnishing the money in the sum of $300 for the Kains and making final proof and pay the money required to pay the United States government where commutation proof is made. He took the note to Edgar Anderson with this indorsement upon it. Edgar Anderson did not loan him the money but referred him to the Farmers' Bank of Crary. The Farmers' Bank of Crary did loan to Charles Anderson the $300, and the $300 was advanced to him out of the funds of the Bank of Crary, and not by Edgar Anderson personally. Edgar Anderson was an officer of the Farmers' Bank of Crary and was its president. Edgar Anderson testifies that it was not his money personally, and that the loan was not made by him personally, and that he was acting as agent for the bank. There is no doubt from the record but what Edgar Anderson did not make the loan of $300 to Charles Anderson personally, but that the loan was made by the Farmers' Bank of Crary to Charles Anderson as a bank loan. The bank took Charles Anderson's note for the loan. No written assignment of the note or mortgage was ever made to the Farmers' Bank of Crary, nor any assignment made of the note and mortgage by the Farmers' Bank of Crary to the plaintiff. The plaintiff claims that he guaranteed the note, but he did not do so in writing.

In view of all these circumstances, even assuming that the Farmers' & Merchants' Bank of Warwick came into possession of the note in due course, they afterwards voluntarily turned it over to Charles Anderson, agent and attorney in fact for A. C. Anderson, and indorsed it over to him. It thus came into his possession legally as the agent of A. C. Anderson. At the time it came into his possession, it was past due and became subject to the agreement testified to by the

Kains that this note and mortgage securing it were to be surrendered at the time of the execution of the note for $622.22 and the chattel mortgage securing it. The $518 note and mortgage securing the same thus became of no further effect, and could not thereafter pass as negotiable paper in due course.

The indorsement from the Farmers' & Merchants' Bank of Warwick was afterwards erased and the indorsement on the note then was the indorsement from the State Bank of Warwick to the Farmers' & Merchants' Bank of Warwick, and from the Farmers' & Merchants' Bank of Warwick to Edgar Anderson; but, while Charles Anderson had possession of the note for the purpose of borrowing money, and for the purpose of placing the $518 note as security for the borrowing of the $300, he was in possession of the $518 note lawfully, after the same was turned over to him properly indorsed for the purpose of borrowing money. The note thus being in his possession in the legal course of business and after he made the agreement on behalf of A. C. Anderson that this note should be surrendered on the execution of the $622.22 note, the agreement thus became binding and the note, in his hands, was of no effect and was void, the same having been paid under such agreement, if such agreement were made.

A settlement was had between Charles Anderson, on behalf of A. C. Anderson and the Kains in the fall of 1911, and the note for $622.22 was given in renewal of the $518 note. The defendants claiming that the $622.22 note was given under the specific agreement referred to and operated as a payment and discharge of the $518 note. The evidence on this subject is in direct conflict, the defendants testifying that such was the agreement and the plaintiff denying same. The trial court found for the defendants, thus believing their version of the story, and holding that the $518 note was paid by reason of such specific agreement. The trial court had the opportunity of seeing all the witnesses personally, and was in a better position than we to weigh the credibility of the witnesses, and we see no reason to disturb the conclusion which the trial court reached in this regard.

It really appears to us, in any event, that the plaintiff herein is not the real party in interest. He never loaned any money personally to the Kains or to anyone for the Kains to be used in the payment of the $300. He never had any talk with the Kains and they deny that

they ever gave Serumgard any authority to procure the money for them. It must necessarily follow that Edgar Anderson would have no interest in said note or mortgage even if the same had not been cancelled under the specific agreement, either at the time it was turned over by the State Bank of Warwick to the Farmers' & Merchants' Bank of Warwick, or at the time it came into the hands of Charles Anderson, agent and attorney in fact of A. C. Anderson.

If Edgar Anderson had come into the lawful possession of the $518 note and mortgage and thus became equitable owner of the same, we are of the opinion that, if after coming into possession of such mortgage, he loaned or advanced the $300 for the purpose of paying the amount to the United States government under the commutation proof, he would not have a lien upon the land in consequence thereof, unless at the time of the advancing of the $300, there was a specific agreement that a mortgage was to be given to secure the $300.

We are of the opinion that the $518 note and mortgage was paid at the time of the giving of the $622.22 note and the chattel mortgage securing the same by reason of the specific agreement made between the plaintiff and the defendants at the time of the giving of the renewal note, the agreement being to the effect that the $518 note and the real estate mortgage securing the same should be returned to the defendants. It is clear there is no lien or mortgage for the $518 nor the $300 under the circumstances existing in this case. It also appears that the $300 claimed to be advanced as proof money was, in point of time, approximately three years subsequent to the date of the mortgage. Under the testimony, if it were advanced, it was without the authority or consent of the Kains. Under these circumstances, it is utterly impossible for the $300 to become an actual existing lien upon the land.

It is a rule of law quite well established, that upon the trial of an action before the court without a jury and the witnesses appear in person and give their testimony so that the trial court has an opportunity of seeing the witnesses, hear them testify and observe their demeanor when giving such testimony, that the findings of fact made by the trial court under these circumstances should not be disturbed unless such findings are clearly against the preponderance of the evidence. That rule applies squarely in this case. The trial court saw

all the witnesses in this case and heard them testify and determined what testimony of the witnesses was entitled to credit and that which was not entitled to credit. In other words, the court determined the credibility of the witnesses and made its findings accordingly. As we view it, those findings of fact are not contrary to the testimony nor the preponderance of the evidence. The trial court believed the testimony of the Kains and their witnesses. The trial court had the opportunity of seeing the Kains on the stand while testifying and certainly was in a better position to know if they were telling the truth than this court is. If the testimony of the Kains and their witnesses is admitted to be true, which of course the trial court in effect found, then the findings of the trial court are amply sustained by the testimony, and the findings of the trial court under the rule above stated should by no means be disturbed. Unless this rule is adhered to quite generally, then the trial in the court below becomes somewhat of an unnecessary proceeding. If the trial court's findings of fact in a case like this where all the witnesses are before it are accorded no weight, in what kind of a case should the findings of the trial court have weight with this court?

WILLIAM F. STIEHM, Appellant, v. GUTHRIE FARMERS' ELEVATOR COMPANY, a Corporation, Respondent.

(169 N. W. 318.)

Conversion — damages — action to recover — seed lien — grain converted — must show it was produced from seed furnished — otherwise no lien attached — verdict of jury — conclusive on material facts.

1. Plaintiff brought an action in conversion against defendant to recover the value of a certain quantity of wheat upon which plaintiff claimed a seed lien under §§ 6851, 6852, Comp. Laws 1913: *Held*, in order for plaintiff to recover he must show the grain in question was produced from the seed or part of the seed so furnished by him. The verdict of the jury was in defendant's favor. It necessarily follows plaintiff failed to prove the grain in question was produced from the seed or part of the seed furnished, for which lien is claimed.

New trial — motion for.

2. The trial court properly denied a new trial.

Opinion filed July 27, 1918. Rehearing denied November 16, 1918.

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

Affirmed.

F. B. Lambert, for appellant.

"The statements made by the witness on his oral examination were immaterial upon the main question in the case, as such statements were in square conflict with those made in the document offered in evidence. This being so the document was competent evidence as tending to impeach the witness." Baumer v. French, 8 N. D. 328, 79 N. W. 340.

Such document, when offered for such purpose, was proper, and it was reversible error for the trial court to disallow it. Taugher v. N. P. R. Co. 21 N. D. 111, 129 N. W. 747.

"Any person who shall furnish to another seed to be sown or planted on lands owned or contracted to be purchased, used, occupied, or rented by him, shall, upon filing the statement provided for in the next section, have a lien upon all the crops produced from such seed so furnished to secure the payment of the purchase price thereof." Comp. Laws 1913, § 6851; Mitchell v. Monarch Elev. Co. 15 N. D. 495, 197 N. W. 1086.

"The statute is remedial in its nature and must be construed liberally to carry out its object, if that can be done with reasonable construction of its language." State v. Shannon (S. D.) 64 N. W. 175.

In determining the meaning of a law or the intention of the lawmakers, the evil sought to be remedied should be considered. This is a well-settled rule of construction. People v. Wintermute, 1 Dak. 65; Re Hendricks, 5 N. D. 114, 64 N. W. 110; Brown County v. Aberdeen, 4 Dak. 402, 31 N. W. 735; Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403; State ex rel. Flaherty v. Hanson, 16 N. D. 347, 113 N. W. 371.

It is not necessary for plaintiff to prove conclusively that the grain converted was actually grown from the seed he furnished; that

plaintiff's seed lien is not limited to the price or value of the grain actually so produced.

"As before stated, our seed-lien law is analogous to mechanics' liens statutes, and authorities are numerous under the latter statutes to the effect that the materialman is not required, at his peril, to see that all materials furnished are actually used in the building; whether it is so used or not he is entitled to a lien for the materials furnished." Schlosser v. Moores, 16 N. D. 185, 112 N. W. 81; 20 Am. & Eng. Enc. Law, 2d ed. 286, 347, and cases cited; Hickey v. Collom, 47 Minn. 565, 50 N. W. 918; Burns v. Sewell, 48 Minn. 425, 51 N. W. 224; Fullerton v. Leonard, 3 S. D. 118, 52 N. W. 325; Williametta Mills Co. v. Shea, 24 Or. 40, 32 Pac. 759; Boisot, Mechanics Liens, 173, and cases cited; note to Wilcox v. Woodrugg, 17 L.R.A. 315; Phillips v. Gilbert, 101 U. S. 721, 25 L. ed. 833; Sergeant v. Denby, 87 Va. 206, 12 S. E. 402; Phillips, Mechanics Liens, § 369; Small v. Foley, 47 Pac. 68; Frudden Lbr. Co. v. Kinnon (Iowa) 90 N. W. 515; Re Cook, Fed. Cas. No. 3,151.

"The lien attaches to the property as a whole, and therefore no lien will attach to a part of the entirety." Rockel, Mechanics Liens, §§ 19, 132; Stoltz v. Hurd, 20 N. D. 412, 128 N. W. 115; Thompson v. Dinnie, 21 N. D. 305, 130 N. W. 935; Salzer v. Calfin, 16 N. D. 601, 113 N. W. 1036; Schouweiler v. McCaull (S. D.) 99 N. W. 95; Crawford v. Howell, 101 Ind. 421; Lewis v. Taylor (Iowa) 35 N. W. 601; Childs v. Anderson, 128 Mass. 108; Compound v. Fehlhammer, 59 Mo. App. 66; Davis v. Farr, 13 Pa. 167; Eizenbeis v. Woheman (Wash.) 28 Pac. 923; Meyers Lbr. Co. v. Trigstad, 22 N. D. 558, 134 N. W. 714.

Nestos, Carroll & Herigstad, for respondent.

The mechanic or materialman has a lien upon the property which his labor or material has improved. Similarly, he who furnishes seed grain for the raising of a crop has a lien upon the crops produced by and from such seed.

Judging from plaintiff's brief and argument, he has evidently overlooked this important and controlling principle. Frost v. Atwood, 73 Mich. 67, 41 N. W. 96; 17 R. C. L. 597; Lowe v. Woods, 100 Cal. 408, 34 Pac. 959; Idaho Gold Min. Co. v. Winchell, 6 Idaho, 729, 59 Pac. 583; Small v. Robinson, 69 Me. 425, 31 Am. Rep. 299;

Robinson v. Baker, 5 Cush. 137, 51 Am. Dec. 54; Fitch v. Newburg, 1 Dougl. (Mich.) 1; Drummond Carriage Co. v. Mills, 40 L.R.A. 761, 74 N. W. 987; Sargent v. Usher, 20 Am. Rep. 208.

The charge of the court that "the burden of proof in this case, as in all civil cases, is on the plaintiff to establish his cause of action by a fair preponderance of the evidence, that is, by the greater weight of the evidence," is a correct statement of the law in its application to such matter, and this is the first instance where we have ever heard of such form of charge being challenged as incorrect. 1 Sackett's Instructions, 283; Roberge v. Bonner, 185 N. Y. 265, 77 N. E. 1023.

Complaints in such actions must conform to the requirements of the statutes. Comp. Laws 1913, § 6851; Lavin v. Bradley, 1 N. D. 291; Chaffee v. Edinger, 29 N. D. 537.

In this case no grain grew. None was produced. No value accrued from the seed furnished by plaintiff. There was nothing which could be impressed with a lien. Plaintiff had no lien, and therefore has sustained no damages. There was no conversion of any grain or property in which plaintiff had an interest. Schlosser v. Moores, 16 N. D. 185, 112 N. W. 81.

Any attempt at fraud and diversion of grain would estop a debtor to claim relief from a lien, but no such law or question is present here. A law attempting to hold out any such right or authority would be invalid. N. D. Const. § 13.

The granting or refusing of a new trial by the trial court will not be disturbed on appeal unless it clearly appears from the record that there has been an abuse of discretion. Grant v. Grant, 6 S. D. 147; Williams v. C. & Mo. R. Co. 5 S. D. 20; Morrow v. Letcher, 10 S. D. 34; Merchants Nat. Bank v. Stabbins, 10 S. D. 464; Distad v. Shanklin, 11 S. D. 6.

A motion for a new trial on the ground of insufficiency of the evidence is addressed to the sound judicial discretion of the trial court, and its decision will not be molested except for clear abuse appearing. Gull River Lbr. Co. v. Osborn McMillan Lbr. Co. 6 N. D. 276; Bauner v. French, 8 N. D. 322; Zink v. Lahart, 16 N. D. 56; Ross v. Robertson, 12 N. D. 27; Bristol & S. Co. v. Skapple, 17 N. D. 271; Casey v. First Bank, 20 N. D. 211.

The courts now universally hold that the sound discretion of the

trial court when exercised on motion for new trial will not be disturbed on appeal. Anderson v. Medbery (S. D.) 92 N. W. 1087; Frye v. Ferguson, 6 S. D. 392, 61 N. W. 161; Betky v. Betky, 15 S. D. 310, 89 N. W. 479; Patch v. N. P. R. Co. 5 N. D. 55; Dinnie v. Johnson, 8 N. D. 153; Wells v. Gallagher (Ala.) 3 L.R.A.(N.S.) 759; Ross v. Robertson, 12 N. D. 27; 14 Enc. L. & P. 978, 983.

GRACE, J. Appeal from the district court of McHenry county, North Dakota, Honorable A. G. Burr, Judge.

The action is one to recover the amount claimed under a seed lien for seed sold by the plaintiff to one Leonard Bredstrand. The description of the land in the seed lien upon which such seed was to be sowed was the E. ½ of section 7, and the S. E. ¼ of section 17, township 152, range 75. The lien was properly executed and filed within the proper time and the purchase price of the seed wheat has never been paid. The answer puts in issue the allegations of the complaint. We are of the opinion that the issues in the case narrow down to the simple question of whether or not there was any grain produced from the seed furnished from plaintiff to Bredstrand, which grain, if produced from such seed, was purchased and converted by the defendant.

It must be clear that if there was no grain produced from the seed, there is no seed lien, as the lien attaches only to the grain produced from the seed furnished for which lien is claimed. Section 6851, Compiled Laws 1913, contains the following language:

"Any person who shall furnish to another seed to be sown or planted on the lands owned or contracted to be purchased, used, occupied or rented by him, shall upon filing the statement provided for in the next section, *have a lien upon all the crop produced from the seed so furnished, to secure the payment of the purchase price thereof.*"

It seems certain that there is no doubt but what the seed was furnished by the plaintiff to Bredstrand and that the seed lien was timely filed and that in the lien there was a proper description of the land upon which the seed was to be sowed, and the requirements of § 6852, Compiled Laws 1913, were complied with, it appearing that a statement in writing verified by oath, showing the kinds and quantities of seed, its value, the name of the person to whom furnished, and a description of the land upon which the same is to be or has been planted

or sown, was filed in the office of the register of deeds in the county in which the seed is to be sown or planted.

The question in this case is: Was the wheat, for the value of which the plaintiff has sued the defendant, produced from the seed or part of the seed that was furnished by the plaintiff to Bredstrand? This is the vital question in the case. The burden of proof is on plaintiff to establish this fact. He must prove all the facts necessary to substantiate his lien. That is, he must prove that he furnished the seed to Bredstrand to be sowed upon the land in question that was described in the lien statement filed with the register of deeds; that the lien was executed and filed within thirty days after the time of the furnishing of the said seed, and that thereafter the seed was sowed or planted upon the land described in the lien statement, and that from said seed so planted or sowed the grain in question was produced.

The plaintiff must prove all the foregoing facts to establish his lien and his cause of action thereunder. It is true the answer contains no general denial, but that did not relieve the plaintiff from the necessity of proving, by a preponderance of the evidence, that the grain in question was produced from the seed furnished by plaintiff to Bredstrand. There is a specific denial that any of the seed grain furnished by plaintiff was used on the E. ½ of section 7. It was a question of fact properly submitted to the jury whether the grain in question was produced from the seed furnished by plaintiff to Bredstrand. The jury, under all the testimony, found in favor of the defendant. The appellant, in his brief on page 33, uses the following language:

"True, if the court is to hold that the burden is on the plaintiff to show that the seed sown actually produced a crop and leaving no question on this point whatever, we are willing to concede that it would not only be impossible for this plaintiff to prove his case, but it would be impossible for any other person, either in the past or in the future, to show that said grain sown actually produced a crop."

In the plain words of the statute, the plaintiff must show that the grain in question is of the crop produced from the seed so furnished, and unless the plaintiff does this he has not established his lien upon the grain in question. The jury found a verdict in favor of the defendant and that verdict is conclusive on the question of fact whether

the grain in question was produced from the seed sold by plaintiff to Bredstrand.

The plaintiff assigns error by reason of certain instructions of law given by the court to the jury, and particularly part of the instructions which is as follows:

"The plaintiff must show that he has a right to his seed lien on the wheat which he claims the defendant received and converted. In order to do this the plaintiff must show: First, that he sold seed wheat to the said Bredstrand to be sown on the land in question; second, that this wheat or a part thereof was in fact sown in said land; third, that there was a crop grown and harvested therefrom."

The court further instructed thus:

"So far as this case is concerned there is no issue as to the furnishing of the seed by the plaintiff. The principal issue to be determined first is whether there was a crop grown on the land and produced from the seed furnished by the plaintiff. The plaintiff must show that the wheat taken by the defendant was wheat grown from seed furnished by this plaintiff."

Clearly there is no error at law in the giving of such instructions. The trial court clearly and accurately stated the law. Another part of the instructions of the court upon which error is assigned is as follows:

"The burden of proof in this case, as in all civil cases, is upon the plaintiff to establish his cause of action by fair preponderance of the evidence. This is not established necessarily by the number of witnesses who testify on his side, but by the weight and credence you give to the witnesses."

It is needless to say there is no error in giving such instruction. We have examined the instructions of the court and hold that they state the law of the case clearly and accurately and contain no reversible error.

It is not necessary to analyze the seed grain and feed law enacted at the special session of the legislature in 1918, in chapter 13 of the laws passed at such special session, as such law has no relation to this case.

Bredstrand testified that of the wheat he got from Stiehm, he seeded around seventy acres or between sixty and seventy acres on the S.

E. ¼ of section 17. He testified positively that he raised no wheat from such seed, and the substance of his testimony is that he seeded the same land to flax as the wheat was blown out. He further testified in substance that there was some wheat raised upon the S. E. ¼ of section 17, on a certain twenty acres, but that seed for that twenty acres was obtained from Mrs. Macken or was seed that he had left from the Macken seed. The following question was asked Bredstrand:

Q. Did you raise any wheat on that land at all where the wheat was sown?

A. No, sir.

The appellant assigns error based upon the exclusion of Exhibit 11 by the trial court. There was no reversible error in excluding such exhibit. Exhibit 11 is a lien statement executed by Mrs. Macken setting forth the number of bushels of wheat she furnished Bredstrand to be sown on the S. E. ¼ of section 7, township 152, range 76. This lien statement is signed and acknowledged by Mrs. Macken. After the acknowledgment and the signature of the notary public, the following words were printed on said instrument:

"I do hereby acknowledge that the above-named lien claimant has furnished me seed in the quantity, of the value and at the agreed prices as stated in the foregoing lien statement.

"(Dated) March

"(Signed) Leonard Bredstrand."

It is clear from this that Bredstrand is simply acknowledging the quantity and value of the wheat and says nothing about the land upon which it is to be sown. It would hardly seem that statements made by Mrs. Macken as to where the seed she furnished was to be seeded, would be material to this case, but if the exhibit had been admitted by the court it would tend to prove only that Mrs. Macken furnished seed for the S. E. ¼ of section 7, township 152, range 76, but this would in no way tend to prove that the wheat in question was produced from the seed furnished Bredstrand by plaintiff. Neither can we see

how it in any manner affected the credibility of any other testimony given by Bredstrand. There is no reversible error in the refusal of the court to receive Exhibits 11 and 12 in evidence. The court committed no error in refusing to receive in evidence any of the exhibits excluded, for the reason that none of them would prove or tend to prove that the grain in question was produced from the seed or part of the seed furnished by plaintiff to Bredstrand.

Plaintiff must prove, to recover in this case, that the grain in question was produced from the seed or part of the seed furnished by plaintiff to Bredstrand. This, plaintiff virtually concedes that he cannot do. It is plain, under such circumstances, that a new trial could avail the plaintiff nothing. It appears to us the verdict of the jury finds support in the evidence, and the jury being the exclusive judges of the facts, their verdict will not be disturbed.

The order appealed from is affirmed with costs.

INDEX.

ACCOMPLICES.

1. Under § 9218, Compiled Laws of 1913, which provides that "all persons concerned in the commission of a crime, whether it is a felony or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, are principals in any crime so committed," a verdict finding the defendant guilty of an assault with a dangerous weapon is *held* to be proper where it appears that he aided and abetted his accomplices who used the dangerous weapon. State v. Rosencranz, 93.

ACCOUNTING.

1. The action is one of accounting. Evidence examined and *held* to sustain the findings and judgment of the trial court. Magnuson v. Steihm, 141.

ADULTERY.

1. On the trial of a man for the crime of adultery, evidence of the reputation for chastity of the *particeps criminis* is admissible in connection with evidence of facts showing opportunity for committing the offense, but evidence of a specific act of adultery committed with another than the defendant is not admissible. State of North Dakota v. Vern Austin, 288.

AGENCY.

1. Where personal property is subject to the lien of a chattel mortgage, and such chattel mortgage is foreclosed, and the personal property covered by such chattel mortgage is sold upon such foreclosure sale, and a purchaser at such sale agrees with the owner of the personal property sold at the chattel mortgage sale that the purchaser would purchase the property at such sale and pay for the same, and that the owner might, within five days, repay the purchaser the amount paid out by him at such sale, such purchaser, under such an agreement, is the agent of the owner of the property and upon the payment or tender to the purchaser by the owner

AGENCY—continued.

of the purchase price of said property for which the property was sold at said foreclosure sale within the time stipulated the purchaser must deliver said property to the owner, and, failing and refusing to do so in accordance with the terms of the agreement, he is liable for conversion for the value of the property purchased at such sale and converted. Odegard v. Haugland, 547.

ANIMALS.

1. Where a statute authorized a public board to quarantine or kill disease-infected animals, the determination of which of the two remedies shall be adopted lies within the discretion of the board, and such discretion cannot be reviewed by the courts in the absence of fraud or palpable mistake of fact. In all such matters the only question in which the courts or juries are concerned is the ultimate question whether the animal was diseased or not, or came within the provisions of the statute. Neer v. State Live Stock Sanitary Board, 340.
2. The so-called complement-fixation test for the detection of the disease known as dourine appears to meet with the approval of the scientists of both the United States and Canada; and the courts will not interfere with the discretion of the Live Stock Sanitary Board in adopting the same, and in ordering horses to be killed, which react thereto, even though it is a chemical test merely and the horses show no physical symptoms of the disease. Neer v. State Live Stock Sanitary Board, 340.
3. Section 2686 of the Compiled Laws of 1913 leaves it to the discretion of the Live Stock Sanitary Board whether horses which are infected with the disease known as dourine shall be killed or isolated, and the courts will not interfere with or seek to control such discretion. Neer v. State Live Stock Sanitary Board, 340.
4. The facts that the disease known as dourine can only be communicated in the act of breeding, and that the owners of diseased mares offer to isolate the same and give bonds that they shall not be bred, do not prevent the Live Stock Sanitary Board from ordering their destruction. Neer v. State Live Stock Sanitary Board, 340.
5. The legislature may, in the exercise of the police power, provide for the quarantine of diseased or suspected animals and for the destruction of animals actually infected with contagious diseases. Neer v. State Live Stock Sanitary Board, 340.
6. Under the laws of this state the Live Stock Sanitary Board is empowered to quarantine any domestic animal which is infected with a contagious disease, or which may have been exposed to infection therefrom; but it has no power to kill an animal unless it is in fact infected with a con-

ANIMALS—continued.

tagious or infectious disease. Neer v. State Live Stock Sanitary Board, 340.

7. Whether it is necessary to kill an animal infected with dourine, or whether a quarantine is sufficient, are questions to be determined by the Live Stock Sanitary Board. And it is *held* that if the mare involved in this litigation is in fact infected with dourine, the defendant board has power to order her destruction, but if she is in fact free from contagious or infectious diseases, the defendant board has no power or jurisdiction to order such destruction. Neer v. State Live Stock Sanitary Board, 340.

8. In the case at bar where more than three years have elapsed since the defendant board ordered the mare killed, and it appears that she has been in the past and is at the present time in apparent good health, and has at no time manifested any clinical symptoms of dourine, conditions so unusual are presented as to indicate a strong probability that the mare is in fact free from such disease, and it is ordered that the case be remanded for a new trial upon the question of whether the mare is in fact infected with dourine. Neer v. State Live Stock Sanitary Board, 340.

APPEAL AND ERROR.

1. We may not all agree concerning the weight to be given the findings of the trial judge, but we must all agree that in such a case some weight should be given to the findings. We must all agree that great weight is to be given to the undisputed fact, and the probabilities; also that plaintiffs have the burden of proof; and it is for them to sustain their appeal by convincing evidence. Yocum v. Chisman, 160.

2. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its ruling on the motion will not be disturbed unless a clear abuse of discretion is shown. Eckstrand v. Johnson, 294.

3. Following Re Weber, 4 N. D. 119, it is *held* that an order of the district court dismissing an appeal from a justice's court is not an appealable order. Jahner v. Kary, 486.

4. This case presents an appeal from a judgment on a directed verdict for $565.61. As the verdict is not sustained by clear, competent, and decisive evidence, the judgment is reversed and a new trial ordered. Hemmi v. Shaw, 539.

5. The question of agency was submitted to the jury under proper instructions, and it found the agency existed, and its verdict is conclusive in this regard. Odegard v. Haugland, 547.

6. Where there is no substantial evidence in the record upon which a verdict in favor of the party holding the burden of proof can be based, such

APPEAL AND ERROR—continued.
verdict should be set aside upon a motion for a new trial on the ground that the evidence is insufficient to sustain the verdict. Anderson v. Phillips, 586.

ARMY AND NAVY.

1. The meaning of general terms and of the word "all" as used in § 1776 of the Compiled Laws of 1913 may be restrained by the spirit or reason of the statute, and every statute must be construed with reference to the policy intended to be accomplished. State ex rel. Skeffington v. Seigfried, 57.
2. Even though § 1776 of the Compiled Laws of 1913 provides that "the object of the Soldiers' Home shall be to provide a home and sustenance for all honorably discharged soldiers, sailors, and marines," etc., the board of trustees of the Soldiers' Home is fully justified in refusing admittance to one who owns 240 acres of land of the value of $12,000, a house and lot of the value of $2,000, and draws a pension of $30 a month, and where the proof shows that the home is overcrowded and the admission of the applicant would be to the detriment of poor and needy soldiers, their wives, and widows. State ex rel. Skeffington v. Seigfried, 57.
3. Under the express power granted by § 1781 of the Compiled Laws of 1913 to make rules and regulations "for the management and government" of the State Soldiers' Home, "including such rules as it shall deem necessary for the preservation of order, enforcing discipline, and preserving health of the inmates," the board of trustees of such institution has the power to make rules in regard to the admission of the inmates which shall prevent an overcrowding, and where there is not provision for, or funds appropriated which are sufficient for, the accommodation of all, to limit the use of the home to those who are most in need of its aid and support. State ex rel. Skeffington v. Seigfried, 57.

ASSAULT AND BATTERY.

1. Evidence as to the condition of a wheat field, near the highway upon which an assault was committed, on the day after the assault, is *held* properly admissible, it appearing that the defendant and his accomplices emerged from the wheat field prior to making the assault. State v. Rosencranz, 93.
2. Under § 9218, Compiled Laws of 1913, which provides that "all persons concerned in the commission of a crime, whether it is a felony or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, are principals in any crime so committed," a verdict finding the defendant guilty of an assault with a

ASSAULT AND BATTERY—continued.

dangerous weapon is *held* to be proper where it appears that he aided and abetted his accomplices, who used the dangerous weapon. State v. Rosencranz, 93.

BILLS AND NOTES.

1. Evidence examined and *held* to show that the plaintiff did not take a certain $810 negotiable promissory note in due course of business for value without notice, it having taken and received the note from M. Rumely Company, who did not take said note in due course of business for value without notice, it appearing from the testimony that Rumely Products Company and M. Rumely Company, though separate corporations, are organized for the same general purpose, to wit, the placing in the hands of the purchasers, the actual users thereof, certain farm machinery manufactured by M. Rumely Company, of which the Rumely Products Company, under all the testimony, appears to be a selling agency of the M. Rumely Company, and for all general purposes so far as the public is concerned are one and the same concern. Advance-Rumely Thresher Company v. Geyer, 18.

CANCELATION OF INSTRUMENTS.

1. The purpose of this action is to cancel mortgage liens on the ground that the mortguges have not been paid and that they are outlawed. Such an action does not appeal to equity, and this court has several times held that it does not lie. Bowman v. Retelieuk, 134.

CARRIERS.

1. In the act of the legislature passed in 1907 maximum rates were prescribed for the carriage of lignite coal. The carriers declined to comply with the act, and the state brought an action to enjoin continued violation. In March, 1910, the United States affirmed the decree of the state supreme court in favor of the plaintiff, but provided in the decree that the affirmance should be without prejudice, "to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rate for coal." After a period of experimentation the case was reopened and the injunction was continued by the state supreme court, but later, in June, 1915, dissolved by the United States Supreme Court. In an action against the shipper to recover the difference between the statutory rate and an alleged reasonable rate for shipments made during the period between the dates of the first and second decrees of the United States Supreme Court, it is *held* the action must be considered as brought

CARRIERS—continued.
upon a contract implied either in fact or law. Minneapolis, St. Paul, & Sault Ste. Marie Railway Co. v. Washburn Lignite Coal Co. 69.
2. In the absence of allegations in the complaint, of circumstances from which a contract may be implied in fact, and in the absence of allegations of promise, the complaint does not state a cause of action upon a contract implied in fact. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Washburn Lignite Coal Co. 69.

CAUSE OF ACTION.
1. When a statute prescribing rates is held invalid under the Federal Constitution because of its confiscatory character, it does not follow that a shipper is obliged, as a matter of law, to make reparation to the carrier. Minneapolis, St. Paul, & Sault Ste. Marie Railway Co. v. Washburn Lignite Coal Co. 69.

CERTIORARI.
1. The writ of certiorari is not a writ of right, but will be granted or denied in the discretion of the court and according to the circumstances of each particular case as justice may require. Cofman v. Ousterhous, 391.
2. The writ of certiorari, which is provided for in § 8445 of the Compiled Laws of 1913, can only be used "when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy." It cannot be used for the purpose of reviewing the merits of a case and of weighing evidence. Cofman v. Ousterhous, 391.

COMPROMISE AND SETTLEMENT.
1. A compromise and settlement fairly made operates as a merger of, and bars all right to recovery on, the claim or right of action included therein. The compromise agreement is substituted for the pre-existing claim or right, and the rights and liabilities of the parties are measured and limited by the terms of the agreement. Swan v. Great Northern Railway Company, 258.
2. A compromise stands upon the same footing as other contracts. Either party may enforce it, or recover damages for its breach. And if procured by fraud, the defrauded party may rescind it, if he elects to do so. Swan v. Great Northern Railway Company, 258.
3. Where a party agrees to compromise and settle a claim for personal injuries, and, with full knowledge of the contents, and the nature, character, purpose, and effect of the instrument, executes and delivers to the other party a release of the claim for personal injuries, he cannot avoid the compromise

COMPROMISE AND SETTLEMENT—continued.

and release and recover on the original cause of action on the ground that the compromise or release was procured by fraud, unless he repays or tenders back the consideration received. Swan v. Great Northern Railway Company, 258.

CONSTITUTIONAL LAW.

1. A trial by jury cannot be demanded in a proceeding to amerce a sheriff under the provisions of § 7770, Compiled Laws of 1913, and the statute as so construed constitutes due process of law. Solberg v. Rettinger, 1.

2. The 5th and 14th Amendments of the Federal Constitution, and their counterparts in the Constitutions of the several states, gave no new rights, but merely guaranteed the permanence of those already existing. Neer v. State Live Stock Sanitary Board, 340.

3. There is no property right in that which is a nuisance and no right of liberty in that which is harmful to the public weal. Neer v. State Live Stock Sanitary Board, 340.

4. The state may interfere with private industry whenever the public welfare demands, and in this particular a large measure of discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of these interests. Neer v. State Live Stock Sanitary Board, 340.

5. The state may delegate to an administrative board the power to adopt reasonable regulations and to adopt what tests it deems necessary in order to ascertain the existence of a disease. This is not a delegation of legislative power. It merely relates to a procedure in the law's execution. Neer v. State Live Stock Sanitary Board, 340.

6. The finding or adjudication of a live stock sanitary board cannot generally be made conclusive upon the owner as to the fact and existence of the nuisance, or that it comes within the terms of the statute prohibiting it, so as to deny the owner the right to a trial by jury, and the recovery of damages, if the property so destroyed is not, in fact, a nuisance, or does not, in fact, come within the terms of the statute. Summary proceedings, however, may be authorized by the legislature against the thing declared to be a nuisance, and such property may be destroyed without a hearing before a jury provided that the right to the action for damages remains. Due process of law is not violated by such a procedure. Neer v. State Live Stock Sanitary Board, 340.

7. Chapter 284, Compiled Laws of 1913, which requires the owners or operators of cream stations within the state of North Dakota to take out a license, and provides that the dairy commissioner may at any time revoke such license on evidence that the licensee has violated any of the existing dairy statutes of the state, is constitutional, and does not deprive such licenses

CONSTITUTIONAL LAW—continued.

of liberty or property without due process of law. Cofman v. Ousterhous, 390.

8. The police power of the state is not limited to regulations necessary for the preservation of good order or the public health or safety. The prevention of fraud and deceit, cheating and imposition and unfair competition, are equally within its province. Cofman v. Ousterhous, 390.
9. A person who obtains a license under the law and seeks for a time to enjoy the benefits thereof cannot afterwards, and when the license is sought to be revoked, question the constitutionality of the act. Cofman v. Ousterhous, 390.
10. Section 121 of the Constitution of North Dakota, which limits the elective franchise to male persons of the age of twenty-one years or upwards, does not preclude the legislature from authorising women to vote for village officers. Spatgen v. O'Niel, 618.

CONTRACTS.

Rescission of Contracts.

1. In a trial *de novo* of an action to cancel and rescind a contract and to obtain a reconveyance of property conveyed thereunder, the evidence is examined and *held* to establish that there were misrepresentations of material facts upon which the plaintiff relied in entering into the contracts. Bunting v. Creglow, 98.
2. The signing of a paper does not make a contract. Under the plain words of the statute there can be no contract where the consent of the parties to the terms of the same are not free and mutual; and consent is not free when it is obtained by fraud, undue influence, or mistake. In this case the jury found and had a right to find that the document claimed to be a written contract was not a contract. Mathias v. State Farmers Mutual Hail Ins. Co. 240.
3. In order to effect rescission, the party rescinding must ordinarily restore or offer to restore the consideration received, on the condition that the other party shall do likewise, unless the latter is unable, or positively refuses, to do so. Swan v. Great Northern Railway Company, 258.

COSTS.

1. The plaintiff in such foreclosure action, however, is entitled to recover only one statutory attorney's fee. McCarty v. Goodsman, 220.
2. Where there is a reference, under § 7864 of the Compiled Laws of 1913, for the purpose of examining a party to the suit, costs may be properly taxed under § 7793 of the Compiled Laws of 1913. Clifford & Co. v. Henry, 604.

COUNTIES.

1. Section 3208 of the Compiled Laws of 1913, which provides for the temporary location of county seats by the county commissioners and for the permanent location at a general election, and chapter 101 of the Session Laws of 1917, which amends the above section by adding a proviso authorizing a preliminary expression of preference by the voters voting at a primary election, are held to be applicable to the location of the county seat of Grant county. Cahill v. McDowell, 625.

2. Section 1051 of the Compiled Laws of 1913, which provides for contesting the validity of an election as to the right of a place declared and selected as the county seat, is construed and held to be applicable to an election which determines the location of a county seat, but not to one which merely amounts to an expression of preference, preliminary to a final vote and selection at a general election. Cahill v. McDowell, 625.

COURTS.

1. In an action brought to rescind a contract on the ground of fraud, all the necessary parties being joined as defendants, all appearing and answering except one, who is a nonresident and who was served by publication, the land which plaintiff conveyed as the consideration for the conveyance sought to be set aside being within the state, it is *held* that the court has jurisdiction to rescind the contract and cancel the conveyance made by the plaintiff. Bunting v. Creglow, 98.

CRIMINAL LAW.

1. The allowance of leading questions is largely in the control of the trial court, and no prejudice can be assumed where the testimony elicited is afterwards testified to by the witness of the party complaining. State of North Dakota v. John Mueller, 35.

2. Errors in the exclusion of testimony will not be considered where the matters in dispute are afterwards testified to without objection. State v. Mueller, 35.

3. It is not error to exclude testimony which has repeatedly been given, even though the question is not exactly in the same form as that which has been before answered. State v. Mueller, 35.

4. Where a person shoots several others in succession and within the space of less than an hour and is tried for the murder of the first one shot, all of the shootings are part of the *res gestæ*. State of North Dakota v. John Mueller, 35.

5. No reversible error was committed where a medical expert was asked whether a family history of crime would not generally result in a descendant being in the penitentiary, and where the expert answered that

CRIMINAL LAW—continued.

"criminal tendencies are not inherited," and even though there was no proof of such family history. State v. Mueller, 35.

6. On the trial of a man for adultery, evidence of the reputation for chastity of the *particeps criminis* is admissible in connection with evidence of facts showing opportunity for committing the offense, but evidence of a specific act of adultery committed with another than the defendant is not admissible. State of North Dakota v. Vern Austin, 288.
7. Where in a prosecution for rape evidence, which might have been excluded had objection been seasonably made, is admitted without objection and the defendant has availed himself of the opportunity to cross-examine the witness touching the matters covered by such evidence, the admission of such testimony is *held* not to be error. State v. Bushbacker, 495.
8. Where a defendant in a prosecution for rape seeks to establish his innocence by implicating a third person, testimony of such third person, denying his guilt, is admissible. State v. Bushbacker, 495.
9. Certain statements of the defendant to third persons are *held* admissible as amounting to admissions. State v. Bushbacker, 495.
10. Certain conduct of the defendant manifested towards a person other than the prosecutrix, but in the presence of the prosecutrix, is *held* admissible as a circumstance tending to corroborate the prosecuting witness. State v. Bushbacker, 495.

CROSS-EXAMINATION.

1. The ill feeling and prejudice of a witness can always be shown on cross-examination. State v. Mueller, 35.

DAIRY COMMISSION.

1. The dairy commissioner of the state of North Dakota, whose office is created by §§ 2835 and 2836, Compiled Laws of 1913, is an independent officer, and as far as his duties as dairy commissioner are concerned is not subordinate to the commissioner of agriculture and labor.

DAMAGES.

1. A city is not liable for damages sustained by falling on steps erected on a public sidewalk as a part of an entrance to a private building, which is used as a postoffice, even though such steps may be out of repair and in a dangerous and defective condition, and even though ice and snow may have accumulated thereon and such steps occupy a portion of the sidewalk. Ellingson v. Leeds, 415.
2. This is an action by an apprentice in a machine shop to recover damages for a personal injury resulting from his own negligence and from the alleged

DAMAGES—continued.

wrong and negligence of two foremen in charge of the shop. The verdict was against the railway company, and there was no verdict either for or against the foremen, who were parties defendant and the parties guilty of the alleged wrong. The result was a mistrial. Bauer v. Great Northern Railway Company, 542.

DUE PROCESS OF LAW.

1. What is, and what is not, due process of law, depends upon the circumstances, and the constitutional provisions which provide for a preliminary court procedure are often held to have no application to statutes which are passed in the exercise of the co-called police power of the state. Neer v. State Live Stock Sanitary Board, 340.
2. The fact that chapter 105 of the Laws of 1917, which provides for the revocation of the licenses of the owners of cream stations by the dairy commissioner on evidence that statutes of the state have been violated, is not unconstitutional, and does not deprive the owners of the due process of law, for the reason that no appeal from the order of the dairy commissioners is provided for by statute, it being clear that mandamus will lie to redress any wrong which is suffered through any arbitrary, tyrannical, or unreasonable action on the part of the officer, or which is based on false information. Cofman v. Ousterhous, 391.

ELECTIONS.

1. Section 862 of the Compiled Laws of 1913, which at a primary election provides that "if the total vote cast for any party candidate or candidates for any office for which nominations are herein provided for shall equal less than 25 per cent of the average total number of votes cast for governor, secretary of state, and attorney general of the political party he or they represented at the last general election than no nomination shall be made in that party for such office," is unconstitutional in that its provisions are arbitrary, unnatural, and lack uniformity in the different counties of the state, and does not provide a standard for determining the basis for classification which is stable and constant throughout the counties of the state. State ex rel. Allen v. Flaherty, 487.
2. The primary election provided by our laws takes the place of the former nominating conventions; the separate entity of the several political parties participating in the primary election is preserved, and the means for the maintenance of party organizations provided, and it was the intention of the legislature that the ballots of each party should be canvassed separately, and a separate declaration of the result of the primary election made by the canvassing board as to each political party. Walton v. Olson, 571.

ELECTIONS—continued.

3. Where a person who claims to have received the nomination for some office upon the ticket of one of the political parties which participates in a primary election in this state desires to contest the nomination of another candidate or candidates, under § 881, Compiled Laws 1913, he must serve a notice of contest upon the adverse party or parties within ten days after the county canvassing board has completed, and officially declared the result of, the canvass of the votes of the particular party on whose ticket the contestant seeks nomination. Walton v. Olson, 571.
4. The legislature having failed to provide a method for contesting the result of a primary election at which the voters are authorized to express a preference between the various towns contending for the county seat, the result of such an election cannot be questioned in a contest proceeding. Cahill v. McDowell, 626.
5. Section 1051 of the Compiled Laws of 1913, which provides for contesting the validity of an election as to the right of a place declared and selected as the county seat, is construed and held to be applicable to an election which determines the location of a county seat, but not to one which merely amounts to an expression of preference preliminary to a final vote and selection at a general election. Cahill v. McDowell, 626.

ESTATES.

1. Where there existed a partnership between two parties which was dissolved by mutual consent, one of the partners succeeding and continuing to the business of the firm including the firm name, and the partner who continues the business before the liquidation of the partnership is completed dies, and one who was not theretofore connected with the partnership was appointed administrator of the estate of the deceased partner, and, after his appointment and qualification as administrator, forms a corporation, the incorporators consisting of himself and two others, one being the wife of the deceased, for the purpose of continuing the business of the deceased, and the following entry is made on the corporate books: "Paid for the good will of company fifteen shares of stock to E. M. Jenkins, fifteen shares to McFadden, and fifteen shares to R. Simonitsch," each share being for $100, the total of such shares being $4,500, it is *held* under all the testimony, circumstances, and facts of this case that the corporation took over the business of the deceased, and the notation made upon the books of the company with reference to the good will is an agreement to pay $4,500 for the good will of such business. McFadden v. Jenkins, 422.

ESTOPPEL.

1. A person has no standing in a court of equity to question the existence and right of maintenance of a public highway on account of a failure to have

ESTOPPEL—continued.

the order locating the same filed with the county auditor, where such highway has been continuously used for sixteen years after the filing of the petition for the road, and during such time public money has been expended thereon and road taxes worked thereon, and during the sixteen years the said objector has implicitly recognized its existence, petitioning both the board of county commissioners and the board of township supervisors, and has, until the bringing of the suit, at no time otherwise questioned the validity of its creation. Kleppe v. Odin Twp. 596.

EVIDENCE.

1. Evidence as to the condition of a wheat field, near the highway upon which an assault was committed, on the day after the assault, is *held* properly admissible, it appearing that the defendant and his accomplices emerged from the wheat field prior to making the assault. State v. Rosencranz, 93.
2. The plaintiff's each swear that the deed did contain such a covenant. The defendants swear that it did not, and the trial court found it did not, and that defendants did not in any manner assume or agree to pay the mortgages. Yocum v. Chisman, 161.
3. We may not all agree concerning the weight to be given to the findings of the trial judge, but we must all agree that in such a case some weight should be given to the findings. We must all agree that great weight is to be given to the undisputed fact and the probabilities; also that plaintiffs have burden of proof, and it is for them to sustain their appeal by convincing evidence. Yocum v. Chisman, 161.
4. On the whole, the case is not free from doubt. There is no convincing weight of testimony in favor of either party. Hence, as the burden of proof is on the plaintiffs, the judgment is affirmed. Yocum v. Chisman, 161.
5. It is held that a layman is competent to testify to the size of an abscess which can be observed with the naked eye. Beardsley v. Ewing, 373.
6. Where a defendant in a prosecution for rape seeks to establish his innocence by implicating a third person, testimony of such third person, denying his guilt, is admissible. State v. Bushbacker, 495.
7. Certain statements of the defendant to third persons are *held* admissible as amounting to admissions. State v. Bushbacker, 495.
8. Certain conduct of the defendant manifested towards a person other than the prosecutrix, but in the presence of the prosecutrix, is *held* admissible as a circumstance tending to corroborate the prosecuting witness. State v. Bushbacker, 495.
9. The courts must presume honesty, and not dishonesty, as far as the actions of village trustees are concerned. Ashley v. Ashley Lumber Co. 515.
10. The word "deemed" which occurs in § 1927 of the Compiled Laws of 1913 and in the phrase, "and in case the board having jurisdiction shall fail to

EVIDENCE—continued.

file such order within twenty days, it shall be deemed to have decided against such application," refers to a disputable presumption. Kleppe v. Odin Twp. 595.

EXECUTORS AND ADMINISTRATORS.

1. The plaintiff brings suit as administrator of Stina Lindquist, to set aside an alleged transfer to defendant of promissory notes and a mortgage for $2,000 and interest. The transfer, if made at all, was made by the deceased during her last sickness and about a month prior to her death. Peterson v. Lindquist, 501.

FRAUDULENT REPRESENTATIONS.

1. Where a contract induced by fraudulent representations concerning the quality of land embraced therein contains a provision to the effect that the purchaser agrees and warrants, as a part of the consideration, that he has inspected the premises, and is not relying upon the representations made by the vendor, and waives any claim on that account, the provision does not preclude a rescission of the contract on the ground of fraud. Bunting v. Creglow, 99.

GRANT.

1. The fact that the object of a grant may be comprehensive does not deny the right and the power, when that object cannot be fully accomplished, to so use the fund that its real and fundamental purpose may be attained. State ex rel. Skeffington v. Seigfried, 57.

HABEAS CORPUS.

1. A judgment or order quashing a writ of habeas corpus and awarding the possession and custody of a minor child to one of the contending parties is a final order or judgment affecting substantial rights, which is made in a special proceeding and is appealable under the provisions of § 7841 of the Compiled Laws of 1913. Larson v. Dutton, 230.

HIGHWAYS.

1. In the absence of constitutional restriction, public highways are under full control of the legislature, and may be vacated in such manner and through such instrumentalities only as the legislature prescribes. County of Morton v. Forrester, 281.
2. Under the provisions of §§ 1921 and 1923, Comp. Laws 1913, the board of township supervisors of an organized township has the power, upon peti-

HIGHWAYS—continued.

tion, to vacate a highway situated within the township. Morton v. Forrester, 281.

3. The fact that a highway situated within a township connects with a highway situated in adjoining township and does, in fact, form a portion of a continuous, traveled highway, originating and terminating at points outside of the boundaries of the township, does not devest the board of township supervisors of jurisdiction over such highway as is actually situated within the boundaries of the township. Morton v. Forrester, 281.

4. All that the law requires of a petition for the laying out of a highway, which is filed under the provisions of § 1925 of the Compiled Laws of 1913, is that it shall be sufficiently definite as to description to enable a surveyor to locate the highway, and to be reasonably intelligible to a reasonably intelligent man. Kleppe v. Odin Twp. 595.

5. A person has no standing in a court of equity to question the existence and right of maintenance of a public highway on account of failure to have the order locating same filed with the county auditor, where such highway has been continuously used for sixteen years after the filing of the petition for the road, and during such time public money has been expended thereon and road taxes worked thereon, and during such sixteen years the said objector has impliedly recognized its existence, petitioning both the board of county commissioners and the board of township supervisors, and has, until the bringing of the suit, at no time otherwise questioned the validity of its creation. Kleppe v. Odin Twp. 595.

INSURANCE.

1. Section 5053 of the Compiled Laws of 1913, which provides that "the money or other benefit . . . provided or rendered by any" fraternal beneficiary society "shall not be liable to attachment" or garnishment, either against the association or beneficiary, is constitutional, and is not in violation of § 11 of article 1 of the state Constitution, which provides that "all laws of a general nature shall have a uniform operation;" nor of § 2 of article 1, which provides that "the government is instituted for the protection, security, and benefit of the people;" nor is it in violation of the 14th Amendment of the Constitution of the United States in that it denies equal protection of the laws to citizens and persons; nor is it unconstitutional because in violation of § 208 of the Constitution of North Dakota, which provides that "the right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families, a homestead the value of which shall be limited and defined by law, and a reasonable amount of personal property; the kind and value shall be fixed by law. Brown v. Steckler, 113.

2. This action is based on an adjustment of loss under a hail insurance con-

INSURANCE—continued.

tract. The plaintiff alleged and proved to the satisfaction of the jury that by oral agreement his loss was adjusted at $335; that being unable to read English, he signed a paper fixing the loss at $250. Mathias v. State Farmers Mutual Hail Insurance Company, 240.

3. As a mortgagee in possession of a livery barn, defendant insured it for $1,000, charging the premiums paid to the rents and profits of the barn. For the loss of the barn by fire, the defendant received a draft for $1,000 payable to himself and the plaintiff, the owner of the property. Under the facts presented, it is *held* that the trial court should have directed a verdict for the plaintiff for the insurance. Thress v. Zemple, 510.

JURISDICTION.

1. In an action brought to rescind a contract on the ground of fraud, all the necessary parties being joined as defendants, all appearing and answering except one who is a nonresident and who was served by publication, the land which plaintiff conveyed as the consideration for the conveyance sought to be set aside being within the state, it is *held* that the court has jurisdiction to rescind the contract and cancel the conveyance made by the plaintiff. Bunting v. Creglow, 99.

2. Where an objection is made to the jurisdiction of the justice court on the ground that the summons issued therefrom gives the proper first or given name of the defendant in the caption of the summons and a wrong given or first name in the body of the summons, the objection to the jurisdiction is waived where the defendant subsequently makes a motion for a change of venue supported by an affidavit signed by the defendant, the motion for a change of venue and the affidavit supporting it constituting a general appearance of the defendant in the case. Benson v. Gressel, 217.

3. Where one chooses his forum in which his rights shall be determined or adjudicated he cannot complain of the lack of jurisdiction. Cofman v. Ousterhous, 391.

JURY.

1. In a criminal prosecution in which the defendant was found guilty of the crime of assault and battery with a dangerous weapon with intent to do bodily harm, it is *held* that no error was committed in bringing the action to trial before a special panel of petit jurors regularly summoned by the judge of the district court, in accordance with § 815, Compiled Laws of 1913, the regular panel having been discharged at the conclusion of the regular session of the term. State v. Rosencranz, 93.

2. Where one brings an action to foreclose a chattel mortgage and the answer admits all of the allegations of the complaint, all of the equity matters in such case are disposed of, and there is nothing before the court further

JURY—continued.

to be considered in such equity proceedings; and where the answer, in addition to admitting all of the allegations of the complaint in such equity proceedings, pleads two counterclaims for specific amount for the recovery of money only, and at the time of the trial demands a jury trial,—such jury trial cannot be denied to him, and he is entitled to such jury trial as a matter of strict legal right. Lehman v. Coulter, 177.

JUSTICE OF THE PEACE.

1. Where an objection is made to the jurisdiction of the justice court on the ground that the summons issued therefrom gives the proper first or given name of the defendant in the caption of the summons and a wrong given or first name in the body of the summons, the objection to the jurisdiction is waived where the defendant subsequently makes a motion for a change of venue supported by an affidavit signed by the defendant, the motion for a change of venue and the affidavit supporting it constituting a general appearance of the defendant in the case. Benson v. Gressel, 217.
2. Following Re Weber, 4 N. D., it is *held* that an order of the district court dismissing an appeal from a justice's court is not an appealable order. Jahner v. Kary, 486.

LANDLORD AND TENANT.

1. In an action of forcible entry and detainer it appeared that the plaintiff had leased the property in question to a tenant who had stipulated in the lease that his term might be terminated if the property were sold. The plaintiff proceeded to terminate the lease under this provision and in the action seeks to recover possession and the rents accruing subsequent to the serving of the notice to quit. *Held:* There being no provision in the contract of sale whereby the vendor, the plaintiff, reserved the rents, he is not entitled to recover rent as damages during the period of holding over. Gagnon v. Veum, 563.
2. Where the right to the value of the use and occupation is shown to have arisen in April, and where the testimony shows that the value to the owner of the farm property is that which he derives from a share of the crop, and that it is generally considered advantageous to him to have the buildings occupied during the portion of the year when the crops are not growing, it is not error to receive testimony going to establish the rental value of the land for the entire season. Clifford & Co. v. Henry, 604.

LICENSES.

1. Licenses may be imposed not merely for the purpose of acting as temporary permissions to engage in harmful occupations, but in order to so control

LICENSES—continued.

those that are useful that their operation may be harmless and that they may really subserve the public good. Cofman v. Ousterhous, 390.

2. Licenses may be exacted for the purpose of regulation, so that a business which intimately affects the public welfare may be brought within the supervision of the authorities, and that the regulations which are made concerning it may be more easily and certainly enforced. Cofman v. Ousterhous, 390.

LIENS.

1. Sections 6854 and 6855, Compiled Laws of 1913, authorize and provide for the making and filing of a thresher's lien. Evidence examined and held to contain no proof showing a compliance with the requirements of said sections. Auth v. Kuroki Elevator Co. 533.
2. This case is governed by the decision rendered in Auth v. Kuroki Elevator Co. ante, 533. Auth v. Farmers Elevator Company, 538.
3. Plaintiff brought an action in conversion against defendant to recover the value of a certain quantity of wheat upon which plaintiff claimed a seed lien under §§ 6851, 6852, Compiled Laws of 1913: *Held*, in order for plaintiff to recover he must show grain in question was produced from the seed or part of the seed so furnished by him. The verdict of the jury was in defendant's favor. It necessarily shows plaintiff failed to prove the grain in question was produced from the seed or part of the seed furnished, for which lien is claimed. Steihm v. Guthrie Farmers Elevator Company, 648.

MASTER AND SERVANT.

1. For general services as maid of all work in defendant's hotel, the plaintiff sues to recover $4 a week, amounting to $76.25. Judgment for the same was duly given in justice court and in the district court. The case is very simple. There is no error. The verdict is well sustained by direct and convincing testimony. Zittle v. Wurth, 132.
2. In an action for personal injuries alleged to have been sustained by reason of burns and an electric shock occasioned by the handling of an electric light suspended by a cord, the evidence is examined and *held* to present a proper cause for the application of the doctrine of *res ipsa loquitur*, and that there was sufficient evidence to support the verdict of the jury in favor of the plaintiff. Lieferman v. White, 150.
3. This is an action by an apprentice in a machine shop to recover damages for a personal injury resulting from his own negligence and from the alleged wrong and negligence of two foremen in charge of the shop. The verdict was against the railway company, and there was no verdict either for or against the foremen, who were parties defendant and the parties guilty

MASTER AND SERVANT—continued.
of the alleged wrong. The result was a mistrial. Bauer v. Great Northern Railway Company, 542.

MISREPRESENTATION.

1. In a trial *de novo* of an action to cancel and rescind a contract and to obtain a reconveyance of property conveyed thereunder, the evidence is examined and *held* to establish that there were misrepresentations of material facts upon which the plaintiff relied in entering into the contract. Bunting v. Creglow, 99.

MORTGAGES.

1. The purpose of this action is to cancel mortgage liens on the ground that the mortgages have not been paid and that they are outlawed. Such an action does not appeal to equity, and this court has several times held that it does not lie. Bowman v. Retelieuk, 134.
2. Where the foreclosure of a mortgage by advertisement is enjoined under § 8074, Compiled Laws 1913, and it is established in the subsequent foreclosure action that the plaintiff had a right to foreclose the mortgage under the power of sale, and that there was, in fact, no legal counterclaim, or valid defense against the whole or any part of the amount claimed to be due in the notice of sale, the plaintiff is entitled to recover in such foreclosure action the costs and disbursements which he has actually and necessarily incurred in the foreclosure proceeding, which was enjoined. McCarty v. Goodsman, 220.
3. In an action brought by the holder of a sheriff's certificate of sale to recover rents, or the value of the use and occupation, under § 7762 of the Compiled Laws of 1913, where a purchase-price mortgage had been legally foreclosed, it is *held:* Following Clement v. Shipley, 2 N. D. 430, § 7762 of the Comp. Laws of 1913 gives to a purchaser at foreclosure sale, under a foreclosure by advertisement, the same right to rents or the value of the use and occupation as though the foreclosure had been conducted by action. Clifford & Co. v. Henry, 604.
4. Section 7762 of the Compiled Laws of 1913, which provides that the purchaser, from the time of sale until redemption, is entitled to receive from "the tenant in possession the rents and profits from property sold, or the sold, or the value of the use and occupation thereof," is construed and *held* to give to the certificate holder the right referred to, whether the premises are in the possession of the mortgagor or of a tenant of the mortgagor. Clifford & Co. v. Henry, 604.
5. Section 6740 of the Compiled Laws of 1913, which gives to the mortgagor the right to remain in possession during the year for redemption, does not fix the terms or conditions of occupancy. Clifford & Co. v. Henry, 604.

MORTGAGES—continued.

6. Where in an action to recover rents and profits, the defendant interposes an answer which constitutes an equitable attack upon the foreclosure proceedings, and where the plaintiff moves for a trial of the equitable issues before the court, the trial judge reserving his ruling and indicating that the admissibility of testimony in support of the equitable allegations would be determined as presented, no testimony being offered in support of the allegations, the equitable defense to the foreclosure must be considered as abandoned. Clifford & Co. v. Henry, 604.
7. In a trial *de novo* of an action to foreclose a real estate mortgage securing indebtedness which is evidenced by a renewal note secured by a chattel mortgage, as well as by the note and real estate mortgage upon which the action is brought, the evidence is examined and *held* not to support the findings of the trial court that the renewal note and mortgage were to operate as payment of the indebtedness and as a satisfaction of the real estate mortgage. Anderson v. Kain, 632.
8. Where the holder of a mortgage on a homestead upon which final proof has not been made, in order to protect the security of his mortgage advanced on behalf of the homesteader, the government purchase price of the homestead, and where the mortgagor avails himself of the benefit of the payment and receives the patent with full knowledge thereof, the amount so advanced may be added to the mortgage and the mortgagee becomes subrogated to the right of the government to treat the land as security for the payment. Anderson v. Kain, 632.
9. Where a note and mortgage have been respectively indorsed and assigned, the indorsee and assignee may maintain an action in his own name to foreclose the mortgage for the amount of the lien, though he may be accountable to others for a portion of all of the recovery. Anderson v. Kain, 632.

MUNICIPAL CORPORATIONS.

1. The court will not hold as a matter of law that negligence is not shown where a city allows three boards to be missing from a sidewalk and an opening to exist some 20 inches in breadth and from 2 to 5 inches in depth, and where the lighting of the street is more or less inadequate. Krause v. Wilton, 11.
2. A traveler is not required to avoid traveling upon a sidewalk merely because he has knowledge that it is defective. Krause v. Wilton, 11.
3. The question of negligence and contributory negligence are primarily and generally questions of fact for the jury. Krause v. Wilton, 11.
4. The burden of proving contributory negligence rests upon the defendant. Krause v. Wilton, 11.

MUNICIPAL CORPORATIONS—continued.

5. Knowledge that a sidewalk is defective does not necessarily impute knowledge of a defect at any particular point. Krause v. Wilton, 11.
6. Although one may not go blindly forward without looking ahead and take the chances of getting along safely, it is not negligence as a matter of law for a person who has knowledge of a defect not to remember it at all times and under all circumstances, nor to be momentarily forgetful of it. Krause v. Wilton, 11.
7. Under § 130 of the Constitution, the legislature is given plenary control over the taxing power of municipalities, and § 179 of the Constitution, as amended, in 1914, does not give to local taxing districts the constitutional right to retain upon their tax lists all of the property within such districts. State ex rel. Fargo v. Wetz, 300.
8. A city is not liable for damages sustained by falling on steps erected on a public sidewalk as a part of an entrance to a private building, which is used as a postoffice, even though such steps may be out of repair and in a dangerous and defective condition, and even though ice and snow may have accumulated thereon and such steps occupy a portion of the sidewalk. Ellingson v. Leeds, 415.
9. Whatever space in a public place in a city set apart for the use of the public as a sidewalk, the public has a right to use in its entirety, free from any and all unauthorized obstructions; and this, even though the fee to the street may be in adjacent property owners, and not in the public. Kennedy v. Fargo, 475.
10. A city is not estopped, by reason of its past failure to enforce its ordinances against the obstruction of sidewalks, from subsequently removing all obstructions therefrom. Kennedy v. Fargo, 475.
11. Under the provisions of § 3818, Compiled Laws of 1913, the city commissioners of the city of Fargo have the power to compel the removal of areaways which encroach upon the public sidewalks. Kennedy v. Fargo, 475.
12. Under the provisions of ¶ 3 of § 3861 of the Compiled Laws of 1913, which among other things gives to the board of trustees of villages the power generally "to establish other measures of prudence for the prevention or extinguishment of fires as it shall deem proper," such village trustees have the power to establish fire limits. Ashley v. Ashley Lumber Company, 515.
13. The limits of a fire district must necessarily be largely left to the sound discretion of the administrative or legislative body which is authorized to create it. Ashley v. Ashley Lumber Company, 515.
14. Where, in violation of the provisions of a village ordinance, a person erects a wooden structure within a fire district, and the only penalty prescribed by the ordinance is a fine of $10 for such construction, but the ordinance also provides that the village trustees may condemn such building, if erected, and order its destruction or removal, and when there is doubt

MUNICIPAL CORPORATIONS—continued.

as to the validity of the ordinance and the power of the village trustees to create the same, the court, in a proceeding in equity to determine such question and after resolving the doubt in favor of the village, may order the defendant to remove such building, even though, generally speaking, it is not of such a nature as to be a nuisance at the common law. Ashley v. Ashley Lumber Company, 515.

MURDER.

1. It is not error to instruct a jury that, "In order to constitute wilful murder in the first degree as charged in the information the killing must have been wilful, with malice aforethought, and with premeditation and deliberation. There must have been a specific, deliberate, premeditated intention to take life, unaccompanied by any circumstances of mitigation. The generally accepted meaning of the word "premeditation" is a prior determination to do the act in question and then determination to do it, but it is not essential that this intention should exist for any considerable time before it was carried out. If the determination is formed deliberately and upon due reflection, it makes no difference how soon the fatal resolve was carried into execution. An act is done wilfully when done intentionally and on purpose. Murder in the second degree differs from murder in the first degree only in the fact that as to the second degree there is no premeditation or deliberation. Thus, when a person forms a design to kill in the midst of a conflict, and immediately executes such design, the killing is not premeditated, and is therefore no higher offense than murder in the second degree." State v. Mueller, 35.

NEGLIGENCE.

1. In this case it appears that plaintiff was guilty of gross negligence by permitting horses to trespass on defendant's right of way at an early hour in the morning of March 31st, when the horses should have been in their stables. Defendant was guilty of no negligence which in any manner contributed to or caused the killing of the horses. Stoeber v. Minneapolis, St. Paul & Sault Ste. Marie R. Co. 121.
2. This is an action by an apprentice in a machine shop to recover damages for a personal injury resulting from his own negligence and from the alleged wrong and negligence of two foremen in charge of the shop. The verdict was against the railway company, and there was no verdict either for or against the foremen, who were parties defendant and the parties guilty of the alleged wrong. The result was a mistrial. Bauer v. Great Northern Railway Company, 542.

NEGOTIABLE INSTRUMENTS.

1. Where a debtor gives to his creditor a note with the understanding that it is to take the place of a past note which it was agreed should be redelivered to the debtor, it does not follow that the parties regarded the debt for which the first note had been given as paid. Anderson v. Kain, 632.

NEW TRIAL.

1. In the instant case it is *held* that the trial court did not abuse its discretion in denying a new trial. Eckstrand v. Johnson, 294.
2. Where there is no substantial evidence in the record upon which a verdict in favor of a party holding the burden of proof can be based, such verdict should be set aside upon a motion for a new trial on the ground that the evidence is insufficient to justify the verdict. Anderson v. Phillips, 586.
3. The trial court properly denied a new trial. Steihm v. Guthrie Farmers Elevator Company, 649.

PARTNERSHIP.

1. Where there existed a partnership between two parties which was dissolved by mutual consent, one of the partners continuing and succeeding to the business of the firm including the firm name, and the partner who continues the business, before the liquidation for the partnership is completed, dies, and one who was not heretofore connected with the partnership was appointed administrator of the estate of the deceased partner, and, after his appointment and qualification as administrator and his entry upon the discharge of his duties as such administrator, forms a corporation, the corporators being himself and two others, one being the wife of the deceased, for the purpose of continuing the business of the deceased, and the following entry is made on the corporate books; "Paid for the good will of company fifteen shares of stock to E. M. Jenkins, fifteen shares to McFadden, and fifteen shares to B. Simonitsch," each share being for $100, the total of such shares being $4,500,—it is *held* under all the testimony, circumstances, and facts of this case that the corporation took over the business of the deceased, and the notation made upon the books with reference to the good will of the company is an agreement to pay $4,500 for the good will of such business. McFadden v. Jenkins, 422.

PHYSICIANS AND SURGEONS.

1. In an action for the recovery of damages for malpractice, the evidence is examined and *held* to present a question of negligence as one of fact for the determination of a jury. Beardsley v. Ewing, 373.

PRINCIPAL AND AGENT.

1. An executory agreement to act as agent for another is ordinarily not binding on either party unless based on sufficient consideration, but where one gratuitously agrees to act for another and enters upon the performance of the undertaking, he must complete performance according to his promise even though there is a lack of consideration. Odegard v. Haugland, 547.

PUBLIC INTERESTS.

1. The creamery business in North Dakota is a business which is affected with a public interest. Cofman v. Ousterhous, 390.

RAILROADS.

1. The statute makes the killing of animals by a railway company presumptive evidence of negligence, but when, as in this case, the facts in regard to the killing are all put in evidence, the presumptive evidence, the presumption of the statute does not apply. The proved facts clear away and supersede all presumptions. Stoeber v. Minneapolis, St. Paul & Sault Ste. Marie R. Co. 121.

RAPE.

1. Where every element essential to the commission of the crime of statutory rape in the first degree is admitted, and the only issue is as to the identity of the one guilty of the crime, it is *held* not improper for the court to instruct the jury that the offense committed "is either rape in the first degree or no crime at all." State v. Bushbacker, 495.

REBUTTAL TESTIMONY.

1. It is not necessary that the name of a witness who is called in rebuttal should have been written upon the information. State v. Mueller, 35.

REPLEVIN.

1. In an action against the sureties upon a bond given under § 7521, Compiled Laws 1913, whereby the defendant in a claim and delivery proceeding obtained the redelivery of the property seized in such proceeding, the evidence is examined and *held* not to support a verdict in favor of the defendant based upon the ground that the defendant had returned or offered to return the property to the plaintiff in substantially as good condition as it was when delivered to the defendant under the bond. Anderson v. Phillips, 586.

SCHOOLS AND SCHOOL DISTRICTS.

1. A petition filed with a school board for the establishment of a school and the construction of a school building examined and *held* to be a valid petition, and to have been signed by residents of the school district who were parents of or persons charged with support and having the custody and care of the requisite number of children of school age to entitle said residents to sign such petition. Wulfkuhl v. Galehouse, 172.
2. The number of children of school age named in the petition was fifteen, ten of which were of school age and lived within said school district, and not less than 2½ miles from any other school in the school district. Such being the case, petition was sufficient and the petitioners were entitled to the relief asked for in such petition. Wulfkuhl v. Galehouse, 172.
3. The fact that there may be another school and school building in another school district less than 2½ miles from the residence of the children whose names appear upon the petition is not sufficient reason for the refusal to grant the relief asked for in the petition, for such other school districts could not be compelled to admit to its school the children whose names appear upon the petition under consideration. Wulfkuhl v. Galehouse, 172.

SHERIFFS AND CONSTABLES.

1. A proceeding for the amercement of a sheriff under the provisions of § 7770, Compiled Laws 1913, may be instituted by a motion in the original case in which the execution is issued, and a new and separate action is not necessary. Solberg v. Rettinger, 1.
2. Ordinarily it is the duty of the sheriff to return an execution within the time required by the statute, and no demand on him so to do is necessary to be proved in order to justify a proceeding in amercement. Solberg v. Rettinger, 1.
3. Where upon an adverse claim of property levied on being made, the sheriff asks for instructions from the plaintiff's attorneys, which are promised him, he is not liable to amercement for not selling, until he has disobeyed or disregarded directions to that end. Solberg v. Rettinger, 1.

SHIPPING.

1. In the absence of allegations in the complaint of circumstances from which a contract may be implied in fact, and in the absence of allegations of a promise, the complaint does not state a cause of action upon a contract implied in fact. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Washburn Lignite Coal Co. 69.

SPECIFIC PERFORMANCE.

1. This is an appeal from a judgment denying the specific performance of a

SPECIFIC PERFORMANCE—continued.

contract to exchange three quarter sections of land in Benson county, North Dakota, for a stock of clothing at Emmetsburg, Iowa, the goods to be selected so as to make a *well-balanced stock*. The contract gave no method of selecting the goods. The land was worth $7,000. The selected stock was less than half the land value. Specific performance of an agreement must be denied when its terms are not sufficiently certain to make the precise act which is to be done clearly ascertainable. Also, when it is not based on an adequate consideration, and when it is not in all respects just and reasonable. Even when a contract is fair and honest, specific performance is not a matter of course. It rests in the sound, legal discretion of the court. Beebe v. Hanson, 559.

STATUTES.

1. The title, "An Act Regulating Fraternal Beneficiary Societies, Orders, or Associations," is sufficiently comprehensive to include a provision in the act that the money or other benefit to be paid by the association and the fund for the payment thereof shall not be liable to attachment or garnishment, either as against the insured or his beneficiary, and does not violate § 61 of the Constitution, which provides that "no bill shall embrace more than one subject which shall be expressed in its title." Brown v. Steckler, 113.
2. Where at the same session of the legislature, two bills are passed, one providing for the classification of property generally for purposes of taxation and the other dealing particularly with a single species of property, which is embraced in the general schedule of the classification act, the conflict in the two bills must be resolved in favor of that which deals particularly with the specific property. State ex rel. Fargo v. Wetz, 299.
3. Where two bills are approved by the governor in the inverse order of their passage, conflicting provisions therein contained cannot be resolved in favor of that which was passed last, on the theory of a repeal by implication. State ex rel. Fargo v. Wetz, 299.
4. Following State ex rel. Rush v. Budge, 14 N. D. 532, and State ex rel. Miller v. Taylor, 27 N. D. 77, it is *held* that § 4 of the Motor Vehicle License Act, in conferring upon the secretary of state unlimited power to employ agents and incur expenses, is unconstitutional as involving an attempted delegation of legislative power. State ex rel. Fargo v. Wetz, 299.
5. Where a portion of a law is unconstitutional, the remainder will stand where the court can reasonably say that the legislature would have passed the act with the invalid portion stricken therefrom. State ex rel. Fargo v. Wetz, 299.
6. Section 862 of the Compiled Laws of 1913, which at a primary election provides that "if the total vote cast for any party candidate or candidates for

STATUTES—continued.

any office for which nominations are herein provided for shall equal less than 25 per cent of the average total number of votes cast for governor, secretary of state, and attorney general of the political party he or they represented at the last general election, then no nomination shall be made in that party for such office," is unconstitutional in that its provisions are arbitrary, unnatural, and lack uniformity in the different counties of the state, and does not provide a standard for determining the basis of classification which is stable and constant throughout the counties of the state. State ex rel. Allen v. Flaherty, 487.

STIPULATIONS.

1. Acquiescence in error takes away the right of objecting to it. And where a party consents to a certain procedure, and stipulates that certain evidence may be admitted, he is estopped from asserting in the appellate court that the procedure was erroneous and the evidence inadmissible. Walton v. Olson, 571.

TAXATION.

1. For the purposes of taxation, personal property, even though of an intangible character, may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his domicil. State ex rel. Langer v. Packard, 182.
2. Under the provisions of chapter 229, Laws of 1917, all bills receivable, obligations, or credits owned by a nonresident and derived by him from a business conducted in this state, are assessable at the business domicil of said resident, his agent, or representative within this state in the same manner as though such bills receivable, obligations, or credits were owned by a resident of this state. State ex rel. Langer v. Packard, 182.
3. The state is not deprived of power to impose taxes on obligations evidenced by bills receivable merely because the owner has removed the bills receivable from this state. State ex rel. Langer v. Packard, 182.
4. It was not the purpose of chapter 229, Laws 1917, to impose a tax upon all obligations or debts owed by citizens of North Dakota, to residents of other states, but to impose such taxes only upon such credits and obligations as have arisen and have been accumulated in the course of business by one who is actually conducting a business in the state. State ex rel. Langer v. Packard, 182.
5. A nonresident who has no established place of business or any duly authorized agent or representative in this state, and keeps no funds for investment in this state, but loans moneys on applications sent to him by loan brokers, and receives and accepts such applications at his home office in another state, from whence he transmits the moneys to the broker or borrower by

TAXATION—continued.

draft or cashier's check drawn upon a bank in the state of such non-resident's domicil, is not doing business in this state within the meaning of chapter 229, Laws 1917, so as to subject such mortgage securities to taxation in this state. State ex rel. Langer v. Packard, 182.

6. Chapter 156 of the Session Laws of 1917 construed and *held* to provide for the collection of a license tax or fee in lieu of other taxes upon motor vehicles. State ex rel. Fargo v. Wetz, 299.
7. Sections 176 and 179 of the Constitution, as amended in 1914, which provide that "taxes shall be uniform upon the same class of property, including franchises within the territorial limits of the authority levying the tax," and for the assessment of certain public utility property by the state board of equalization and other "taxable property . . . in the county, city, township, village or district, . . ." do not require the taxation of all property on an ad valorem basis, and are not violated by a law which provides for the payment of a license fee in lieu of general and local taxes. State ex rel. Fargo v. Wetz, 299.
8. Section 176 of the Constitution, as amended in 1914, which provides that the "legislative assembly shall by general law exempt from taxation personal property to any amount not exceeding in value $200 for each individual liable to taxation," is not violated by an enactment according to which the owners of a given class of personal property will be compelled to contribute to the cost of maintaining certain governmental functions an amount which will approximately equal a fair property tax if levied upon an ad valorem basis. State ex rel. Fargo v. Wetz, 299.
9. Section 174 of the Constitution, under which the legislative assembly is directed to provide for the "raising of revenue to defray the expenses of the state, not to exceed in any one year 4 mills on the assessed valuation of the taxable property in the state," is a limitation upon the power of the legislature to provide state revenues by the taxation of property upon an ad valorem basis. It has no application to revenues derived from other sources and according to some other method. State ex rel. Fargo v. Wetz, 299.

TRIAL.

1. Where improper questions are asked for the purpose of showing that the defendants in a malpractice suit are insured against the consequences of the action to which objections are sustained, the prejudicial effect of the asking of the questions is a matter in the first instance, for the consideration of the trial court. It is *held* that the improper suggestions of the liability insurance under the circumstances disclosed by the record are not reversible error. Beardsley v. Ewing, 373.

VENDOR AND PURCHASER.

1. Upon the sale of property under a contract for deed, as between the vendor and purchaser, the latter is regarded as the owner of the property, sustains the risk of loss, and has the corresponding right to the rents and profits. Gagnon v. Veum, 563.

2. Provisions in a contract of sale, whereby the vendor and purchaser agree upon a division of the proceeds of the operation of a hotel upon the property embraced in the contract, do not amount to a reservation of the rents and profits while the property is wrongfully held by a tenant in possession. Gagnon v. Veum, 563.

WITNESSES.

1. No error is committed in asking the question, "Didn't you testify in answer to the question I am reading now, and make the following statement when you were at the preliminary examination?" etc.; nor is there any merit in the contention that the evidence on the preliminary examination had been given through an interpreter, and was not understood by the stenographer who transcribed it, when the question is merely asked for the purpose of laying the foundation for impeachment. State v. Mueller, 35.

WORDS AND PHRASES.

1. The word "deemed" which occurs in § 1927 of the Compiled Laws of 1913 and in the phrase, "and in case the board having jurisdiction shall fail to file such order within twenty days it shall be deemed to have decided against such application," refers to a disputable presumption. Kleppe v. Odin Twp. 595.