REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

JOSEPH COGHLAN
REPORTER

VOLUME 44

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
ROCHESTER, N. Y.
1922.

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BY JOSEPH COGHLAN, SUPREME COURT REPORTER

FOR THE STATE OF NORTH DAKOTA.

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HON. RICHARD H. GRACE, Judge.
HON. JAMES E. ROBINSON, Judge.
HON. H. A. BRONSON, Judge.

JOSEPH COGHLAN, Reporter.
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REPORTER'S NOTE.—The judicial redistricting act reducing the number of judicial districts from 12 to 6 became effective on July 1st, 1919, at which time there were three additional judges appointed, the present system requiring 15 judges, whereas the old system required but one judge for each of the 12 districts.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

M. F. LEROY, Respondent, v. ANTON E. HAGEN, Appellant.

(175 N. W. 718.)

Principal and agent — authority of agent to waive provisions of guaranty contract.

1. An agent possessing general authority from his principal to act as manager in the sale, trade, and exchange of stallions under guaranty contracts, may waive the provisions thereof when possessed of such authority, even though there is a stipulation contained in such guaranty contract providing that salesman are forbidden, in any way, to change the printed form of the guaranty.

Principal and agent — sale — where horse is warranted with right to return same under written contract, the question of the failure of horse to comply with warranty and authority of agent is for the jury.

2. In an action on promissory notes given for the purchase price of a stallion, where a guaranty contract provided that the stallion should be serviceable and a 50 per cent foal getter, after fair trial on sure breeding mares, with the right of the purchaser to return the stallion and receive another horse of equal value that is supposed to be sure, provided such stallion was handled carefully, returned in a proper condition, and reports made monthly of the service of such stallion;. and contained the specific provision that salesmen are forbidden, in any way, to change the printed form of the

guaranty contract, and *where* it appears that there is evidence that the stallion was not a 50 per cent foal getter, that the purchaser reported such fact to the agent who sold such stallion, and the agent thereupon advised the purchaser to keep the horse and try him another year, and that he would ship up another horse in exchange therefor, the agent possessing the authority so to make an exchange—*it is held* that the questions of the utility of the stallion under the contract, and the authority of the agent, were questions of fact for the jury; and that the trial court erred in directing a verdict against the defendant.

Opinion filed November 29, 1919.

Action on promissory notes given for the purchase price of a stallion. From a judgment in District Court, Burke County, *Leighton,* J., directed for the plaintiff, the defendant has appealed.

Reversed and new trial granted.

E. R. Sinkler, for appellant.

The motion made for a directed verdict in this case is in the nature of a demurrer to the evidence, and therefore all fair inferences from the evidence must be drawn in favor of the party against whom such verdict is directed. Miller v. Klovstad, 14 N. D. 435; Schantz v. Northern P. R. Co. (N. D.) 173 N. W. 556.

A. M. Thompson and *Greenleaf & Wooledge,* for respondent.

Bronson, J. This is an action on two promissory notes for the purchase price of a stallion. The trial court directed a verdict. The defendant has appealed from the judgment entered thereupon.

In June, 1910, the defendant purchased a Shire stallion from one Holbert, of Iowa, under a guaranty contract. Such contract guaranteed all stallions serviceable and breeding stallions; also that if the stallion should not prove himself a 50 per cent foal getter, after a fair trial, on sure breeding mares, the purchaser should return him to Iowa and receive another horse of equal value that is supposed to be sure. Further, that the purchaser contracted that such stallion should be well handled and kept. Further, that the vendor should not be bound by the conditions of the guaranty unless the purchaser submitted a monthly report during the season, in writing, showing the condition of the horse and number of mares tried and reserved each

month; by its terms the contract expired, and the vendor was released from any obligations, after April 1, 1911. In this contract there was printed in red ink the following:—

"Note: Each party to this purchase, by accepting this slip, accepts the above as complete and full terms of their purchase, and you are to take notice that salesmen are forbidden to, in any way, change the printed form of this guaranty, and, if changed, will not be accepted as changed by the firm."

The stallion was sold to the defendant by one Fisk, who came to the farm of the defendant with the horse, subsequently there made the sale, and produced the guaranty contract in question, which had theretofore been signed in blank by Holbert. There is evidence in the record that Fisk was the district manager of Holbert in North Dakota, and had full charge of all deals, including this particular deal with the defendant. That the defendant in 1910 bred to this horse some thirty or thirty-one mares, including thirteen mares of his own, and that there was produced from this breeding only one colt. That many of these mares had produced colts before and after, when bred to other stallions.

In the fall of 1910, as the defendant testifies, he notified Fisk that the horse was not a foal getter; that the horse was no good; Fisk admitted that this horse was not a sure foal getter, or that probably the horse was not very sure, but that the defendant should keep him another year, and that, if he did not then do better, they would give him another horse; Fisk further stated that the defendant should keep the horse; that he would ship up another horse; that the defendant could get back his old notes, and that then they wanted new papers from him. That, furthermore, it was not necessary to send the horse to Iowa, because he was shipping a horse up, and that they could exchange at Tolley or Kenmare.

The defendant kept the horse during the year 1911. During that season he bred him again to various mares, and the experience again was to the effect that the mares did not become in foal. Subsequently, pursuant to arrangement made with Fisk, he met him at Minot. Fisk had some horses there, but the parties did not agree upon an exchange concerning the horses there, but Fisk stated that a horse would be shipped up for the defendant, and that the defendant should keep the

stallion until he so did. In the year 1912 no other stallion was produced, so the defendant then, in July, 1912, wrote Holbert, stating that the horse did not come up to the warranty; that Mr. Fisk had so admitted; that he had taken up the matter with Mr. Fisk several times, and told him that he must either take the horse back and give a good horse in exchange, or else take the horse and return the notes; that Fisk had promised from time to time to attend to it, but nothing had been done. In the meantime the notes involved herein had been sold to the plaintiff. Fisk requested the defendant to send reports of the service of the stallion to Holbert, at Iowa, and defendant did send many reports. Defendant further testified that he kept the horse in a horsemanlike manner. In the spring of 1913 the stallion died.

Fisk, as a witness for the plaintiff, admitted, concerning the subsequent transactions, that he had heard most of the testimony of the defendant, and he did not object to very much of it; that the testimony of the defendant concerning the conversation in the fall of 1910 was substantially correct; that he took the responsibility upon himself after the contract had matured to try and help the defendant; that he wanted to treat the defendant right; that he was not authorized to change the contract, but did testify that he acted for Holbert; that he had worked for him for years; that he had authority to say what kind of notes he would take, and had authority to go on with this trade with the defendant; that this included the authority to take paper from him and to take up the papers that defendant had given; that even after the contract had expired he had authority to make a contract to suit himself and the customer; that he took responsibility upon himself, and this was satisfactory to Holbert; that if he made a contract of that kind it was all right with Holbert; that he had made these deals and always assumed that authority.

The defendant, as a defense, pleaded failure of consideration, breach of guaranty, and the agreement of Holbert, in respect thereto, to furnish another stallion.

Upon the action of the trial court there are just two legal questions presented upon the record: (1) Does the evidence disclose any question of fact of breach of the guaranty given by Holbert? (2) Did the agent of Holbert have authority to act so as to waive the express stipulations contained in the written contract?

It is well settled that all fair inferences must be drawn from the evidence submitted in favor of the party against whom a verdict has been directed, and that where honest and intelligent men may fairly differ upon evidence adduced and material upon the issues, it is error to withdraw such evidence from the consideration of the jury. John Miller Co. v. Klovstad, 14 N. D. 435, 440, 105 N. W. 164; Schantz v. Northern P. R. Co. 42 N. D. 377, 173 N. W. 558.

It is unquestioned upon this record that there is evidence sufficient to form a question of fact concerning the utility of the stallion, under the terms of the guaranty. The only serious question in this record is whether there exists any question of fact upon the authority of the agent Fisk to act contrary to, and thereby to waive, the express terms of the written guaranty, which provides in substance that salesmen are forbidden, in any way, to change the printed form of guaranty. We are satisfied upon this record that there is presented a question of fact of the authority of the agent in this regard. It is apparent that Holbert himself could have waived the terms of this guaranty contract, and that, if he himself had promised and agreed in the manner that the record discloses Fisk did, such action would be binding upon him. See 2 C. J. 609; note in 1 L.R.A.(N.S.) 142; Randall v. J. A. Fay & E. Co. 158 Mich. 630, 123 N. W. 574; Springfield Engine & Thresher Co. v. Kennedy, 7 Ind. App. 502, 34 N. E. 856; Peter v. Piano Mfg. Co. 21 S. D. 198, 110 N. W. 783. There is evidence in this record sufficient to form a question of fact, that Fisk, as district manager, possessed the authority from Holbert to act fully in his place, not only as a salesman, but to represent his principal fully. Such being our opinion upon this record, it follows that the trial court erred in directing a verdict. It is therefore ordered that the judgment be reversed and a new trial ordered, with costs to the appellant.

C. P. SANDVIG, Plaintiff, v. LARS KLEPPE, Defendant.

(175 N. W. 724.)

Landlord and tenant — where both sides give evidence as to terms of contract the jury may properly pass upon the contract.

1. Where a lease to a certain tract of land was oral, and there was a dispute as to what were the actual terms of the lease, and testimony was in-

troduced by each of the parties as to what were the terms, what the terms of the lease actually were was a question of fact for the jury.

Landlord and tenant — sufficiency of evidence required to sustain verdict.

2. Plaintiff having recovered for the value of certain hay alleged to have been converted by the defendant, it is *held* the verdict is sustained by the evidence.

Opinion filed December 10, 1919.

This is an appeal from the District Court of Ward County, *K. E. Leighton,* J.

Judgment affirmed.

Halvor L. Halvorson for appellant.

Moody O. Eide and *C. B. Davis,* for respondent.

An agreement cannot be held uncertain if the court can see what the parties intended and enforce the same. 9 Cyc. 250, and authorities cited.

A promise not in itself certain can be rendered certain by reference to something certain. Supra; Coldwell v. School Dist. 55 Fed. 372; Lungerhausen v. Crittenden (Mich.) 61 N. W. 270.

Contracts must be interpreted to give effect to mutual intention as it existed at the time of the contracting as far as the same is ascertainable. See N. D. Comp. Laws 1913, § 5896, and cases cited thereunder.

A contract may be explained by reference to circumstances under which it was made and the matter to which it relates. See N. D. Comp. Laws 1913, § 5907, and cases cited.

A demand to place the defendant in the wrong must be clear and absolute in its terms, and leave nothing to conjecture. The C. T. v. Taylor, 88 N. E. 331; Miller v. Smith, 1 Phila. 173.

While the plaintiff may make a demand by an agent, in those cases where demand is prerequisite to an action for trover, yet he must, as a general rule, prove the authority of the agent in the premises. Kendrick v. Beard, 90 Mich. 589, 51 N. W. 645; Tweepell v. Hawkeye Dredge Co. 137 Iowa, 206, 114 N. W. 906.

GRACE, J. The action is one to recover the value of 42½ tons of hay, the property of the plaintiff, appropriated by the defendant to

his own use and benefit, or sold and disposed of by him, with the exception of three stacks of said hay, in the possession of the defendant, and claimed by him as his property.

The defendant claims the hay is his property, with the exception of about 8⅔ tons. It appears that the plaintiff leased from the defendant, the owner, a certain tract of land. The lease was an oral one, and the terms of it were in dispute. What were the terms of it was for the jury to determine under all the evidence properly submitted.

The plaintiff claims that defendant was to furnish everything for the cultivation of the farm, including horses, machinery, seed, and livestock; and that defendant was to furnish all feed for the stock; that plaintiff was to receive, for his share, one fourth of the crops raised on the land, and one half of the increase of stock, and all the hay; that the agreement, with reference to the hay, as made, was later modified so that the plaintiff would receive but one half of the hay for his share.

Defendant claims he was to furnish one half of the feed only, and that plaintiff's share of the hay was 8⅔ tons. There was altogether, 95 tons of hay, of which the plaintiff claimed one half.

At the time the plaintiff took possession of the land, there were 24 tons of hay, of the alleged value of $400, belonging to defendant thereon, which plaintiff used and fed to the stock, claiming a right to do so under the terms of the lease, the defendant claiming conversion thereof by plaintiff.

The defendant further claims to recover for 10 tons of hay, of the alleged value of $100, which was fed by plaintiff, instead of feeding certain fodder which he claims plaintiff should have fed, and claims further to recover $10 for certain threshing done for plaintiff.

The plaintiff, in his reply, claims certain other set-offs against the claims of the defendant, all of which constituted questions of fact for the jury. The defendant claims that the terms of the lease were similar to a certain lease between one Olson and Hovda.

The jury returned a verdict in plaintiff's favor, fixed his damages, including costs, at $409.49.

Upon the verdict, judgment was entered, and, from that judgment, the defendant appeals and assigned as error the exclusion of certain evidence sought to be introduced; that the court erred in overruling

defendant's motion to dismiss the action, at the close of the defendant's case, and at the close of the evidence, and on the further ground that the verdict is not sustained by the evidence. The court was not in error in overruling defendant's motion to dismiss the action.

The evidence presented certain questions of fact, which it was a province of the jury to determine, and such facts were properly submitted to them, by the court, for their determination.

The verdict is quite well sustained by the evidence. The defendant assigned error because certain evidence, which he sought to introduce with reference to a certain lease betwen Olson and Hovda, was excluded.

Any evidence of what the terms of a lease were between other parties was no evidence of what the lease was between these parties, in the absence of some preliminary showing of an understanding between the plaintiff and the defendant, that the terms of their lease were to be the same as the lease between Olson and Hovda; and further showing that such understanding was had at the time of the entering into the lease between plaintiff and defendant.

Such showing was not made by the defendant, and, of course, such evidence was, in the absence of such showing, wholly incompetent, irrelevant, and immaterial, and the court was not in error in excluding it.

The defendant also assigns as error the failure of the court, upon objection by defendant, to exclude evidence that plaintiff gave as to the value of the hay in question, in stack, on the Kleppe farm, in the fall of 1917. This, on the ground that the plaintiff had laid no foundation for the introduction of such testimony. This objection is probably based upon the theory that the plaintiff had not shown himself qualified to testify as to the market value of the hay.

We think the court properly admitted the testimony; for the plaintiff being the owner of the hay, he was competent to testify as to its value, at the time and place in question, and there was no error in receiving such testimony.

There is considerable evidence in the record as to what were the terms of the lease, and the conditions upon which plaintiff leased the land. Plaintiff testified positively as to what those terms were, and the jury has decided and determined all questions of fact relative to the

terms of the agreement. The evidence further shows that the plaintiff made a proper demand for the value of the hay before commencing his action.

We have examined all the errors assigned, and find no reversible error in the record.

The judgment appealed from is affirmed.

The respondent is entitled to statutory costs and disbursements on appeal.

MELVIN BERGH, Respondent, v. GEORGE HELLICKSON and A. H. Stavens, Appellants.

(177 N. W. 506.)

New trial — grounds for — where the main defendant is absent from state and suffering mental depression on account of several deaths in his family, new trial should be granted upon paying the costs.

1. Where one of two defendants who was notified of the date of trial more than ten days before the convening of the term of court was not present when the case was called for trial, it appearing that he had been called out of the state on account of the illness of a sister-in-law, it was not error, in the circumstances of this case, for the trial court to order the trial to proceed.

2. But where, on motion for a new trial, it appeared that the facts relied upon by the defendants were more peculiarly within the knowledge of the absent defendant; that the other defendant relied upon the absent defendant for notice of the date of trial as well as for proof of facts; and that the absent defendant was under such state or mental depression, due to the recent death of his mother, his wife, and his only child, and the fresh news of the serious illness of his sister-in-law, as to be incapable of properly attending to his own affairs, the failure of the defendants to be present to defend the action being attributable to the foregoing facts, a new trial should have been granted conditioned on the defendants paying the costs accrued prior to the motion.

Opinion filed December 12, 1919.

Appeal from the District Court of Steele County, *Cole*, J.

Order reversed and new trial granted.

P. O. Sathre and *Chas. A. Lyche,* for appellants.

"Where parties have been diligent in their efforts to be ready for trial, but have been prevented by circumstances beyond their control, the court should grant them a continuance. Radford v. Fowlkes, 85 Va. 820, 8 S. E. 817; Myers v. Trice, 86 Va. 835, 11 S. E. 428; Roberts v. Moore, 27 Ga. 411; Wright v. Lery, 22 Minn. 466; Thompson v. Thornton, 41 Cal. 626; Connell v. Sharpe, 32 Ga. 443; Mayton v. Guild, 29 S. W. 218; Light v. Richardson, 31 Pac. 1123.

"It is unquestionably an important privilege of a party to be present at the trial of his cause, which should not be denied on a proper application made, unless for weighty reasons." 9 Cyc. 93; Robertson v. Woolley, 6 Wash. 156, 32 Pac. 1060; Mathews v. Willoughby, 85 Ga. 289, 11 S. E. 620; Re Townsend, 122 Iowa, 246, 97 N. W. 1108; Hoover v. Hoover, 97 N. W. 620; Martin v. Nichols, 121 Ga. 506, 49 S. W. 613.

"To hold a person liable for tort which he has not himself committed, and which has not been done by his orders, his adoption of or assent to the act, such as will render him liable, must be clear and explicit, and made with a full knowledge of the tort, or at least of the injured party's complaint that the injury has been inflicted on him." Tucker v. Jerris, 75 Me. 184; Cooley, Torts, 215, 216.

"Damages must be assessed in a single sum. They cannot be apportioned by the jury among the defendants, for the sole inquiry open is what damages plaintiff has sustained, not who ought to pay them." 38 Cyc. 492, and numerous authorities cited there.

W. J. Courtney, for respondent.

BIRDZELL, J. The plaintiff brings this action to recover possession, or the value, of three hogs which he claims strayed from his farm in the month of May, 1918, and which thereafter came into the possession of the defendants. The defendant Stavens is the owner of a large farm situated in the vicinity of the place from which the plaintiff's hogs strayed, and the defendant Hellickson is his foreman. This action came on for trial on February 18, 1919, in the district court of Steele county. At the commencement of the trial the attorney for the defendants made an application for a continuance on the ground that one of his clients, Hellickson, was absent from the state under the following circumstances, as set up in the affidavit: The defendant

Hellickson had conferred with his attorney on February 5th, at which time he was apprised of the date of the trial, defendant stating that he would be present at such time. That on the day before the term convened, to wit, on February 17th, affiant called Hellickson by telephone, and was informed by his sister that the former had gone to Minneapolis two days before on account of illness in his family, but that he had expected to return on that day; that affiant again called on the following day, the day of the trial, but defendant had not returned. Defendants' counsel asked either for a continuance or that the action be placed at the foot of the calendar to enable him to communicate with his client. This application was denied and the case proceeded to trial. Defendants' counsel, however, produced no witnesses to testify to their version of the facts the only witness sworn for the defendants being the plaintiff himself, who was called for cross-examination. The jury, under the evidence and under proper instructions from the court, returned a verdict for the plaintiff for the full amount claimed. There is error, however, in the verdict in that the jury purports to relieve the defendant Hellickson from liability for a portion of the sum found against the defendants, when, under the charge of the court and under the law, Hellickson was necessarily liable for any sum for which Stavens might be found liable. But this is error of which the defendants cannot complain.

A motion for a new trial was made, supported by affidavits going to establish the following additional facts, with some of which the defendants' attorney and the defendant Stavens were not familiar at the time of the trial, and which apparently excuse any seeming neglect on their part to be ready to proceed with the trial.

It seems that during the epidemic of influenza in November, 1918, the defendant Hellickson lost his wife, his mother, and his only child, a daughter, within ten days' time; and that his depressed condition for a considerable period of time after this shock rendered him more or less incapable of properly attending to his affairs. That on account of Hellickson's familiarity with the farm, of which he was foreman, Stavens placed principal reliance upon him, both as to the facts and as to advice concerning the date of the trial; that Stavens was not notified of the date of the trial at all; and that the defendant Hellickson's depressed mental condition was aggravated by the news he re-

ceived February 15th of the serious illness of his late wife's sister. These facts were not all before the trial court at the time the court ordered the trial to proceed, but, as above indicated, were incorporated in the affidavits presented upon the motion for a new trial.

In these circumstances, we think the new trial should have been granted, upon condition, however, that the defendants pay the costs incurred in the trial court to the date of the motion; and such is the order of this court. The costs of this appeal will abide the event of a new trial.

CHRISTIANSON, Ch. J., and GRACE and BRONSON, JJ., concur.

ROBINSON, J., dissents.

J. C. BLAIR and Emma Blair, Appellants, v. MAXBASS SECURITY BANK OF MAXBASS, a Corporation, Respondent.

(176 N. W. 98.)

Process — warrant of seizure maliciously and wilfully issued for four times amount of mortgage is abuse of process.

Where certain chattel mortgages were foreclosed by an action, and a summons was issued which claimed to recover, from the defendant, more than four times the amount actually owing upon the mortgages, and, in the course of the action, a warrant of seizure was issued and placed in the hands of the sheriff, under which all of the property described in the mortgages was taken from the possession of the defendant, such property consisting of a large amount of live stock, machinery, grain, and other property, the plaintiff in that action knowing, at the time it caused to be issued said warrant of seizure, that it was foreclosing such mortgage, and maintaining said action for more than four times the amount actually owing it, and the complaint, in this action, which is one for abuse of process in the foreclosure action, alleging all the foregoing facts, and further alleging that the warrant of seizure was maliciously and wilfully issued, with such knowledge.

It is *held*, the complaint states a cause of action for abuse of process, and that the court erred in not receiving evidence offered by the plaintiff to substantiate the allegations of his complaint.

Opinion filed December 13, 1919.

Appeal from a judgment of the District Court of Bottineau County, *A. G. Burr,* J.

Judgment reversed.

J. J. Weeks, for appellants.

If process, either civil or criminal, is wilfully made use of for a purpose not justified by law, this is an abuse for which an action will not lie. Cooley, Torts, 2d ed. 220; 32 Cyc. 542.

An action based on the abuse of process differs from an action for malicious prosecution in at least two respects: First, in that want of probable cause is not an essential element; and, second, that it is not essential that the original proceeding shall have terminated. Kool v. Lee, 134 Pac. 906; Malone v. Belcher, 216 Mass. 209, Ann. Cas. 1915A, 830; Grimestad v. Lofgren, 105 Minn. 296, 117 N. W. 515.

"A cause of action for malicious abuse of process assumes that the process is regular and legal in form." Smith v. Jones, 16 S. D. 337, 92 N. W. 1084; Nix v. Goodhile, 63 N. W. 701.

W. H. Adams, for respondent.

The defendant mortgagee was entitled, as soon as the plaintiffs failed to pay the mortgage in accordance with its terms, to take into its possession all of its mortgaged property and sell enough to pay it, including costs. James v. Wilson, 8 N. D. 186; Sandager v. Northern P. Elev. Co. 2 N. D. 3; Sanford v. Duluth & D. Elevator Co. 2 N. D. 6; N. D. Comp. Laws, § 8137.

GRACE, J. This action is one to recover damages for abuse of process. The plaintiffs pleaded certain facts in their complaint. The defendant interposed an answer.

At the time the case was called for trial, and after the jury were duly sworn, and at the time of the offering and rendering of proof on behalf of the plaintiffs, the defendant objected to the introduction of any evidence, on the ground that the complaint fails to state facts sufficient to constitute a cause of action, in this, that it shows there was an indebtedness existing between plaintiff and defendant; that, at the time of commencement of the action in which it is charged there was a malicious use and abuse of process, such indebtedness was due, and a cause of action did exist; that it shows that the plaintiff in that action, who is the defendant in this action, proceeded by a lawful

method, and pursued a lawful remedy, and that it does not show that the defendant in this action, at any time, had possession of the property mentioned in the complaint in this action, and that it contains no specific allegation of damage.

The court sustained the objection. The case is thus presented to this court as if a demurrer had been interposed to the complaint upon the same ground that the evidence to prove the allegations of the complaint was excluded. In other words, if the complaint in this action states facts sufficient to constitute a cause of action, the trial court was in error in excluding evidence offered to prove the facts alleged in the complaint.

For the purpose of determining the legal questions presented, all of the material facts which are well pleaded by the complaint, and in this case they are all well pleaded, must be taken as true. The complaint shows that the plaintiffs were indebted to the defendant, and, to secure that indebtedness, on the 11th day of November, 1914, executed and delivered to defendant a chattel mortgage.

It further shows that, on the 21st day of May, 1915, the plaintiffs executed and delivered to defendant another chattel mortgage. These chattel mortgages were properly and legally filed in the register of deeds' office at Bottineau county, North Dakota, and each covered and described a large amount of personal property consisting of horses, machinery, cattle and oats, and some other property, all of the alleged value of $2,500.

The complaint further shows that, on the 8th day of December, 1915, there was due on said indebtedness, and said chattel mortgages to defendant, a sum not to exceed $465.64, for which sum defendant held a lien on the property in question. That, on the 8th day of December, 1915, the defendant commenced foreclosure of the chattel mortgages by an action in the district court of Bottineau county, and wrongfully claimed to recover from the plaintiffs, $2,137.64, with interest thereon, from the 15th day of October, 1915, and demanded that the mortgages be foreclosed, and the property, therein mentioned, sold, and the proceeds applied to the payment of that sum, together with costs. That, on the 10th day of December, 1915, the defendant caused to be issued by the clerk of the district court of Bottineau county, a warrant of seizure, which required the sheriff of Bottineau

county to levy upon and take into his possession, and from the possession of the plaintiffs, all of the said property, which the sheriff did on or about the 14th day of December, 1915. That said property was held and kept by defendant, or under defendant's instructions and directions by the sheriff, until about the 7th day of July, 1916, when it was redelivered to plaintiffs.

The complaint further shows that, in the commencing of that action, and therein demanding the foreclosure of the mortgages for the sum of $2,137.64, instead of the sum which was actually due, and known to said defendant to be due at said time, the defendant wilfully and maliciously intended and attempted to pauperize and ruin the plaintiffs financially, and that, at the time of seizure of the property, it was well known to defendant that, on account of the seizure and the destruction of plaintiffs' credit thereby, the plaintiffs would be, and were, unable to rebond and possess themselves of such property during the pendency of the foreclosure action.

That, further, during the time the personal property remained in possession and under the control of defendant, the defendant failed and neglected to furnish sufficient feed and to exercise proper care of the animals described in the mortgage, and wilfully and maliciously, with intent to cause injury and damage to the plaintiffs, allowed the animals to suffer for want of sufficient food and drink and other proper care, so that at the time of the redelivery to plaintiffs, of the animals, they had become very thin in flesh, weak, and depreciated in value to plaintiffs' damage to the extent of $600; that, on account of the seizure of the personal property, and the withholding of the same, plaintiffs have been damaged in the loss of the use thereof, in the sum of $600.

The complaint further shows that the mortgages provided that the harvested crops, covered by said mortgages, might be sold by the mortgagee in any usual market thereof, at the market price thereof, without notice; that there were 2,000 bushels of oats covered by said mortgage, and which were seized and held by defendant, which had a market value in excess of the amount due on the mortgages, all of which was known to defendant at the time of the seizure; and that he knew that the grain was more than sufficient to pay the indebtedness, and knew the same could be sold, under the mortgage, without an action to foreclose; but that the defendant wilfully, unlawfully, and wrongfully com-

menced the action to foreclose the mortgages, and caused the levy to be made on all of the property, with the intention and purpose to hold the same for a long period of time, and with the intention and purpose of incurring large expense, and holding and caring for the property during the pendency of the action, with the preconceived idea of wasting the property, and to cause plaintiffs great financial loss and to destroy his credit, and that, by reason of said acts on the part of defendant, plaintiffs were injured in their name and credit, and prevented from pursuing their business, compelled to pay counsel fees in the action to recover possession of property, and were injured in their employment and business in the sum of $1,000. In all, the complaint demands judgment for $2,200.

The defendant interposed a general denial, and also made certain admissions and pleaded other matter by way of defense. By its answer, it is shown that the mortgages were foreclosed, and substantially at the time and in the manner shown by the complaint, and further shows that, on the 3d day of May, 1916, judgment was entered in the district court of Bottineau county, in its favor for $496.67; that the judgment was decreed to be a lien upon the property, and that the chattel mortgages were a valid lien upon the property, and that it ordered a special execution issued from the court on the judgment, and that the property described in the complaint be levied upon by the sheriff, or as much thereof as might be necessary, and that the same be sold under the direction of the sheriff, and the proceeds applied to the satisfaction of the judgment; that, thereafter, on about the 7th day of July, 1916, the plaintiffs voluntarily paid the judgment, and then the sheriff of Bottineau county released and turned over to the plaintiffs all the property described in the complaint.

No particular attention need be paid to the answer, except in so far as its allegations substantiate those of the complaint; for the sole question is: Does the complaint state facts sufficient to constitute a cause of action? We are thoroughly convinced it does. It was reversible error to exclude evidence and proof of the allegations therein.

The principles of law which are applicable in actions for malicious prosecution do not obtain in an action for malicious abuse of process, or where a party to the action maliciously, and with a sinister purpose, causes process to be issued, under which the officer levying on property

in obedience to the process or writ occasions the damage complained of.

In actions for malicious prosecution, the complaint must allege want of probable cause and a termination of the action claimed to have been prosecuted maliciously. Neither of these elements need be present in an action for malicious abuse of process, or in maliciously and wilfully causing process to issue.

In 21 R. C. L. p. 1261, judicial process is defined thus: "Judicial process, in its largest sense, comprehends all the acts of the court, from the beginning of the proceeding to its end. In a narrower sense, it is the means of compelling a defendant to appear in court, after suing out the original writ in civil, and, after indictment, in criminal, cases. In every sense, it is the act of the court. Any means of acquiring jurisdiction is properly denominated process. The term is sufficiently comprehensive to include an attachment, garnishment, or execution. A writ is process and process is a writ, interchangeably."

The warrant of seizure issued in this case is of the nature, and largely performs the functions and office, of a writ of attachment.

In 32 Cyc. 543, it is said: "All persons who knowingly participate in the abuse of process are liable as joint tort-feasors, and if a party directs or consents to the unlawful acts of an officer or subsequently adopts them, he becomes liable. But a plaintiff who does not direct or participate in abuse of process by the officer, and does not ratify his acts, is not liable.

Although some cases hold that malice is a fact necessary to be shown in an action for abuse of process, and while the action is often denominated one for the 'malicious abuse of process,' it is probable that malice is not an essential element of the cause of action, and becomes important only when exemplary damages are sought. The act constituting the abuse must, however, be shown to have been wilful. Under no circumstances will malice alone give a right of action. Nor will the action lie against one who, in good faith, has sought to properly enforce a supposed writ. 32 Cyc. 542.

It is not necessary to determine in this case the necessity of the presence of both malice and wilfulness in causing to be issued certain process, or for the malicious use of process. It is sufficient to state that the complaint shows both elements present in this case. It contains other

allegations showing bad faith on the part of the defendant, such as an intention to wreck the credit of the plaintiffs, to place them in a position where they could not rebond the property, this by defendant claiming to recover, in its complaint in the foreclosure action, a grossly larger amount than was owing it from the plaintiffs.

The defendant, in its foreclosure action, sought to recover $2,137.64. This was more than four times the amount which the plaintiffs owed it. The defendant knew this, so the complaint states, and it certainly must have known approximately how much the plaintiffs were indebted to it. The judgment which it did recover was $496.67. This was only $31.03 more than the plaintiffs conceded they owed it, and this difference may be partly costs or partly interest. At any rate, the judgment recovered was substantially the amount which plaintiffs conceded they owed.

If, then, the defendant in this action maliciously, knowingly, and wilfully caused to be issued a summons against the plaintiffs in the foreclosure proceedings, wherein it was claimed that these plaintiffs owed the defendant in that action more than four times the amount which these plaintiffs actually did owe it, and, in the same action, caused a warrant of seizure to be issued, taking all the property above mentioned, of the value of $2,500, into its possession, and this, with the intent and purposes alleged in the complaint in this case, it would seem there could be no doubt that such acts constituted malicious abuse of process. Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866.

It may be conceded that the defendant in its foreclosure action had a legal right to have a warrant of seizure issued, default having occurred in the terms of the chattel mortgages. Under the cover of this legal right, however, it cannot be permitted to perpetrate a legal wrong. It had a right to a warrant of seizure to take possession of all the property; for it had a lien, by its mortgages, upon all the property, for the purpose of foreclosing the mortgages and selling the property, or sufficient thereof to discharge the obligation which these plaintiffs then owed it.

It had no right to the possession of the property for any other purpose. It was not entitled to the possession of the property for the purpose of foreclosing the mortgages for an amount more than four times in excess of what these plaintiffs then owed it.

They had no right to the possession of the property for any such purpose; that they did this wilfully, maliciously, and for the ulterior pur-

poses stated, the allegations of the complaint leave no room for doubt. It should not have been the purpose of the defendant, in its foreclosure action, to have caused these plaintiffs great and unnecessary expense.

Under § 8133, Comp. Laws 1913, the defendant, upon the default in the chattel mortgages, could have sold the oats upon the farm where they were located, in the ordinary manner of foreclosure of chattel mortgages, by advertisement, and there was sufficient of them to have paid every dollar which these plaintiffs then owed the defendant.

The defendant may not be required to proceed in that manner, but it is another reason which shows the defendant, in its foreclosure proceeding, as alleged by the plaintiffs, proceeded wilfully and maliciously.

This case is not one where a process was issued in good faith, and placed in the hands of an officer who, in exercising the powers conferred upon him by the writ, caused damage. In such case, the one who caused the writ to be issued might take refuge under the principle that the acts causing the damage were those of the officer, and that the one causing the writ to be issued and placed in his hands was not responsible for the acts of such officer.

In this case, however, the complaint shows that the writ was maliciously and wilfully issued for the collection of a sum more than four times of what could justly be collected. It shows, in effect, that the foreclosure proceedings were conducted in a harsh, unreasonable, and oppressive manner. In all these above circumstances, we are of the opinion the plaintiffs could recover in this action, whatever damages they suffered or to which they could show themselves entitled.

We are of the opinion that the complaint, as a whole, states a cause of action.

The judgment appealed from is reversed, and the case is remanded to the lower court for a new trial.

The appellant is entitled to statutory costs and disbursements on appeal.

BRONSON and ROBINSON, JJ., concur.

CHRISTIANSON, Ch J., and BIRDZELL, J., dissent.

WILLIAM F. KERNKAMP, Respondent, v. ANNA SCHULZ, Appellant.

(176 N. W. 108.)

Trusts — when real property is transferred to one person and the consideration paid by another, a trust is presumed in favor of the payee.

1. Section 5365, Comp. Laws 1913, reads as follows: "When a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

The plaintiff, and one Wm. Schulz, now deceased, were the owners and equally interested in several quarter sections of school land. The title of one of the quarter sections, purchased at a school-land sale, was evidenced by a contract taken in the name of Schulz, though it appears, by competent evidence, that the plaintiff paid one half of part of three purchase-price payments, each for $512, and one half of the interest on deferred payments, and one half of the taxes from the year 1903 to the year 1918; and that then the defendant paid, without the knowledge or consent of the plaintiff, the last two payments on the school-land contract, and the interest then due.

William Schulz, prior to his death, assigned the contract to his wife, this defendant.

It is *held*, under the above section, that the said William Schulz held one-half interest in said land in trust for the plaintiff, subject only to the condition that the plaintiff must pay one half of the two remaining payments paid by the defendant, and half of the accrued interest on such payments made by her.

Trusts — wrongfully detaining thing or gaining it by mistake.

2. Under §§ 6279 and 6280, Comp. Laws 1913, it is further *held* that the contract for the purchase of the school land in controversy was inadvertently, and by mistake, taken in the name of William Schulz, and that he held one-half interest in the land described therein, as an involuntary trustee for the benefit of the plaintiff, upon the plaintiff paying his one half of the purchase price thereof, and one half of the interest on deferred payments, and one half of the taxes levied against such land during each year since it was so purchased.

Opinion filed December 18, 1919.

Appeal from a judgment of the District Court of Barnes County, *J. A. Coffey*, J.

Judgment affirmed.

M. J. Englert, for appellant.

The authorities are conclusive on the subject that if the complaint alleges an agreement, constituting an express trust, then there can be no resulting or implied trust. Golschalck v. Fulmer, 51 N. E. 852; Potter v. Clapp (Ill.) 96 Am. St. Rep. 322, 68 N. E. 81; Monson v. Hutchin (Ill.) 62 N. E. 788; Byers v. McEnry (Iowa) 91 N. W. 797; Stevens v. Fitzpatrick (Mo.) 118 S. W. 51; Butts v. Cooper (Ala.) 44 So. 616; Russ v. Mebius, 16 Cal. 350; Walker v. Bruce (Idaho) 97 Pac. 250; Ames v. Howes (Idaho) 93 Pac. 35.

"A parol promise or agreement by one person to purchase lands and hold them in trust for another is within the statute of frauds, and not enforceable as an express trust." 39 Cyc. 49 (c) and authorities cited to note 69; Harvey v. Shipe (Va.) 88 S. E. 830; Ferguson v. Robinson (Mo.) 167 S. W. 447; Doom v. Brown (Ky.) 188 S. W. 475; Church v. Smith (Ind.) 100 N. E. 384.

"A verbal agreement between two or more persons to make a joint purchase of lands, title to be taken in the name of one for the benefit of all, is within the rule" (of the Statute of Frauds, and not binding). 39 Cyc. 49 (c) and authorities cited under note 70; N. D. Comp. Laws 1913, § 5963.

The authorities hold that claim of possession and payment of taxes is not sufficient to take the matter out of the Statute of Frauds, or to establish a resulting trust. Godschalck v. Fulmer (Ill.) 51 N. E. 852; Perkins v. Perkins (Mass.) 63 N. E. 926; Harney v. Burhns (Wis.) 64 N. W. 1031; Englebracht v. Herrington, 101 Kan. 720, 172 Pac. 715, L.R.A.1918E, 785, and authorities cited; Smith v. Burnham, 3 Sumn. 435, Fed. Cas. No. 13,019; Bigler v. Baker (Neb.) 24 L.R.A. 255, 58 N. W. 1026.

No trust results in favor of the party paying the consideration, or part thereof, for land, where the title is made to another with his consent. Monson v. Hutchin (Ill.) 62 N. E. 788; Ecton v. Moore, 4 Ky. L. Rep. 307; Palmer v. Sterling, 41 Mich. 218, 2 N. W. 24; Tiedeman, Real Prop. Enlarged ed. p. 476, § 500; 39 Cyc. 104 (b) and authorities cited; Godschalck v. Fulmer (Ill.) 51 N. E. 852; Home Land & Loan Co. v. Routh, 123 Ark. 360, 185 S. W. 467, Ann. Cas. 1917C, 1142; Pavlovich v. Pavlovich (Cal.) 135 Pac. 303; Land Co. v. McGregor

(Iowa) 149 N. W. 617; Bernauer v. McCall-Webster Elev. Co. (N. D.) 171 N. W. 282; Andreas v. Andreas (N. J. Eq.) 94 Atl. 415; Casey v. Casey, 146 N. Y. Supp. 348; Martin v. Thomas (Or.) 144 Pac. 684; O'Donnell v. McColl (Wash.) 154 Pac. 1090; Belcher v. Young (Wash.) 155 Pac. 1060.

Where the plaintiff seeks to establish a resulting trust, and depends upon the same through circumstances of making the payment, or paying the consideration, the payment of consideration must be made and paid by him at the time of the transaction or the sale. Ostheimer v. Single (N. J. Eq.) 68 Atl. 231; Howell v. Howell, 15 N. J. Eq. 78; Brooks v. Fowler, 14 N. H. 248; Kelly v. Johnson, 28 Mo. 249; Woodside v. Hewell (Cal.) 42 Pac. 152; Millard v. Hathaway, 27 Cal. 119; Doll v. Gifford (Colo.) 56 Pac. 676; Burden v. Sheridan (Iowa) 14 Am. Rep. 505; Webb v. Webb (Iowa) 104 N. W. 438; Parker v. Newitt (Or.) 23 Pac. 246; Hickson v. Culbert, 19 S. D. 207, 102 N. W. 774.

The measure of proof necessary in case where the plaintiff claims a resulting trust in his favor must be clear and free from reasonable doubt. Bernauer v. McCaull-Webster Elev. Co. (N. D.) 171 N. W. 282; Lehman v. Lewis, 62 Ala. 129; Heneke v. Floring, 114 Ill. 554; Green v. Deitrich, 114 Ill. 636; St. Patrick's Church v. Daly, 116 Ill. 76; Woodward v. Sibert, 82 Va. 441; Catoe v. Catoe (S. C.) 10 S. E. 1078; Hoover v. Hoover, 29 Pa. 201; Behm v. Molly (Pa.) 19 Atl. 562; Guest v. Guest, 74 Tex. 664.

A. P. Paulson, for respondent.

"No variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits." N. D. Comp. Laws 1913, § 7878; Maloney v. Geyser Mfg. Co. 17 N. D. 195, 115 N. W. 669; Robertson v. Moses, 15 N. D. 351, 108 N. W. 788; Halloren v. Holmes, 13 N. D. 411, 101 N. W. 310.

"When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Fleischer v. Fleischer, 11 N. D. 221, 91 N. W. 51; Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 79 N. W. 981.

There was no delay on the part of the plaintiff, after he learned the true situation, to enforce his rights, and he certainly cannot be accused

of laches, or of sleeping on his rights. Hagan v. Powers, 103 Iowa, 593, 72 N. W. 771; Rayl v. Rayl (Kan.) 50 Pac. 501; Costa v. Silva (Cal.) 59 Pac. 695; Dans v. Dans (Mass.) 28 N. E. 905; Barlow v. Barlow (Kan.) 28 Pac. 607; Fleisher v. Fleisher, 11 N. D. 229.

The intention on the part of the payer may be proved not only from his express declarations, but also from the circumstances surrounding the transaction. Carter v. Montgomery, 2 Tenn. Ch. 216; Zimmerman v. Barber, 176 Pa. 1.

The intention of the person paying the consideration as to the interest to be taken by the grantee is to be determined as of the time of the conveyance. Snider v. Johnson, 25 Or. 329.

GRACE, J. The defendant is the widow of William Schulz, who, during his lifetime, and the plaintiff, were farmers of Barnes county, and were neighbors and friends.

It appears that together they had many business transactions, as well as transactions between themselves and other persons; that they bought and owned certain lands together, and at times sold land which they thus jointly owned.

Among other lands which they purchased and owned were several quarters of school lands, in which they were jointly and equally interested.

It is claimed by the plaintiff that the northeast quarter of section 36, township 141, north of range 58 W., Barnes county, North Dakota, was school land, and was purchased by plaintiff and defendant, at the time it was sold publicly at the school-land sale, at the courthouse, in November, 1902, in Valley City, Barnes county; and that, at the time the land was purchased at such sale, each of them contributed one half of the purchase price of the land, both principal and interest, but that the contract, by inadvertence, was made to William Schulz as vendee, in whose possession it continuously remained until his death, in the spring of 1917.

At the school-land sale, the land in question was sold for $2,560, one fifth of the purchase price, or $512, being paid in cash at the execution and delivery of the contract, and the further sum of $15.70 interest, the interest from the date of the contract to the 1st day of January, 1903. The balance remaining due upon the contract bore interest at

the rate of 6 per cent per annum. The second payment of $512 became due January 1, 1908, and a like amount at the expiration of each five-year period thereafter, until the whole purchase price was paid.

It is claimed by the plaintiff that he paid one half of the first payment, both principal and interest; that he has paid one half the payment due on January 1, 1908, and one half of the payment due January 1, 1913, and one half of all the interest that had accrued up until 1918.

He also claims to have paid his one half of the taxes chargeable against the land in question until the year of 1918, and further claims that, prior to the time of the death of William Schulz, and in contemplation thereof, and without any consideration, he sold and assigned all his property, both real and personal, to his wife, this defendant; that the land in question was a portion of the property so sold and assigned.

Plaintiff claims defendant had full knowledge of the plaintiff's interest in and to the premises, and that she took and received the same, understanding that the said William Schulz had only an undivided one-half interest in and to said land.

It is further claimed that she paid no consideration therefor; that, soon thereafter, she surrendered the contract to the state of North Dakota, paid the two remaining payments, and the interest accumulated thereon, in the sum of $1,054.72, and this, without the knowledge or consent of the plaintiff, and received the patent from the state of North Dakota for all of the said premises.

The plaintiff further claims that he has offered to repay to the defendant the one half of the sum of money so disbursed by her, and has demanded that the defendant deed to him an undivided one-half interest in and to the premises, in accordance with the agreement and understanding existing by and between William Schulz and the plaintiff.

Plaintiff further claims that, in the season of 1918, he furnished one half the seed required to sow and plant the land, and operated the land, through a tenant, in conjunction with the defendant, but that the defendant took and received the entire crop planted and harvested on the land, consisting of wheat, oats, and other grains, of the net value of $1,565.97.

The answer claims that William Schulz purchased the land in question, and that, prior to his death, he sold and conveyed same to defendant, and that she thereafter secured a conveyance from the state of North Dakota. Further answering, the defendant interposed a general denial.

The plaintiff maintains this action upon the theory and claims that he was a purchaser of one-half interest of the land in question at the said sale of this school land. That at such time he paid one half of the whole of the initial payment, and one half of subsequent payments, except the last two, and the accrued interest on the amount remaining due until 1918, and has paid one half the taxes until 1918, and that the contract for the purchase of the land was inadvertently executed by and between William Schulz and the state of North Dakota, and for this reason a trust resulted in plaintiff's favor to the extent that the said William Schulz held one half of such land in trust for the plaintiff, and for his use and benefit.

The defendant, in effect, claims that the purchase of the land was by William Schulz only, and that he made all the payments, both principal and interest, except only such as have been made by this defendant, and that he also paid the taxes.

There is considerable evidence in the case, some of which consists of written documents introduced as exhibits, and, in addition to this, there is considerable oral testimony.

We may concisely state the evidence adduced on behalf of the defendant. It consists largely of evidentiary facts contained in written documents, such as the purchase contract between the state of North Dakota and William Schulz; the assignment of it to Anna Schulz, widow of deceased; and the patent from the state of North Dakota, to her, of the land in question; and, further, of receipts issued by the treasurer of Barnes county to William Schulz, describing the payments on principal, and the payments of accrued interest, made by him. Receipts were issued from the treasurer of Barnes county to William Schulz, for the initial payment of $512 on the principal, and the payment made January 18, 1908, for $512, and one made January 30, 1913, for $512.

Receipts likewise were issued by such treasurer to William Schulz, at various intervals, for the payment of the accrued interest. There were fourteen of such receipts for interest issued by the treasurer to William Schulz, which showed, with one exception hereafter to be mentioned payment of the accrued interest from February, 1903, to January, 1917, the amount of the accrued interest being shown in each receipt.

During said time, there was only one receipt issued to William Schulz and Wm. Kernkamp for the payment of the accrued interest, and this

bears the date of January 27, 1914. The receipt for the payment of interest on January 14, 1918, was issued to Anna Schulz.

There are also two receipts showing the payments of two $512 payments, which were paid January 4, 1918. The tax receipts show that the land, from the time of the contract, was assessed in the name of William Schulz, up to the year of 1916. They further show that the tax receipt for the payment of taxes for the years of 1903, 1906, 1907, and 1916 were issued to William Schulz, and for the years of 1904, 1905, 1908, 1910, 1911, 1913, 1914, and 1915 were issued to Schulz and Kernkamp.

In 1909, the receipt for the payment of taxes was issued to Fred Schilling, who had purchased the land on contract, but who did not permanently retain it.

In 1917 and 1918, the tax receipts were issued to Anna Schulz, and in her name.

The oral evidence offered by defendant consisted of her own testimony, and that of one Ernest Schroeder. The latter's testimony is to the effect that he had an arrangement with William Schulz to buy the land in question, at the school-land sale, and that Mr. Schulz was to furnish him the money with which to buy it. He claims that he did buy it, but that it was never turned over to him, and that he never had the money to pay for it. He also testifies that he talked with Kernkamp, two months after the sale, with reference to having the land turned over to him (Schroeder), and that at that time Kernkamp told him that he had nothing to do with it, that Schulz had it himself. He testified further that Schulz made the initial payments.

Schroeder's testimony further shows that he later leased the land from Mr. Schulz for the year of 1904, and that the seed was furnished to him by Mr. Schulz; that he had a talk with Kernkamp with reference to getting some seed, of which he was short while seeding, which amounted to about 20 bushels; that Kernkamp told him to go to Mr. Schulz to get it; that he, Kernkamp, did not have anything to do with it.

The defendant's testimony shows that she made the last two principal payments on the contract, and paid the interest then due, and received the patent for the land. It further shows the assignment of the school-land contract to her by Mr. Schulz.

It further shows that she claimed the crop of 1918 on the land, and

that she so told Kernkamp, and it further shows that he claimed part of it.

Her testimony further shows that the inventory appraisement, exhibit "S," which was made to the state, and which related to the inheritance tax, was prepared by Winterer and Ritchie, her attorneys. Section 9 of which described an undivided one half of the interest in this land. It was valued at $1,888.

On the part of the plaintiff, evidence was introduced showing sale of three quarter sections of land to one Fred W. Schilling, one quarter section of which was the land in question. The sale was evidenced by a contract for deed, executed by William Schulz and Wm. Kernkamp as vendors, and said Schilling as vendee. The purchase price stated in the contract for the whole tract so sold was $18,450.

The contract, in substance, provided that if prior to the payment in full to the state of North Dakota, under the school-land contract, the purchaser had paid the purchase price of all the land, excepting the balance due upon the school-land contract, Schulz and Kernkamp would deed the tract to the purchaser and assign him the school-land contract.

The signatures of all the parties to this contract were proved by competent evidence, and there is no doubt of the genuineness of the contract.

By a lease dated the 11th day of October, 1911, William Schulz and Kernkamp leased to one Charles F. Bartz, for a term of three years, three quarter sections of land, one quarter of which was the land in question. This lease was properly proved and offered in evidence.

It appears from the testimony of the plaintiff, that the land in question was rented to one Snyder for the years of 1903, 1904, and 1905; that the division of the grain was made at the elevator, and that the half of the crop which went to Schulz and Kernkamp was divided between Kernkamp and Schulz equally.

The terms of the lease were such that the owners of the land got one half of the crop. It appears the land was rented to a different party during the years of 1906 and 1907, upon the same terms it had theretofore been rented to Bartz, and the rent received from the land divided in the same manner, as between this plaintiff and Schulz. It was summer fallowed in 1908. In the year of 1908, in the month of July, the land was sold, with other lands, to Mr. Schilling under the contract above mentioned.

The land was farmed during 1909 and 1910 under this contract. Said sale was made upon crop payments, one half the crop was to be paid to Schulz and Kernkamp, and applied on the contract. This appears to have been done for those years, and the share which they received divided equally between them. Under the lease from Schulz and Kernkamp to one Bartz, he farmed the land for the years of 1912, 1913, and 1914.

The land in question, with other land, was rented to one Hoffman for the years of 1915, 1916, and 1917, upon the same terms that it had theretofore been leased to other parties, that is, on shares, one half to the tenant and one half to Schulz and Kernkamp, and the share which they received was divided equally between them.

The 1917 crop was, however, hailed out; the crop was light and the share of Schulz and Kernkamp, for that year, was put in the granary on section 31, and what was not used for seed was sold and divided, as usual, between Kernkamp and this defendant, Mr. Schulz having died.

Kernkamp testifies that, in the spring of 1918, he looked after the seeding operations on this land, and that the seed sowed on the land in that year was taken from the granary on section 31. Mr. Hoffman was still renting the land.

Kernkamp further testifies that he had a talk with this defendant in her house in Valley City in the latter part of December, 1917, or the first part of January, 1918, in which he told her there was a payment coming due on the school land in a week or so, and that he would come in and they would go up and straighten that out, and pay that up, and that she did not say anything against that; she said nothing at all. That later on, when he paid the interest on the other lands, he found that the defendant had paid up the balance on the contract.

Witness Schilling's testimony confirms the making of the contract for the sale of the land to him. It also shows that he kept the land two years and surrendered it, and that he delivered half the crop he raised thereon to Schulz and Kernkamp. In other respects, it, to some extent, corroborates Kernkamp's testimony.

The testimony of Triebold shows that he, in the year of 1915 and 1916, was engaged in buying grain at Alta, North Dakota; that he bought certain grain from Kernkamp, Schulz, and Hoffman, and made the scale tickets out in their name.

It will be remembered that Hoffman, during these years, had the land in question, together with the west half of section 31, leased. Triebold testifies the ownership of the grain, which he bought from those parties, was in Schulz, Kernkamp, and Hoffman.

Witness Utke's testimony is to the effect that he worked on the land in question and the west half of section 31; that he was hired to work on such land by Schulz and Kernkamp; that Schulz and Kernkamp paid him by the month; that he was working there by the month, and worked there a whole year; that Schulz and Kernkamp each furnished half of the machinery, and both furnished the seed; that that year the land in question was seeded to flax, and he hauled the flax to the elevator and delivered it in the name of Schulz and Kernkamp; that he asked Mr. Schulz in whose name it should be delivered, and he told him Schulz and Kernkamp.

We have referred, at length, to the testimony in the case, for the reason, upon the consideration of it and its character, must the determination rest, and the conclusion reached, if at all, as to the creation, by operation of law, of a resulting trust of an interest in the land in question, in plaintiff's favor.

Section 5365, Comp. Laws 1913, reads as follows: When a transfer of real property is made to one person and the consideration therefor is paid by or for another a trust is presumed to result in favor of the person by or for whom such payment is made.

In this case, if the evidence is clear and convincing that the plaintiff paid one half the purchase price of the land in controversy, then it must follow that Wm. Schulz held such one-half interest in trust for the plaintiff, though the title of all such land was in Schulz. This principle is recognized in the case of Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 83 N. W. 245; Smith v. Security Loan & T. Co. 8 N. D. 451, 79 N. W. 981.

Section 6279, Comp. Laws 1913, contains the following: One who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner.

Section 6280 is as follows: One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act is unless he has some other and better right thereto, an involuntary trus-

tee of the thing gained for the benefit of the person who would otherwise have had it.

The evidence, as we view it, clearly shows that the contract for the school land was inadvertently, and by mistake, taken in the name of Schulz, and this, though the testimony shows that Kernkamp had made all the payments above referred to. It must necessarily follow that Schulz held one half of the land in trust for the plaintiff, and that he wrongfully detained from the plaintiff his interest therein, and, for these reasons, an involuntary trust was created, of which the plaintiff was a beneficiary.

It appears to us that certain facts, which are proved by documentary evidence, cannot be explained upon any other theory than that the plaintiff, during all the time from and since the purchase of the school land in controversy, had a right and interest therein. For instance, the sale of the land of Schulz and Kernkamp to Schilling, which is evidenced by the contract for deed between Schulz and Kernkamp and Schilling, which covers and describes the west half of section 31 and this land, and which describes the terms and conditions of said sale of such land to Schilling, has, in no manner, been attacked or disproved. The evidence clearly shows such sale was in fact made.

It conclusively appears that such a contract for deed was entered into. It does not seem reasonable that Kernkamp would enter into a written contract to deliver a title to the land in controversy, unless he, at that time, knew that he had an interest in such land.

Likewise, the lease between Schulz and Kernkamp and Bartz is a document which shows that Kernkamp claimed and understood that he had an interest in the land. It certainly would appear that Kernkamp and Schulz could not join in the execution of these documents, unless they each had a right and authority to execute them, and unless each understood and knew of the interest of the other.

When these facts are taken into consideration with all the testimony adduced by plaintiff, it conclusively shows that he made the payments to which he testified. The conclusion is irresistible that he did purchase in the manner stated by him, a half interest in the land in controversy, and that the title to the land and contract of purchase from the state was inadvertently taken in the name of Schulz.

There is no other theory upon which the documentary evidence, on

behalf of plaintiff and his testimony, as a whole, can be explained. It is true that plaintiff produces no exhibits such as checks, receipts, etc., to show the payments which he made. This, however, is easily explainable in view of the statute which prevents the introduction of testimony relative to the transactions with the deceased.

Plaintiff, in all probability, testified as to the payments made, in the manner in which he did, in order that his testimony might not be in conflict with the statutory rule above referred to. In view of said rule, his oral testimony should not be excluded nor disregarded on the ground that it was not the best evidence. For, when it is taken in connection with the documentary evidence, it appears to have considerable weight, and we think the trial court was justified in taking it into consideration.

On the other hand, the fact that several of the tax receipts were in Schulz's name, and that the receipts for the payment of the first three payments on principal and the payments on interest were in Schulz's name, is not necessarily absolute proof that he had the entire interest in and title to such land. Such receipts are but prima facie proof of the facts recited in them, which may be fully disproved by other competent evidence.

All of these matters might be true, and yet he would be holding a part of the land in trust for the plaintiff. Schulz might have title to the land in his name, and may have receipts for the payments of principal, interest, and taxes, and yet one half of such payments may have been made to him by the plaintiff. This could be true, and, from the testimony as a whole, we think it is true.

We are of the opinion that the testimony of the plaintiff, as a whole, including the documentary testimony in his behalf, and including the documentary evidence contained in exhibit "S," above referred to, conconclusively and clearly shows that plaintiff did purchase a half interest in the land in controversy at the school-land sale, and that he has made the payments upon the principal, interest, and taxes, to which he has testified.

If this be true, it must follow that, though the title of the land was exclusively in Schulz, he held a one-half interest therein, in trust for this plaintiff, subject to the plaintiff's duty to continue to make his proportionate payments on the balance remaining due from time to time.

The last two principal payments were made by the defendant herein,

and she also paid some interest. One half of these amounts will necessarily have to be repaid to her by this plaintiff. It is also clear, from what has been said, that the plaintiff is entitled to one-half interest of the net proceeds of the crop produced upon the land in controversy, for the year of 1918, and that such interest in such crop is properly chargeable against the defendant.

We think there is no merit in the claim of defendant that the plaintiff's complaint declares upon an expressed trust. We think the facts therein stated can and should be said to constitute a basis, which will support a resulting or involuntary trust. There may be courts which would draw a different distinction, but refined distinctions, quite too frequently result in a denial of justice.

If Kernkamp, in this case, to the extent he testified, furnished money to pay one half of the payments and interest and the taxes, and this, with the knowledge of Schulz, it is certain that Schulz did not become the sole owner of the land. He owned only half of it, and the other half, under the clear and convincing testimony of this record, belonged to Kernkamp, for whom Schulz must be held to have held it in trust.

We have examined each of the errors assigned, and the points relied upon by the appellant, including point six, which has reference to transactions with the deceased person, and we find nothing therein which is sufficient to warrant a reversal of judgment appealed from.

All the evidence offered by plaintiff was competent. He has not attempted to testify or introduce evidence of any transactions with the deceased, in such a manner that such evidence would be in conflict with § 7861, Comp. Laws 1913.

It appears from the record that Mr. Schulz and Mr. Kernkamp had, for a very long period of time, transacted business together. There is nothing in the record to show that those relations were other than of the most amicable nature. There is no charge of overreaching or deceit by either party, and we are quite well satisfied there was none.

We think the judgment should be affirmed.

It is affirmed, and the respondents are entitled to their statutory costs and disbursements on appeal.

BRONSON and ROBINSON, JJ., concur.

CHRISTIANSON, Ch. J. (concurring specially). The trial court found that the plaintiff paid one half of the purchase price of the land involved in this litigation, and that Wm. Schulz paid the other half. While my mind is not altogether free from doubt, I am not prepared to say that such finding is erroneous, and am rather inclined to the view that it is in accord with the weight of evidence. The facts found by the trial court bring the case squarely within the purview of § 5365, Comp. Laws 1913. I fail to see, however, where §§ 6279 and 6280, Comp. Laws 1913, have any application.

BIRDZELL, J. (concurring). I concur in an affirmance on one ground stated in the principal opinion and which is expressed in paragraph 1 of the syllabus.

FRED V. DALE, Respondent, v. JAMES J. DUFFY et al., Appellants.

(176 N. W. 97.)

Appointing of receiver — cases in which receivers may be appointed.

1. Under the provisions of § 7588, Comp. Laws 1913, a receiver may be appointed, among others, in an action between partners or others jointly owning or interested in property, on the application of the plaintiff, or of any party whose right to or interest in the property is probable, and when it is shown that the property is in danger of being lost, removed, or materially injured. Receivers may also be appointed in all other cases where receivers have heretofore been appointed by the usages of courts of equity.

Appeal and error.

2. An appeal from an order appointing a receiver is not triable anew in the supreme court.

Receivers — appointment of.

3. For reasons stated in the opinion the order appointing a receiver in this case is affirmed.

Opinion filed December 23, 1919.

Appeal from Ward County, *Leighton*, J. Defendants appeal from an order appointing a receiver.

Affirmed.

F. F. Wyckoff, for appellants.

McGee & Goss, for respondent.

"The appointment of a receiver *pendente lite* is a matter committed to the sound discretion of the judge before whom the proceeding is pending." Cameron v. Groveland Improv. Co. 20 Wash. 169, 72 Am. St. Rep. 26.

"The power to appoint a receiver in the settlement of the partnership affairs is inherent in the court, and not dependent upon any statute." Cox v. Voekert, 86 Mo. 511; McIntosh v. Perkins, 13 Mont. 143; 23 R. C. L. 4; Baughman v. Reed (Cal.) 7 Am. St. Rep. 170.

CHRISTIANSON, Ch. J. This is an appeal from an order appointing a receiver. It appears that on or about January, 1918, the plaintiff and the defendant Duffy entered into a contract whereby the defendant agreed to farm during the seasons of 1918 and 1919 certain lands which the plaintiff held under a lease. In connection with such farming operations a large tractor was obtained. This controversy involves the ownership of such tractor.

On this appeal, appellants have argued two questions: (1) That the evidence fails to show that the plaintiff has any interest in the tractor; and (2) that if he has such interest, he has an adequate remedy by means of an action for accounting, and by the enforcement by execution of any judgment he might obtain in such action.

We are entirely satisfied that upon the record before us we would not be justified in disturbing the order of the trial court upon either of the grounds. Under our statute "a receiver may be appointed by the court in which an action is pending, or by a judge thereof:

"1. In an action . . . between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund or the proceeds thereof is probable, and when it is shown that the property or fund is in danger of being lost, removed or materially injured.

"6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity." Comp. Laws 1913, § 7588.

Upon the hearing of the application for the appointment of a receiver,

many affidavits were submitted upon the questions involved. The affidavits submitted by the plaintiff were to the effect, and tended to show, that he is the owner of a one-half interest in the tractor; that the relations between the parties in connection with which the tractor was purchased have terminated; that the present relations between the parties are rather strained; that the defendants are not financially responsible; that the tractor is in need of repairs, and continued use thereof by defendants will materially reduce its value; that the interest of the plaintiff in such tractor does not appear of record, and that such interest might be seriously affected by a sale or encumbrance of the tractor by the defendants. Plaintiff's claim that he is the owner of a one-half interest in the tractor is corroborated by the cashier of the bank from whom the tractor was purchased.

Appellants have asked for a trial *de novo* in this court. This is not a case properly triable anew here. The statute authorizing trials anew in this court applies to judgments only. Comp. Laws 1913, § 7846, This case has not been tried on its merits. No judgment has been entered. There has been merely an order appointing a receiver. The appeal before us is from that order. The question here is whether the plaintiff made a showing justifying the appointment of a receiver under our laws. We are of the opinion that the facts stated in the affidavits of the plaintiff bring the case within the statutory provisions above quoted. The trial court was vested with considerable discretion in determining the disputed questions of fact which arose, as well as whether the ends of justice required the appointment of a receiver.

We are agreed that it cannot be said upon the record before us that the court erred in appointing a receiver.

Order affirmed.

BRONSON, ROBINSON, and BIRDZELL, JJ., concur.

GRACE, J., concurs in the result.

T. M. ULMAN, Appellant, v. A. H. LINDEMAN, Respondent.

(10 A.L.R. 1440, 176 N. W. 25.)

Husband and wife — liability of husband for negligent operation of automobile by wife.

1. The owner of an automobile, kept and used for the business and pleasure of the family, is liable for its negligent operation by his wife, when driven for such purposes, with his knowledge and consent.

Damages — automobile — owner is liable for negligent operation of same by a third person, where his wife permits third person to drive automobile.

2. The owner of such automobile is liable for its negligent operation by a third person, directed or permitted by his wife, in her presence, to drive such automobile for purposes of the business or pleasure of the owner's family.

Opinion filed December 12, 1919.

Action for damages, through negligent operation of an automobile.

From order of the District Court, Divide County, *Leighton,* J., sustaining demurrer, plaintiff has appealed.

Reversed.

Brace & Stuart, for appellant.

If the master authorize the servant to use an instrumentality provided by him, and the servant negligently uses it so as to cause injury to another, the master is liable therefor, if the servant, at the time, was engaged in the business of the master, but is not liable therefor if the servant, at the time, was not engaged in the business of the master, but was using the instrumentality for his own purpose. Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 Pac. 1091; McNeal v. McKain, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; Geiss v. Twin City Taxicab Co. 120 Minn. 368, 45 L.R.A.(N.S.) 382, 139 N. W. 611; Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; Hutchins

NOTE.—For authorities passing on the question of liability of husband for an injury resulting from the negligent operation of an automobile by his wife, which he kept for the comfort and pleasure of his family and which he permitted her to use for that purpose, see notes in L.R.A.1916F, 227; L.R.A.1918F, 300; 5 A.L.R. 232, and 10 A.L.R. 1452, on liability where spouse of owner is using car.

v. Haffner (Colo.) L.R.A.1918A, 1008, 167 Pac. 966; King v. Smythe (Tenn.) L.R.A.1918F, 293, 204 S. W. 296.

A father who furnishes a vehicle for the customary conveyance of the family makes their conveyance by that vehicle his affair, that is, his business, and anyone driving the vehicle for that purpose, with his consent, express or implied, whether a member of his family or another, is his agent. Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; Lemke v. Ady (Iowa) 159 N. W. 1011; Marshall v. Taylor, 168 Mo. App. 240, 153 S. W. 527; McNeal v. McKain, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; Jensen v. Fischer (Minn.) 159 N. W. 827; Linde v. Browning, 2 Tenn. C. C. A. 262; Lewis v. Steel, 52 Mont. 300, 157 Pac. 575; Missell v. Hayes, 86 N. J. L. 348, 91 Atl. 322; Hutchens v. Haffner (Colo.) L.R.A.1918A, 1008, 167 Pac. 966; King v. Smythe (Tenn.) L.R.A.1918F, 293, 204 S. W. 296; Boes v. Howell (N. M.) L.R.A.1918F, 288, 173 Pac. 966.

One who maintains an automobile for the pleasure of himself and his wife, who has general permission to use it as she desires, is liable for injury negligently inflicted by her while driving the car for her own pleasure; since she is his agent in carrying out the purpose for which the car was purchased. Hutchens v. Haffner (Colo.) L.R.A.1918A, 1008, 167 Pac. 966; McWhitter v. Fuller (Cal.) 170 Pac. 417.

Where a father keeps an automobile for the general use of the family, employing a chauffeur as a driver, he is liable for its negligent operation while it is being used for such purpose. Cohen v. Borgencht, 83 Misc. 28, 144 N. Y. Supp. 399; Winefrey v. Lagerns, 148 Mo. App. 388, 128 S. W. 276; Moon v. Mathers, 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219; McHarg v. Adt, 163 App. Div. 782, 149 N. Y. Supp. 244; Hazzard v. Carstairs, 244 Pa. 122, 90 Atl. 556; Freeman v. Green (Mo. App.) 186 S. W. 1166; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745.

Where the owner's daughter was in charge of the family pleasure car, and she allowed a guest to operate, the owner was responsible for damages caused by the negligent operation of the car by such guest. Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; Berry, Automobiles, 2d ed. § 653; Babbit, Automobiles, § 902.

It was, at least, a question for the jury whether, at the time of the

accident, she was not the servant of the defendant and engaged upon the business of defendant. Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Missell v. Hayes, 86 N. J. L. 348, 91 Atl. 322; Clark v. Sweaney (N. C.) 95 S. E. 568.

W. H. Sibbald, for respondent.

BRONSON, J. This is an appeal from an order sustaining a demurrer to the complaint. The allegations of the complaint, essential for consideration herein, are as follows: "That on the 7th day of April, 1918, defendant, A. H. Lindeman, was the owner of a Ford automobile owned and kept for the use, pleasure, and recreation of himself and family. That on the 7th day of April, 1918, the wife of the defendant, Bessie Lindeman, with the knowledge and consent of defendant, together with the children of defendant and one Alice B. Thomas, was riding in said car in the public streets of the city of Crosby, North Dakota. Said car then being operated and driven by the said Alice B. Thomas, with the knowledge and consent of defendant's wife, the said Bessie Lindeman; that the said Alice B. Thomas was incompetent to properly operate and drive said car, and wrongfully, negligently, and carelessly drove the said car upon the above-described Bowser gasoline tank belonging to plaintiff, etc."

The pertinent question is whether such allegations state a cause of action against the defendant, the owner of the automobile, for the alleged negligence of the driver.

This court has heretofore held that the owner of an automobile is liable for its negligent operation by his wife, when driven, with his knowledge and consent, for purposes of business or pleasure of the family. Vannett v. Cole, 41 N. D. 260, 170 N. W. 663. The question now involved upon the complaint herein is the liability of an automobile owner for the negligent operation of his automobile, then used for the business or pleasure of the family, when driven by a stranger, with the knowledge and consent of his wife, who, with the knowledge and consent of the owner, together with his children, was then riding in such automobile.

The owner of an automobile is held to a liability for its negligent operation by one, other than himself, upon principles involving the

relation of master and servant, and, to some extent, principles of agency.

So, when an automobile is negligently operated by a chauffeur employed by the auto owner, he is liable as master for the negligent operation by his servant.

Likewise, when an auto is negligently operated by a person then directed by the auto owner to so operate in his presence, the owner is held liable for its negligent operation by such person, as the servant or agent of the owner.

Where an automobile is operated by a person not the servant or the express agent of the owner thereof, there are recognized to be three grounds upon which the owner may be held to a liability for the negligent operation of the car, *viz.*:

1. Where the servant of the auto owner, employed for the purpose of driving such auto, negligently chooses a stranger to operate the car in his place, the master may be held negligent in its operation by reason of such servant's negligence. Engelhart v. Farrant [1897] 1 Q. B. 240, 66 L. J. Q. B. N. S. 122, 75 L. T. N. S. 617, 45 Week. Rep. 179; Thyssen v. Davenport Ice & Cold Storage Co. 134 Iowa 749, 13 L.R.A. (N.S.) 576, 112 N. W. 177; Leavenworth Electric R. Co. v. Cusick, 60 Kan. 590, 72 Am. St. Rep. 379, 57 Pac. 519, 6 Am. Neg. Rep. 282. See Andrews v. Boedecker, 126 Ill. 605, 9 Am. St. Rep. 651, 18 N. E. 651; Hill v. Winnipeg Electric R. Co. 21 Manitoba L. R. 442, 6 B. R. C. 691. See note in 6 B. R. C. 705; Ricketts v. Tilling [1915] 1 K. B. 644, 6 B. R. C. 683, 84 L. J. K. B. N. S. 342, 112 L. T. N. S. 137, 31 Times L. R. 17; Collard v. Beach, 81 App. Div. 582, 81 N. Y. Supp. 619. See Labatt, Mast. & S. § 2517, p. 7743.

2. Where a servant employed to drive such car directs or permits a stranger to operate such car in the master's business, and in the presence of the servant, the master may be held liable for its negligent operation, upon the ground that such operation was, in fact, the servant's operation. See note in 13 L.R.A.(N.S.) 572. See cases hereinafter cited.

3. Where the servant employed to operate the automobile selects a stranger to so drive the car, in his place, upon the express or implied permission or direction of the owner thereof, a liability for the negligent operation of the automobile may be fastened upon the owner by reason of the consent or permission of such owner. Mechem, 3 Mich. Law Rev. (1905) 216. See note in 45 L.R.A.(N.S.) 382; Cooper v. Lowery, 4 Ga. App. 120, 60 S. E. 1015.

In this case, if the complaint states any cause of action at all, it must exist upon the second ground hereinbefore stated. The complaint does not allege that the wife of the defendant negligently selected the stranger to operate the car. There is, therefore, no cause of action stated under the first ground above mentioned.

The complaint does not allege that Alice B. Thomas, the stranger, operated the car, with the expressed or implied permission or consent of the owner thereof. There is therefore no cause of action stated upon the third ground above mentioned.

The complaint does, however, sufficiently allege that the automobile, at the time, was being operated for the business of the defendant; namely, the use, pleasure, and recreation of his family; that it was being used at the time by the wife of the defendant, with his knowledge and consent; that the wife directed or permitted Alice Thomas to operate such car for the purpose of the business of its owner; that, by reason of its negligent operation, the accident occurred.

The question is therefore squarely presented, upon these allegations, of the liability of the owner for the negligent act of the stranger.

If, at the time of the accident, the wife of the defendant were driving the car for purposes of the owner's business (and the pleasure of the family is a business of the master), the husband would have been liable for its negligent operation. Vannett v. Cole, 41 N. D. 260, 170 N. W. 663; Hutchins v. Haffner, 63 Colo. 365, L.R.A.1918A, 1008, 167 Pac. 966; McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417; Farnham v. Clifford, 116 Me. 299, 101 Atl. 468; McNeal v. McKain, 33 Okla. 449, 126 Pac. 742, note in 41 L.R.A.(N.S.) 775; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; King v. Smythe, 140 Tenn. 217, 204 S. W. 296, note in L.R.A.1918F, 297; Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020, note in 50 L.R.A.(N.S.) 59; Boes v. Howell, 24 N. M. 142, 173 Pac. 966, note in L.R.A.1918F, 288; Crittenden v. Murphy, 36 Cal. App. 803, 173 Pac. 595; Johnson v. Smith, 143 Minn. 350, 173 N. W. 675; Griffin v. Russell, 144 Ga. 275, 87 S. E. 10, Ann. Cas. 1917D, 994, note in L.R.A.1916F, 223; Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443, see note in L.R.A.1917F, 365; Hiroux v. Baum, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 354; Stowe v.

Morris, 147 Ky. 386, 39 L.R.A.(N.S.) 224, 144 S. W. 52; Landry v. Oversen, 187 Iowa, 284, 174 N. W. 255; Collinson v. Cutter, 186 Iowa, 276, 170 N. W. 421; Lewis v. Steele, 52 Mont. 300, 157 Pac. 575; Missell v. Hayes, 86 N. J. L. 348, 91 Atl. 322; Plasch v. Fass, 144 Minn. 44, 10 A.L.R. 1446, 174 N. W. 438.

Is the husband still liable, as a master or upon principles of agency, where the wife, authorized to operate the car, permits or directs, in her presence and stead, that the car be operated negligently by a stranger, for purposes of the business of the master?

In such or similar cases, a long line of authorities have held a liability to attach to the master. In many cases this holding is based upon the reasoning that the stranger is a mere instrumentality by which the servant or agent performs his duties; a longer arm which the servant or agent wields and controls; that the master's business is being performed, therefore, by the agent or servant through the stranger in question. 6 B. R. C. 710; Mechem, 3 Mich. L. Rev. 216; Geiss v. Twin City Taxicab Co. 120 Minn. 368, 45 L.R.A.(N.S.) 382, 386, 139 N. W. 611; Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091.

Thus in Booth v. Mister (1835) 7 Car. & P. 66, the master was held liable for the negligence of one who was permitted to drive a cart, by the servant, in the presence of such servant.

So, in Althorf v. Wolfe (1860) 22 N. Y. 355, the master was held liable where the servant secured a friend to aid him in cleaning off a roof whereby a passer-by was injured.

So, in James v. Muehlebach, 34 Mo. App. 512, the master or owner of a beer wagon was held liable by reason of injuries sustained when a barrel was thrown from the wagon by a stranger, with the consent of the driver, the servant. This court stated: "If a servant in charge of his master's carriage should take a stranger with him into the driver's seat, hand him the reins, and tell him to drive at a run, and an injury happen in consequence of the speed, the master must answer for the damage, for the negligence was that of his servant. But not so if the servant had quit the carriage and substituted the stranger in charge, generally in his stead, without the knowledge of the master."

So, again, in Simons v. Monier, 29 Barb. 419, the master was held

liable where a son of the servant, through his direction, set fire to brush, occasioning damage.

In Hollidge v. Duncan, 199 Mass. 121, 17 L.R.A.(N.S.) 982, 85 N. E. 186, the owner of a cart was held liable where the driver called to his assistance, in order to repair the same, a stranger, through whose negligence injury was occasioned.

In Lippman v. Campbell, 40 Mo. App. 564, liability was fastened upon the master through the negligent act of a boy in throwing a switch through the consent of a brakeman whose duty it was so to do.

In Slothower v. Clark, 191 Mo. App. 105, 179 S. W. 55, where the chauffeur let a stranger take the wheel, he remaining in the seat beside him, the court stated that the stranger's acts, practically speaking, were the acts of the servant, done in the defendant's service and while carrying out the chauffeur's employment.

In Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 971, 146 N. W. 1091, where the daughter had authority to operate the car of her father, and upon his business; and where, further, while so doing, she turned the car over to a stranger to drive, through whose negligence injury occurred in her presence,—it was held that the owner thereof was not absolved from responsibility.

Likewise in Geiss v. Twin City Taxicab Co. 120 Minn. 368, 45 L.R.A.(N.S.) 382, 139 N. W. 611, where two servants whose duty it was to operate the automobile turned over such operation to another person through whose negligent operation an accident occurred, it was held that when the master intrusts the performance of an act to a servant, he is liable for the negligence of one who, though not a servant of the master, in the presence of his servant, and with his consent, negligently does the act which was intrusted to the servant.

These cases, upon the specific principles of law involved, as hereinbefore stated, are not in conflict with Van Blaricom v. Dodgson, 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443, where the owner of an automobile was held not liable for its negligent operation by his adult son, when, with such owner's permission, he was using the car for his own purposes; nor with the case of McFarlane v. Winters, 47 Utah 598, L.R.A.1916D, 618, 155 Pac. 437, where the owner of an automobile was held not liable for its negligent operation by his son, who was driving the car for a stranger, to whom it had been loaned by the owner.

We are therefore satisfied, upon principles and authority, that the owner of an automobile is liable for its negligent operation by a stranger, where such automobile, at the time, is being used in furtherance of the owner's business, and in the presence of one who, authorized by the owner to operate such car, has authorized or directed such stranger, in her presence, to drive such car. In our opinion the legal reasons are sound which justify the imposition of a liability upon the owner of an automobile where injury, through negligence occurs by means of an instrumentality used for his business or the pleasure of himself or family, through methods or agencies that he has provided or authorized.

It therefore follows that the complaint herein states a cause of action. The order of the trial court is reversed, with costs to the appellant.

GRACE and ROBINSON, JJ., concur.

BIRDZELL, J. (dissenting). It will be apparent that the doctrine of *respondeat superior* has undergone considerable change when it is made the basis for a holding such as that adhered to by the majority of the court in this case. In dissenting, I have no disposition to question the fact that a considerable number of our courts of last resort have countenanced analogous extensions in automobile cases; nor do I care to take the time to analyze the decisions for the purpose of showing to what extent excrescences have been ingrafted upon the basic rule of liability by a species of judicial legislation. I shall content myself with the use of this case and a few others that may be supposed as illustrations of what I believe to be the erroneous extension of the doctrine of *respondeat superior.* I shall, however, prefix my remarks by saying that this is the first time this question has been presented in this court and the first time the court has been called upon to pass upon it. In Vannett v. Cole, 41 N. D. 260, 120 N. W. 563, cited by the majority, there is no holding by a majority of the court upon the question, and, inasmuch as counsel for the defendant expressly stated that the question was not raised nor relied upon by him, it was, of course, not here for decision.

In the instant case it is held that when one who owns an automobile, keeps it for the use, pleasure, convenience, or recreation of himself and family, and consents to his wife driving the car, and she, in turn, allows a stranger to drive the car for her, such owner is liable for the negligence

of the stranger in the operation of the car. The principle upon which liability is supported is that the wife is the servant of the husband, or possibly his agent, when using the car for the intended purpose, and that the acts of the stranger are equally the acts of the servant or agent. Similarly, in the Vannett-Cole Case, the writer of the principal opinion treated the liability of the defendant as based upon the doctrine of *respondeat superior,* the wife in the case being the servant of her husband when using the car for a purpose that he authorized or intended it to be used; namely, her own recreation. It is novel, to say the least, that the relations between husband and wife are such that when an indulgent husband furnishes an automobile for the convenience and recreation of his wife, and the latter uses it for the intended purpose, while doing so she is the servant of her husband. According to this logic, how much more ground would there be for liability if the wife, through the negligent use of an electric iron, which the husband has provided for her convenience, should burn down the flat building. Or does the wife cease to be the servant of the husband when she steps from the automobile, and does she again become a free and independent lady when she steps into the laundry to perform the household tasks? Truly may the servant who sits at the steering wheel of her husband's automobile envy the independence of the lady who has nought to do but smooth out the family washing!

Or, possibly liability is not predicated so much upon a true relation of master and servant as upon ownership and license. If so, it is all the more a pure judicial invention, as there is no principle of law according to which the owner of a chattel becomes liable for the negligence of one who merely has permission to use it,—dangerous instrumentalities excepted. The decisions in automobile cases do not treat them as dangerous instrumentalities. If the generosity of the owner of an automobile is to be thus penalized, why not extend the penalty so as to cover the thousand and one instrumentalities which parents provide for their children's amusement, and with which the latter are prone to commit depredations with more or less serious consequences, to their neighbor's personal and property rights? Ownership and license do not, in themselves, afford any ground for legal liability to third persons.

But yet, strange to say, if an infant, whose fortune in worldly goods exceeded that of his father, should use some of his means to purchase an

automobile for his father's convenience in going back and forth to his place of business, and the father, while so using the machine, should meet with an accident, the infant owner, through the magic wrought by unusual differences of fortune, is his father's master for all purposes of legal liability. Or if the wife should supply the car for the husband's use, by a similar touch of the legal magician's wand, the husband becomes the servant of his wife. The date of writing (December 24th) suggests the thought that all these strange legal consequences could readily be avoided by taking the next step in generosity, and making the gift outright to those for whose use the car is purchased. How reassuring to the twentieth century woman, that her position of servility hangs upon such a slender legal thread that it may be broken by the mere gift and acceptance of a bill of sale to a Ford automobile!

I submit that there is no basis in law for the liability imposed by the doctrine followed by the majority, and which finds more or less support in the cases cited. If it is thought desirable that the ownership of an automobile be made a prima facie indication of the possession of means sufficient to assure payment of damages to those who may be injured as a result of the operation of the car, the legislature should establish the presumption and fix the rule of liability.

This is not an instance of the application of an established legal principle to a new set of facts, and it does not, therefore, represent a legitimate progressive growth of the common law. On the contrary, the established legal doctrine of *respondeat superior* is simply the plausible pretext used to justify a result arbitrarily reached. I can see no occasion to stretch settled legal doctrines beyond recognition in order to enforce what might, at first blush, seem to be a salutary rule of liability.

CHRISTIANSON, Ch. J., concurs.

WEST END FURNITURE COMPANY, a Corporation, Appellant, v. M. NORMAN, Respondent.

(176 N. W. 5.)

Contracts — action for goods sold and delivered — it was error to dismiss on the ground that complaint stated a cause of action on implied contract only.

In an action to recover for goods sold and delivered to the defendant, where

the answer, by way of admission, defense, and counterclaim, admits a contract, and pleads a breach of warranty, and where the proof discloses a sale and delivery of such goods upon an agreed price, it is error to direct a verdict dismissal upon the gound that the complaint states a cause of action upon implied contract.

Opinion filed December 27, 1919.

Action to recover for goods sold and delivered, in District Court, Grand Forks County, *Cooley*, J.

From judgment entered upon a directed verdict of dismissal the plaintiff has appealed.

Reversed and new trial granted.

W. J. Mayer, for appellant.

"In no case can the plaintiff recover on the general counts where the special agreement (executory) continues in force." Lindingdale v. Livingston, 10 Johns. 37.

"When the terms of a special contract have been so far performed that nothing remains but a mere debt or duty to pay money, the amount due may be recovered under a general count." See note in 2 Enc. Pl. & Pr. p. 991, under title "Special Contract Executed" also authorities from the United States courts, and a most convincing array of authorities from numerous states.

Plaintiff has employed in this action a pleading substantially, if not literally, in the form of one of the common counts in *indebitatus assumpsit*. Such plea states a cause of action in this state. Weber v. Lewis, 19 N. D. 473, 126 N. W. 105.

O'Connor & Johnson, for respondent.

"Under the Code System of Pleading as contra-distinguished from that of the common-law system, it is neither necessary nor proper to allege a promise on defendant's part, in actions to recover upon implied contract." Pom. Code Rem. 4th ed. § 540; Weber v. Lewis, 19 N. D. 437, 126 N. W. 105.

"Plaintiff cannot try his case on one theory and then, after finding himself unable to prove it, shift to another." 31 Cyc. 85; Robinson v. Rice, 20 Mo. 229; Newell v. Nicholson, 17 Mont. 389, 43 Pac. 180.

"It is well established that under an allegation of an expressed contract no recovery can be had on a *quantum meruit*. It is not a cause of

immaterial variance alone, but it is a failure of proof." Lowe v. Jensen, 22 N. D. 148, 132 N. W. 661.

"Where the complaint alleges an express contract and a proof shows an implied contract and *vice versa,* no recovery can be had." Other cases sustaining this view are: Buell v. Brown, 131 Cal. 158, 63 Pac. 167; Morrow v. Board of Education, 7 S. D. 553, 64 N. W. 1126; Creamer v. Miller, 56 Minn. 62, 57 N. W. 318; Winchester v. Joslyn, (Col.) 72 Pac. 1070; Columbus, H. V. & T. R. Co. v. Gaffney, 65 Ohio St. 104, 61 N. E. 152; Yansey v. Voyce, 28 N. D. 187, 148 N. W. 539; Comtograph Co. v. Citizens Bank, 32 N. D. 59, 155 N. W. 680; Beers v. Shallern, 36 N. D. 45, 161 N. W. 557; Louva v. Worden, 30 N. D. 401, 152 N. W. 689.

ROBINSON, J. On the evidence in this case it appears that plaintiff is entitled to recover $581.71 and interest on an account for goods sold and delivered. The appeal is from a directed verdict against plaintiff. The complaint avers that the plaintiff sold and delivered to the defendant certain furniture, on which there was due a balance of $506.95. The answer admits the purchase of certain furniture from the plaintiff, but denies that the amount due and owing the plaintiff is the amount stated in the complaint. On the trial plaintiff's attorney testified that the claim against defendant consisted of three promissory notes, and the account amounting to $581.75; that credits had been given on the account for $42.70 and $56.25, and that at the request of the plaintiff the credits were put on the promissory notes, and that he then paid the balance due on the notes, leaving the account wholly unpaid; that the account and the notes amounted to $1,063. He testified that he gave Mr. Norman the statement of the account as received from the company for comparison with the invoices (ex. J); that Mr. Norman returned the statement and said it was correct as to the goods purchased and the price. The statement was put in evidence as exhibit J. The plaintiff rested and defendant moved for a directed verdict on the ground that the complaint shows an implied contract, and the testimony establishes conclusively an express contract; that the price of the articles was agreed upon between the parties. The motion was granted and the action dismissed, with costs. That is a rare specimen of tweedledum and tweedledee; it is practice which reflects no credit on the court or on the counsel.

When the plaintiff rested he had put in evidence the account (exhibit J.), with proof that defendant had examined it and said it was correct. That made a good strong *prima facie* case, and the question as to whether the contract price was express or implied became wholly immaterial. In a complaint for goods sold and delivered, the plaintiff has a perfect right to aver an express contract to pay the price charged and also that the goods were reasonably worth the prices charged.

It is true that the complaint is a slipshod document, and, before a new trial, it should be amended; but when the account was put in evidence, with proof showing that defendant had examined it and admitted that it was correct, it virtually became a part of the complaint, and, if necessary, the complaint should have been amended to conform to the fact. This principle is too clear for any discussion.

Judgment reversed and case remanded forthwith.

CHRISTIANSON, Ch. J. (concurring specially). I agree with Judge Robinson that the trial court erred in dismissing this action. The complaint alleged: "That on and between the 16th day of June, 1916, and the 15th day of May, 1917, it (plaintiff) sold and delivered to defendant a large amount of goods, wares, and merchandise, consisting of furniture and accessories, upon which there was a balance due on January 1, 1918, of $566.95; that the said sum, although duly demanded, has not been paid, nor has any part thereof." The answer, among other things, averred: "Defendant admits the purchase of certain articles from the plaintiff, but denies that the amount due and owing the plaintiff is the amount stated in the complaint." Clearly this paragraph of the answer was a negative pregnant and did not raise an issue as to the amount due the plaintiff from the defendant. 31 Cyc. 204, 225; Pom. Code Rem. 3d ed. §§ 618–621. In view of the pleadings, the question of variance between plaintiff's pleading and proof did not really exist. For there was in fact no denial that there was a balance due the plaintiff of $566.95 upon the furniture, except in so far as such indebtedness might be deemed denied by the averments of the counterclaims. But the burden of proving the affirmative matters set forth by way of counterclaim was upon the defendant. Hence, it was error to dismiss the action on the ground that plaintiff had failed to establish the cause of action set forth in the complaint.

I do not, however, agree with Judge Robinson that there may be a recovery upon an express contract under an allegation of implied contract. The contrary rule has been announced by the decisions of this court (Lowe v. Jensen, 22 N. D. 148, 132 N. W. 661; Yancey v. Boyce, 28 N. D. 187, 148 N. W. 539, Ann. Cas. 1916E, 258), and has the support of the great weight of authority (9 Cyc. 749; Pom. Code Rem. 4th ed. § 438).

BIRDZELL, J., concurs.

BRONSON, J. (specially concurring). This is an appeal from a judgment dismissing the action.

The complaint alleges that between certain dates the plaintiff sold and delivered to defendant goods upon which there was a balance due, on January 1, 1918, of $566.95. The answer admits the purchase of certain goods, but denies that the amount due and owing the plaintiff is the amount stated in the complaint. By way of defense and also of counterclaim, the answer further alleges that, concerning some of the articles so ordered and purchased, the plaintiff made certain warranties; that by reason of the breach of such warranties, upon which the defendant relied, he has been damaged in an amount stated; that one item of such damage for the misrepresentation and deceit occasioned is the difference between the actual value of the articles furnished and the contract price.

At the trial the defendant objected to the introduction of any evidence, upon the ground that the complaint failed to state a cause of action, and also demanded that the plaintiff state upon what theory it was proceeding, whether upon an express or an implied contract, or whether upon an agreed or reasonable value of the goods.

The court expressed its opinion that the action was on an implied contract. The plaintiff's counsel then stated that such was the theory upon which the action was brought. The plaintiff thereupon proceeded to prove the itemized account for the articles furnished, with the prices therefor after each of the articles, and that the defendant stated that such account was correct as to goods purchased and prices. Thereupon the plaintiff rested, and the defendant moved for a directed verdict for dismissal upon the ground that the proof disclosed an expressed contract

whereas the complaint was upon an implied contract, and such was the theory of the action as stated by the plaintiff. This motion was granted together with a dismissal of defendant's counterclaim, without prejudice. The appellant, in his brief, contends that the action might be considered, under the old practice as laid in debt, or otherwise as *"indebitatus assumpsit."* The respondent contends that the action, as laid in the complaint and upon the theory as adopted by the plaintiff, is upon an implied contract, and, the proof showing an express contract, there exists a fatal variance which prohibits the appellant, under the general rule, from recovery.

I am of the opinion that both the court and the parties misconceived the issues existing upon the allegations of the complaint and the admissions and allegations contained in the answer. Even though inartificially drawn, the test of the sufficiency of a complaint is whether it informs the defendant of the nature of the demand so that he may not thereby be misled in the preparation of his defense (31 Cyc. 101). It is fundamental furthermore, in pleading, that a fact admitted in an answer is available to the plaintiff as if well pleaded in the complaint. 31 Cyc. 214. Consequently the admission of a necessary allegation in a complaint may be supplied, admitted, or alleged by the answer. 31 Cyc. 714.

Accordingly, upon the issues as framed in this case, it appears that the plaintiff alleges a sale and delivery to the defendant and of a balance due therefor; that the defendant admits the sale, admits the purchase of certain articles from the plaintiff and a contract price therefor, denying, however, that the amount due and owing was the amount stated in the complaint. Upon the issues in this case the defendant could not, in any manner, be misled concerning the nature of plaintiff's demands. The issues show an action upon an express contract; a sale of goods is an accepted and executed contract therefor. 35 Cyc. 27. Ordinarily there is no sale if the parties have not agreed upon the price, either expressly or by implication. 35 Cyc. 48. Expressly, the plaintiff proved the same and the prices for the goods so sold. The fact that the court or the plaintiff may have considered this complaint, by itself, upon ancient procedure, or upon the subtleties of common-law pleading, as a cause of action based upon a form of implied contract, does not serve thereby to defeat the right of the plaintiff when the issues as framed

and the proof as submitted, show a right of recovery upon an express contract. Where no prejudice is shown to the rights of the defendant, it is a mere play upon legal technicalities to defeat plaintiff's right of recovery, by shifting the plaintiff, through the action of the court and of his counsel, into a position of construction upon archaic forms of pleading, so as to thereby deprive the plaintiff of his day in court. The judgment should be and is reversed, and a new trial awarded, with costs to the appellant.

GRACE, J., concurs.

GILFORD YORK, Plaintiff, v. GENERAL UTILITY CORPORATION and James Rheinfrank, Defendants.

(176 N. W. 352.)

Electricity — verdict of jury sustained by the evidence.

1. In an action by the plaintiff against the defendants, to recover damages for injuries sustained on account of the negligence of the defendants in the operation of an electric light plant, and the instrumentalities connected therewith, whereby the plaintiff was severely injured and burned, and one of his hands thereby crippled, and the question of defendants' negligence and plaintiff's contributory negligence and assumption of risk having been submitted to a jury, and the jury having returned a verdict in plaintiff's favor in the sum of $15,000,—it is *held*, upon an examination of the record, that the verdict is sustained by the evidence.

Electricity — contributory negligence — choice of methods of work.

2. The plaintiff was called to one W. J. Payne's residence to make repairs upon the electric wires therein. Ordinarily, such wires contained a voltage of 110. By reason of defendants' negligence, two primary wires rested upon an upper crossarm on a pole, loosely, and were uninsulated. A secondary wire, which was on the second crossarm, extended upward and immediately under the two unfastened primary wires, and then led to certain houses in the vicinity, to which it conveyed electric current; among others, being the Payne house.

Each of the primary wires contained a voltage of 2,300. By reason of the close proximity to the secondary wire which passed under and very near to them, and, by reason of the noninsulation of the primary wires, the voltage of 2,300 contained in such wires was transmitted to the secondary wire, and, by

it, transmitted to the Payne residence, where plaintiff, upon proceeding to make the repairs, and in attempting to take hold of one of the disconnected wires in the basement of the Payne residence, received the excessive voltage of 2,300.

If plaintiff, before going to the basement to make the repairs, had turned off the switch, he would not have been injured. When he went to the basement, he placed a dry board under his feet before starting to make the repairs. If there had been only 110 volts in the wires to be repaired, instead of 2,300, the use of the board would have been a safe method.

The defendants claim that plaintiff had the choice of two methods, one of which was dangerous and the other safe, and that he chose the dangerous method. The evidence shows that the method selected by plaintiff was safe had the wires contained only 110 volts. It further shows that that method became unsafe by reason of the negligence of the defendants in failing to properly insulate the primary wires in question.

Special verdict — questions contained in special verdict held to cover merits of the case.

3. It is further *held*, that the matters involved in the case, which were, by the court, submitted to the jury by questions contained in a special verdict, involved and covered the merits of the case.

Opinion filed December 27, 1919.

Appeal from the District Court of Eddy County, *C. W. Buttz*, Judge.

Judgment affirmed.

Lawrence & Murphy and *Watson, Young, & Conmy*, for defendants and appellants.

"If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence." 29 Cyc. 520.

"In every case there is a preliminary question for the judge whether there is evidence from which the jury may properly proceed to find a verdict." Anderson v. Phillips, 160 N. W. 315.

There is no liability of the defendant Rheinfrank to any person because of the method of construction of this defendant company of its business instrumentalities. There is no question about the law on that point. Floyt v. Shenango Furnace Co. 186 Fed. 539; Bryce v. Southern R. Co. 125 Fed. 959; Mechem, Agency, §§ 560, 573; Greenberg v. Whitcomb Lumber Co. 90 Wis. 231, 28 L.R.A. 439, 63 N. W. 93; Murray v. Usher, 117 N. Y. 542; Drake v. Hagan, 108 Tenn. 265, 67 S. W. 470.

"At most, the allegation charges no more than nonfeasance, mere omission on the part of the foreman to perform the master's duty as to inspection and repairs. For this the foreman is not liable to the plaintiffs." Macutis v. Cudahy Packing Co. 203 Fed. 291.

"Where a joint tort is charged there can be no recovery on proof of one or more separate torts." Goodman v. Coal Twp. 206 Pa. 621, 56 Atl. 65.

"Proof of separate acts not committed with a common design or for a common purpose, and without concert, will not authorize a joint recovery. . . . Where two or more commit separate trespasses, or do separate acts tending to produce injury to another without concert, there is no joint liability, and consequently there can be no joint recovery." Howard v. Union Traction Co. (Pa.) 45 Atl. 1077; Weist v. Philadelphia, 58 L.R.A. 666; Jayne v. Loder, 7 L.R.A.(N.S.) 991; William Tackaberry Co. v. Sioux City Service Co. 40 L.R.A.(N.S.) 114; Fortmeyer v. National Biscuit Co. 37 L.R.A.(N.S.) 573.

For separate and distinct wrongs in nowise connected by the ligament of a common purpose, actual or implied by law, the wrongdoers are liable only in separate actions, and not jointly in the same action. Citing cases, 15 Enc. Pl. Pr. p. 562; Livesay v. First Nat. Bank, 6 L.R.A.(N.S.) 601, 602.

In a special verdict, if any fact essential to sustain a judgment is not found, there can be no judgment on the verdict. McGongie v. Godon, 11 Kan. 167; Bibb v. Hall, 101 Ala. 87, 14 So. 98; Brock v. Louisville & N. R. Co. 114 Ala. 431, 21 So. 994; Carter v. Dublin Bkg. Co. 104 Ga. 569, 31 S. E. 407; Chicago & N. W. R. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15; Rary v. Lee, 16 Ind. App. 121, 44 N. E. 318; Shipps v. Atkinson, 8 Ind. App. 505, 36 N. E. 375; Moore v. Moore, 67 Tex. 293, 3 S. W. 284; Kerr v. Hutchins, 46 Tex. 384; Ward v. Cochran, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230; R. v. Haues, 2 Ld. Raym. 1518.

And an omission of a material fact from a special verdict is not cured by the fact that the circumstances stated may be sufficient to warrant an inference or presumption of the existence of the matter omitted. Jones v. State, 2 Swan, 399.

Nor can anything be taken by implication or intendment. McCormick v. Royal Ins. Co. 163 Pa. 184, 29 Atl. 747; Vansyckel v. Stewart,

77 Pa. 124; Loew v. Stocker, 61 Pa. 347; Morse v. Chase, 4 Watts, 456; Craven v. Gearhart, 1 W. N. C. 257; Lee v. Campbell, 4 Port. (Ala.); Sewell v. Glidden, 1 Ala. 52; Brock v. Louisville & N. R. Co. supra; Noblesville Gas & Improv. Co. v. Lehr, 124 Ind. 79, 24 N. E. 579; Bloomington v. Rogers, 9 Ind. App. 230, 36 N. E. 439; Lake Shore & M. S. R. Co. v. Stupak, 123 Ind. 210, 23 N. E. 246; Rice v. Evansville, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; Pittsburgh, C. & St. L. R. Co. v. Spencer, 98 Ind. 186; Shipps v. Atkinson, supra; Alexandria Min. & Exploring Co. v. Irish, 16 Ind. App. 534, 44 N. E. 680; Louisville, N. A. & C. R. Co. v. Bates, 146 Ind. 564, 45 N. E. 108; O'Neal v. Chicago & I. C. R. Co. 132 Ind. 110, 31 N. E. 669; State v. Burdon, 38 La. Ann. 357; State v. Ritchie, 3 La. Ann. 511; Com. v. Dooly, 6 Gray. 360; Com. v. Fishblatt, 4 Met. 354; Birckhead v. Brown, 5 Hill, 634; Williams v. Willis, 7 Abb. Pr. 90; Brush v. Batten, 15 N. Y. S. R. 548; Jenks v. Hallet, 1 Caines, 60; State v. Belk, 76 N. C. 10; State v. McGhee, 143 N. C. 640, 57 S. E. 157; State v. Stephanus (Or.) 99 Pac. 428; Jones v. State, 2 Swan, 399; Tunnell v. Watson, 2 Munf. 283; Farr v. Newmand, 4 T. R. 621.

Where negligence is in issue, and the facts are such that different conclusions may be drawn, the primary facts from which such conclusions are drawn by the jury must be stated in a special verdict. Wabash R. Co. v. Miller, 18 Ind. App. 549, 48 N. W. 663; Walkup v. May, 9 Ind. App. 409, 35 N. W. 917; Pittsburgh, C. & St. L. R. Co. v. Spencer, 98 Ind. 186.

"A special verdict finding that one of the parties to the action has been guilty of negligence is a mere statement of a conclusion, and will not support a judgment." Chicago, St. L. & P. R. Co. v. Burger, 124 Ind. 275, 24 N. E. 981.

And an interrogatory as to whether or not the injury in question was received without any fault or negligence upon the part of the defendant is improper, as involving both the law and the facts. Huntington County v. Bonebrake, 146 Ind. 317, 45 N. E. 470; Hadley v. Lake Erie & W. R. Co. 21 Ind. App. 675, 51 N. E. 337.

Interrogatories submitted to a jury in connection with a general verdict should be so clear and concise as to be readily understood and answered by the jury. Freedman v. New York, N. H. & H. R. Co. 81 Conn. 601, 71 Atl. 901.

They should be made up of sufficient direct questions to cover singly all material issues of fact raised, by the pleadings and controverted on the evidence, each question admitting of an answer in the affirmative or negative. Hallum v. Omro, 122 Wis. 337, 99 N. W. 1051; Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816; Goessel v. Davis, 100 Wis. 678, 76 N. W. 768; Flaunery v. Kansas City, St. J. & C. B. R. Co. 23 Mo. App. 120.

Rinker & Duell, Julian E. Brown, and *Daniel H. Hollihan* (*T. D. Sheehan,* of counsel), for respondent.

"One injured by an electric wire cannot be presumed, in the absence of evidence, to have had knowledge that moisture delayed the insulation of such a wire" Giraudi v. Electric Emp. Co. (Cal.) 40 Pac. 108; Predmore v. Consumers' Light & P. Co. 91 N. Y. Supp. 116.

"A lineman of a telephone company, repairing wires attached to the same pole as electric light wires, was not negligent in allowing a wire which he was handling without insulation to come in contact with the light wire, if he was justified in believing that the insulation which the light company was required by ordinance to use on its wires was sufficient to prevent the escape of the current by the contact of another wire, and that this particular wire was so insulated." Knowlton v. Des Moines Edison Light Co. (Iowa) 90 N. W. 918; Mangan v. Louisville Electric Light Co. (Ky.) 91 S. W. 703; Gilbert v. Duluth General Electric Co. (Minn.) 100 N. W. 653.

"One working on a roof of a building near wires of an electric company may presume that they are properly insulated, unless the defect is visible to such examination as he ought to make." Will v. Edison Electric Illuminating Co. (Pa.) 50 Atl. 161; McCabe v. Narragansett Electric Lighting Co. (R. I.) 59 Atl. 112.

"In places where electric wires should be insulated for safety to persons, one may assume that they are so insulated, if he knows not to the contrary." Thomas v. Wheeling Electric Co. (W. Va.) 46 S. E. 216; Commonwealth Electric Co. v. Rose (Ill.) 73 N. E. 780; Paine v. Electric Illuminating & P. Co. 72 N. Y. Supp. 279.

"We have no statute in this state fixing any rule upon the subject of the joinder of parties defendant in actions in tort. . . . We must, therefore, refer to the rules of the common law. The authorities even

upon this branch of the subject are by no means harmonious, but the weight of reason sustains the right of the joinder. The following authorities sustain this proposition." Newman v. Towle, 37 N. J. L. 89; Greenburg v. Whitcomb, 90 Wis. 225; Wright v. Crompton, 53 Ind. 337; Consolidated v. Keefer, 26 Ill. App. 466; Southern v. Sittasen (Ind.) 74 N. E. 898; Lynch v. Elektron, 88 N. Y. Supp. 70; Wright v. Wilcox, 19 Wend. 343; Colegrove v. New York, 20 N. Y. 492; Cuddy v. Horn (Mich.) 10 N. W. 32.

The negligence of a mine superintendent in permitting the use of an unsafe shaft was not merely nonfeasance, but that the same amounted to misfeasance, and that he could be joined in an action with his employer for injuries resulting from such negligence. Lewisville Ore Co. v. Vincent, 95 S. W. 179; Southern R. Co. v. Rowe, 59 S. W. 463; Eastment v. Texas R. Co. 92 S. W. 838; Ellis v. McMaughter, 42 N. W. 1113; Lous v. Davis, 70 Pac. 491.

"The section boss and a railway company can be sued when the sole ground of the liability of the railway company is in the act of the section boss alone." Morrison v. R. Co. 74 Pac. 1064; Howe v. R. Co. (Wash.) 70 Pac. 1100; Able v. R. Co. 73 S. C. 173; Chesapeake R. Co. v. Dixon, 179 U. S. 131.

Injury to a property owner whose building an electric light company had contracted to light by means of a harmless voltage through incandescent electric lamps, the equipment furnished by the company, by the escape of the current from the wires when he attempts to turn the light at a particular lamp, raises a presumption of negligence on the part of the company. Alexander v. Nanticoke Light Co. 209 Pa. 571; Crow v. Nanticoke Light Co. 209 Pa. 580; Reynold v. Narragansett Electric L. Co. 59 Atl. 393; Royal Electric Co. v. Heve, Rap. Jud. Quebec, 11 B. R. 436.

"The burden of establishing the defense, not only of contributory negligence, but of assumption of risk, was upon the defendant." Shebeck v. Nat. Cracker Co. (Iowa) 94 N. W. 930; Nicholas v. R. Co. 90 Iowa, 85, 57 N. W. 694; Thompson v. R. Co. 70 Minn. 279, 72 N. W. 692; Nadau v. White, 76 Wis. 120, 43 N. W. 1135; Wyldes v. Patterson (N. D.) 153 N. W. 644.

GRACE, J. This action is one to recover for personal injuries received by the plaintiff, on the 6th day of July, 1916, at the city of

New Rockford, North Dakota, which injuries are alleged to be due to the negligence of the defendants.

The case was twice tried to the court and a jury. In the first trial, the jury returned a verdict in plaintiff's favor for $14,750. From the judgment entered upon that verdict, an appeal was taken to this court, and, for errors in the instructions of the court, it was reversed, and the case remanded for a new trial, which was had, the jury returning a verdict for plaintiff in the sum of $15,164.10.

No motion was made for a new trial after the entry of the last judgment. The case again comes before this court on appeal from the judgment.

The material facts in the case are, in substance, as follows: The General Utility Corporations owns and operates, among others, an Electric Light and Power Plant at New Rockford, from which it furnished its patrons electric light and power.

James Rheinfrank, at the time of the accident, and sometime prior thereto, was the superintendent of the plant. The plaintiff, prior to and at the time of the accident, was in the employ of one Beaudry, who was operating a heating, plumbing, and electrical shop in the city of New Rockford.

The defendant, in conducting its business at New Rockford, had erected poles, which were strung with wires for the purpose of transmitting an electric current for light and power purposes. It had erected poles and strung wires thereon, on Stenson and Lamborn streets, which extended east and west, parallel, and one block distant from each other. Between these two streets, there extended an alley, in and along which there were poles and wires used for furnishing light to its patrons who reside on each of these streets.

The poles, to which particular attention is directed in this action, are in the alley between the two cross streets, known as Fourth street on the east, and New Haven street on the west. The poles were about 7 inches in diameter. To them were attached the crossarms, which were 6 feet in length, thus extending on either side of the pole a little less than 3 feet.

The house of W. J. Payne and the house of Kellington face Stenson street. Each were furnished with an electric current for lighting pur-

poses. The Lasher house faces Lamborn street; this, likewise, was furnished with an electric current.

On each of the poles in this alley, there were two crossarms. On the top crossarm, there were five primary wires, each carrying a voltage of 2,300 volts. On the second crossarm were the secondary wires, which received their current from the primary wires, through a transformer, thus reducing the voltage from 2,300 to 110 volts.

The light to the Payne, Kellington, Lasher, and other homes along that alley, was furnished by secondary wires, which carry a voltage not to exceed 110 volts.

In the alley, at the entrance from New Haven street, and east along the alley, are poles, and on them, on the top crossarm, on the right-hand side of the poles, which is the south side, there are three primary wires, used to furnish power and light to the city. On the left hand or north side of the poles, on the top crossarm, there are two primary wires which were used only in connection with the secondary wires in furnishing light to the different homes along the alley.

In this alley, towards the east, on the second crossarm, to the right or south side, there was one secondary wire, and to the left or north of the poles, on the same crossarm, there were two of the secondary wires. Two of the secondary wires were positive, and the other, which was in the center, was negative or neutral, and was used in furnishing light to any of the houses, and was always connected with one of the positive wires, thus reducing the voltage to 110 volts at the homes.

On the top crossarms of these poles, there were six wooden pegs, three on either side of the pole, and they were approximately 7 inches inches high above the crossarm. They were used for the purpose of putting thereon glass cups as insulators, to which the wires carrying electric currents could be tied when strung upon the poles. A similar arrangement was had with reference to the second crossarms. On a pole in this alley, behind the Kellington house, the center, secondary, neutral wire, on the second crossarm, was attached to the third wooden peg, which was to the left or north side of the pole, and, from that peg, a wire led to the first crossarm, and attached to the third peg of the first crossarm, to the left or north of the pole, and, from there, this wire led directly north or to the left, to the Lasher home on Lamborn

street. It passed underneath and close to the primary wires, each of which carried a voltage of 2,300 volts.

The two primary wires, which were on the first crossarm to the left or north of the poles, which were used to carry the current for furnishing light to the homes along the alley, are claimed to have been placed there in the late fall of 1915, or in the spring of 1916, by James Rheinfrank, superintendent of the defendants' plant.

It appears, there were no glass insulators placed upon the pegs at that time, and these primary wires, each carrying the 2,300 voltage, were placed on top of the crossarms, between the first and second, and the second and third, pegs, and simply rested loosely upon the crossarms, and were not attached to anything. These wires were thus placed upon the pole, behind the Kellington house, and came in close proximity, or possibly in contact with the secondary wire, which was stretched upward from the second crossarm to the first crossarm, and which extended directly beneath the primary wires which were on the north side of the pole, having been allowed to lie loosely on the crossarms, as above stated, and which, as stated, came in close proximity, or possibly in contact, with the secondary wire, which carried the current to the Lasher house and all of the houses along this particular alley. The current which it carried should not exceed 110 volts. This was the wire which conducted the current to the home of W. J. Payne, where the plaintiff was injured on the day in question. This wire, by reason of its close proximity, or possibly its contact with the primary wires referred to, which were unprotected, it is claimed, that day, carried a voltage of 2,300 volts instead of 110 volts.

On July 6, 1916, the plaintiff, in pursuance of his duties to his employer was engaged in wiring a house in a small town, some 8 miles south of New Rockford. He returned from there to New Rockford about 4 o'clock in the afternoon, and, having gone to the shop of his employer, he learned there was trouble with the lights at the Payne and Kellington homes. He and his helper went to the Payne home, where he found no one except a boy about twelve years of age. The plaintiff went to the second floor of this house, inserted some new fuses, and tested the lights, which he found to be all right after the insertion of the new fuses.

He then tested the lights on the first floor, and found them in proper

condition and operating in proper manner. He was then informed by the boy in question, that the electric wire in the basement was broken. He and the helper went to the basement. He asked the helper to get him a board upon which to stand, which was done, and he placed the board upon the floor of the basement, and stepped upon it with both feet. He reached upward to take hold of the end of the wire with his left hand, intending to splice the ends of the wire, and immediately received a severe shock, which rendered him unconscious. He got both hands, his arms, and one toe on the right foot badly burned. He received a burn across the chest and on the top of the head. It appears, prior to the time of this accident, the plaintiff had lost the second and third fingers of the left hand, being off from the point where they joined the hand. He had theretofore also lost a portion of the little finger of that hand from a point just below the knuckle of middle joint thereof.

It appears that the plaintiff's right hand was in normal condition prior to the time of the accident, and that it was so injured by the burns that several of the fingers were badly crippled, the little finger being so injured that it assumed a position such as to leave the tip of it resting in or near the palm of the hand. The second finger was also badly crippled, so that he could use it but very little. This was, likewise, true of the index finger, and the thumb had very little motion in it, and the third finger was amputated. The first and second fingers are, by reason of the accident, joined together by a tissue, in form similar to a web.

The plaintiff was rendered unconscious by reason of the injuries, and so remained for a considerable period of time. He suffered intense pain for some twenty days; he had considerable trouble with his heart for a period of a couple weeks, and was subject to sinking spells, at such times becoming unconscious.

There was a deep burn on plaintiff's arm between the elbow and the shoulder, about 4 inches in width around the arm. There was also a severe burn on the back of his head at the top of the spine. The evidence shows the plaintiff to have been severely injured and burned.

At the request of the defendants, the court directed the jury to find a special verdict. Under subdivision 2 of § 7632, Comp. Laws 1913:

"A special verdict is that by which the jury find the facts only, leaving the judgment to the court."

Section 7633, Comp. Laws 1913, provides that "the special verdict . . . shall be prepared by the court in the form of questions in writing, which shall be confined to matters involving the merits of the case and shall admit of direct answer and the jury shall make their answer thereto in writing."

In the pursuance of its duty, as defined by said section, the court did prepare such special verdict, in the form of written questions, which were confined to matters involving the merits of the case, and which admitted of direct answers, and submitted such written questions to the jury for answer. Such questions, so submitted, had reference to, and included, questions concerning the negligence of the defendant, the contributory negligence, if any, of the plaintiff, the assumption of the ordinary risk of his employment by the plaintiff, the nature and permanence of his injuries, and the amount of damage sufficient to compensate him for his injuries.

The following is a copy of the special verdict:

Question No. 1: Were the two primary wires, on the top crossarm, on the north side of the pole behind the Kellington home, left unfastened so that one of the same came in contact with the secondary wire attached to the same crossarm?

Answer: Yes.

Question No. 2: Was there an excessive voltage in the wires, in the home of W. J. Payne, at the time the plaintiff met with the injuries?

Answer: Yes.

Question No. 3: If you answer question No. 2, "Yes," was such excessive voltage of electricity in the wires in the Payne home, on July 6, 1916, caused by reason of a contact of a primary wire and the secondary wire on the top crossarm of the pole behind the Kellington home?

Answer: Yes.

Question No. 4: Was the secondary wire, leading from the second crossarm to the first crossarm, upon the pole behind the Kellington home, and from that crossarm to the Lasher home, there at the time the two primary wires were placed upon the top crossarm of the same pole?

Answer: Yes.

Question No. 5: If you answer the first question, "Yes," then were the defendants guilty of the want of ordinary care in the manner of placing the said wires on the pole behind the Kellington home?

Answer: Yes.

Question No. 6: If you answer question No. 5, "Yes," then was such want of ordinary care the proximate cause of plaintiff's injury?

Answer: Yes.

Question No. 7: Was the plaintiff, at the time he received the injuries complained of, guilty of the want of ordinary care, which contributed to produce the injuries complained of?

Answer: No.

Question No. 8: Were the injuries received by the plaintiff the result of the ordinary risk of his employment?

Answer: No.

Question No. 9: Are any of plaintiff's injuries of a permanent nature?

Answer: Yes.

Question No. 10: Did plaintiff sustain any damage by reason of the injuries received by him?

Answer: Yes.

Question No. 11: If he did sustain damage, what sum of money will compensate plaintiff for his injuries?

Answer: $15,000.

W. L. Daniels,
Foreman.

Dated this 11th day of February, A. D. 1919.

The defendant assigns twenty-one errors of law, and seven specifications of the insufficiency of the evidence to sustain the verdict. We cannot take the space to consider each of the errors and specifications separately, but, after full consideration of all of them, we will refer to some of the more material and important ones.

The court was not in error in refusing defendants' request to direct a verdict in favor of the defendants and against the plaintiff, on the ground that no negligence, which was the proximate cause of the injury, had been established against the defendants.

Reasons assigned by the defendants for asking that a verdict be

directed in favor of the defendants and against the plaintiff were as follows: That there was a failure of proof to establish the conditions which existed, to be unsafe or dangerous; or that there was any condition created or maintained by the defendants, which was not sufficient and safe under all the conditions; and, further, that there was no proof to establish the defendant corporation had jurisdiction or control over the electrical wires, or appliances inside the house where the accident occurred; that there was no proof as to the good or safe condition of the privately owned wires and appliances inside of the house where the injury occurred; that it is left to conjecture to learn as to whether or not the accident might have occurred through some defect in the construction inside the house, over which the defendant company had no control. Further, that there was no joint nor concerted negligence of the defendants; that the specific acts of negligence, attempted to be established by the testimony, apply only in part to the defendants; that all of the acts charged, or upon which joint liability would be submitted, do not apply to both the defendants; that the testimony shows the plaintiff assumed the risk under conditions which were known to him, or should have been known. Further, that the plaintiff is guilty of contributory negligence in failing to use safeguards, and that such could have been used, and for the further reason that it is admitted by the plaintiff that there were two methods of performing the work in question,—one entirely safe, and one in which there was an element of chance,—and that the plaintiff admitted that he took the element of chance, when he knew there was a safe method. Further, that the testimony shows, as a whole, there was contributory negligence on the part of the plaintiff.

All of the foregoing are relied upon by the defendants, in support of their motion for a directed verdict, as reasons why a verdict should have been directed in their favor. None of said reasons require any extended consideration, for we are convinced that the special verdict of the jury disposed of most of them; it certainly disposed of the question of the negligence of the defendants, and the contributory negligence of the plaintiff. A mere reading of the special verdict will disclose this fact.

There is one matter which is claimed as a reason why the verdict should be directed in favor of the defendants. This refers to the two

methods of performing the work in question,—one claimed to be safe, and the other unsafe,—it further appearing that the plaintiff took that method claimed by the defendants to be unsafe.

We think the court was not in error in refusing to direct a verdict in defendants' favor, on the claim that the plaintiff, in doing the work in question whereby he was injured, had the choice of an option of two methods in performing the work,—one safe, and the other unsafe.

We are of the opinion that the testimony does not show that one method was safe and the other unsafe, but that it does show that both methods were safe, when it is considered, as the plaintiff had a right to consider and believe, that the current contained in that house, and in the wires which he was about to repair, did not exceed 110 volts. His testimony shows that, if he had turned off the current of electricity by use of the switch on the second floor, the injury could not have occurred.

His testimony also shows that, if the wires contained no more than 110 volts, which they were supposed to contain, and which, with his experience, he had reason to believe they did contain, the procuring and standing upon a dry pine board while making the repairs would, under such conditions, be a perfectly safe way to proceed, and, in this case, it would have, no doubt, been a perfectly safe way in which to proceed had it not been for the negligent acts of the defendants, which were, in fact, the grossest kind of carelessness and negligence, in leaving the two primary wires lying loosely upon the upper crossarm, and in no manner insulated, so that, when the secondary wire which passed from the second crossarm upward and near these wires, and then led off to the left and north, as above stated, it came very near, or possibly in contact with, such primary wires, and received from them the voltage which they contained, which was 2,300.

If the two primary wires in question had been properly insulated, the injury could not have occurred. The defendants were grossly negligent in failing to properly insulate those two wires, and such gross negligence is the proximate and primary cause of the plaintiff's injuries, and, had it not been for such negligence on the part of the defendants, there would have been only 110 volts in the wires in the basement in question, instead of 2,300 or possibly more.

The use of the pine board, according to the testimony of the plaintiff, would have been a safe method to have used while making such repairs. If the use of the pine board, upon which plaintiff stood while making the repairs, was not a safe method, it was made unsafe by the gross negligence of the defendants, of which the plaintiff had no knowledge.

The court was not in error in overruling the objections of the defendants, relative to a special verdict, on the ground that it did not contain all of the issues to be submitted, and on the further ground that the questions, in part, were not questions relative to the ultimate facts, but were legal conclusions; and that the specific questions, relative to the liability of either or both the defendants, were entirely omitted from the questions, and many other and further objections interposed by the defendants, to the special verdict,—all of which were, by the court, overruled, and we think, properly. We think the questions stated by the court in the special verdict fairly covered the matters involved in the merits of the case.

While the provisions of § 7633 provide that the special verdict shall be prepared by the court in the form of questions in writing, etc., this does not mean that the attorneys and counsel connected with the case have no duty to perform. They are officers of the court, whose duty it is to assist it. If, then, there were any material matter which the attorneys, or any of them, considered involved the merits or material matter of the case, it would seem it would be their duty to draw the attention of the court to such a matter, and to make an effort to have it incorporated in a question to be submitted by the court.

Under such circumstances, the counsel cannot sit quietly by, believing that some material matter should be incorporated into a question and, by the court, presented, and permit the court to fail to submit such matter in the special verdict, by a special question covering the matter, and then afterward, when it is too late for the court to correct such matter, claim that the court has committed error.

In such case, such error should generally be considered harmless, and the party claiming benefit, by reason of the court's failure to include the matter complained of in such question, should be considered to have waived the same.

Courts and juries were organized and came into existence as a means

of determining the rights of parties invoking their powers, and, when rights are being determined thereby, the counsel of the litigants are in duty bound not only to those whom they represent, and whose cause they champion, but to the court, to use every effort to assist it in bringing before it every matter material to the controversy, to the end that, in that trial, there may be a final determination of all issuable matter, so far as that court is concerned.

We have examined at a considerable length the instructions of law as given by the court, with reference to each of the questions submitted, and find therein no reversible error. As a whole, they were fair to the defendants, and, in some respects, were much more favorable to them than they could have hoped for.

The court properly submitted each of the special questions to the jury. There were none that should not have been submitted, and, as submitted, they embraced the merits of the case.

The seven specifications of the insufficiency of the evidence to sustain the verdict are without merit. The evidence is quite sufficient to sustain the verdict. It is also quite sufficient to establish the negligence of the defendants, and to establish that the plaintiff was not guilty of any contributory negligence.

The questions of negligence of defendants, the contributory negligence, and the assumption of risk, if any, by the plaintiff, were, by proper questions, included in the special verdict. Each were questions of fact for the jury. It decided them in the manner shown by the special verdict. There is nothing more that need be, or really can be, said with reference to these questions. They have been decided by the jury, and their special verdict disposes of these questions.

There is nothing in the record to show that the verdict of the jury was rendered under the influence of passion and prejudice. Where a verdict of a jury is sought to be set aside, on the grounds of passion and prejudice, there should be something to show that it was actuated by passion or prejudice. It must not be a mere imaginary condition.

The passion and prejudice complained of must not be a mere conclusion. It would seem, before it could reasonably be maintained that a verdict is the result of passion and prejudice on the part of the jury, there should be some fact, circumstance, incident, or action presented to and before the jury, which should not have been presented,

or, if it should have been presented, was presented in such an unwarranted, unlawful, and prejudicial manner as to likely cause bias and prejudice to arise in the mind of the jury.

However, under any view, it is absolutely clear there was no bias and prejudice on the part of the jury in this case. There was no error in the court denying the motion of the defendants for a dismissal of the action as to James Rheinfrank. The special verdict finds that both the defendants were negligent, and that finding is sufficiently supported by the evidence. Neither was it error for the court to refuse to dismiss the action as to both the defendants.

The court was not in error in granting the plaintiff's motion during the course of the trial, in which the plaintiff abandoned any claim based upon the negligence of the defendants in failing to properly ground the secondary wire used in connection with the furnishing of light to the houses in question, and, hereinbefore mentioned, the evidence not showing the manner in which the secondary wire was grounded, but being confined principally to the fact as to what constitutes proper grounding. Part of the same motion abandoning any claim of recovery by reason of want of proper inspection of the wires by the defendants, and also as to plaintiff's right to recover solely on the claim of want of due diligence, after receiving notice of the trouble in the Kellington home on the day of the injury, was properly granted, for the principal issues in the case were those which were included in the special verdict. We have examined all the other errors assigned, and conclude that the court has committed no reversible error.

The eleven questions were properly submitted by the court to the jury, in the special verdict. There were none of such questions improperly submitted to the jury.

In this case, the defendants had the opportunity and benefit of two extended trials before the trial court, and the benefit of a jury at each trial. There is every reason to believe, from the state of the record, that each of those trials were fair and impartial.

The defendants appealed to this court from the first judgment rendered against them, and it was reversed on account of erroneous instructions of the trial court. The case has been retried, and a slightly increased verdict returned in favor of plaintiff. There being no error

in the record on appeal, there is no reason why the judgment should not be affirmed.

The judgment is affirmed.

The respondent is entitled to his statutory costs and disbursements on appeal.

BIRDZELL and BRONSON, JJ., concur.

CHRISTIANSON, Ch. J. (concurring specially). On a former appeal I expressed the views that the questions of negligence and contributory negligence were for the jury. I also stated that I was of the opinion that it could not be said as a matter of law that a verdict for $14,759.99 was excessive. 41 N. D. 137, 170 N. W. 312. These views are equally applicable on this appeal. With respect to the special verdict I am of the opinion that it covers the material, controverted points in the case; and that the facts found by the jury thereon entitle plaintiff to judgment against the defendants for the amount specified in the verdict. For these reasons do I concur in an affirmance of the judgment.

ROBINSON, J. (dissenting). This is a personal injury suit in which, for the second time, defendants appeal from a verdict and judgment for $15,000. 41 N. D. 137, 170 N. W. 312. As stated in the former appeal, the complaint avers, and it is true, that in July, 1916, at New Rockford, North Dakota, defendant corporation owned and operated an electric light and power plant, and furnished electricity and light and power in the city of New Rockford, and at the residence of one W. J. Payne; also that the defendant James Rheinfrank was in charge of and had the control and management of the plant; that the plaintiff was an expert electrician in the employ of one Beaudry, and, in the line of his special business, at the direction of his employer, at the residence of Payne, he undertook to repair an electric light wire that had been burned and severed during a severe electrical storm. For that purpose, with an assistant, he went into the cellar of the Paine building, and found the electric wire burned and severed, with the two ends dangling. For protection he stood on a board, and then took hold of one end of the wire, and at the same time he, by some inadvertence, put his head in contact or close proximity to a grounded iron

pipe so as to complete the electric current. Instantly the blue electric flames played between his head and the pipe, and held him fast until his helper ran upstairs, pulled the switch and shut off the electric current. For two weeks the plaintiff was confined to his bed. Then he passed six months in a state of convalescence and commenced to work at $50 a month. Then, in six months, his wage rate was $75 a month; then, $85 a month, then $90 and then $100. At the hazardous electrical work the salary of the plaintiff amounted to about $140 a month. He suffered from some burns on his left hand and on the crown of his head and other parts of his body, and from nervous shock and several incidental burns. His greatest loss was an injury to his right hand. He lost the ring finger, which had to be amputated, and, in part, the use of the other fingers by reason of the fact that, in healing, the fingers were permitted to grow together, with a new tissue flexing and bending them down to the palm of the hand.

On the former appeal one judge held that the verdict was excessive, and all the judges agreed on a reversal because of errors of law occurring at the trial.

The case presented is one of negligence and contributory negligence. The accident would not have happened if the primary and secondary wires leading to the Payne house had been properly fastened so as to prevent them from coming together. It would not have happened if the plaintiff had pulled the electric switch at the Payne house and shut off the current before going into the cellar,—and possibly it would not have happened had it not been for the severe electrical storm. There was a safe way and an unsafe way of doing the business, and no one knew that as well as the expert, and with such knowledge he chose to do it in the unsafe way. Of course he did not intend to incur any danger; he did not know the effect of the severe electrical storm in causing the primary and secondary wires to run together and throw all the electric current onto the cellar wires. However, it was manifest that the current had burned and severed the wires. Plainly this is a case where the loss should be apportioned between the plaintiff and the defendant, as they were both negligent. The jury found a special verdict in answer to several questions; they found that the sum necessary to compensate the plaintiff for his damage was $15,000. Though the questions are so framed as to elicit answers in favor of plaintiff,

defendant's counsel has no good reason to complain, because he did not draft and submit proper questions as requested by the court. He said to the court: I am just making all the objections I can think of. It seems his purpose was not to aid the court, but to gain a reversal by some nice practice, and such practice is not to be commended by considering any of his objections. However, the record shows negligence on the part of both the plaintiff and the defendant, and it does show that plaintiff's own negligence, or rather his lack of clear perception and presence of mind, was the proximate cause of his injury. He went into the cellar, knowing that a severe electrical storm had just occurred, and that by the excessive electric current the cellar wires had been burned and severed, and, with his bare hands, he took hold of them and inadvertently put his head against the grounded iron wire, and that was the direct and proximate cause of his injury. However, according to modern thought, he should not bear all the loss, because it is in no way possible for an ordinary man at all times to preserve his presence of mind, and to contemplate and guard against all hazards and accidents; and it is fair to presume that in doing the business it was not the purpose of the plaintiff to incur any risk or hazard. Hence, his injury was a pure accident.

At the date of the accident the plaintiff had thirty-one years; he had still thirty years of good working capacity. His actual pecuniary loss has been about $600 a year. In fairness the defendant should pay a sum sufficient to purchase for the plaintiff a life or thirty-year annuity of $600; $15,000 is excessive, because interest on that sum would be a thousand a year; $15,000 would buy a life annuity of $1,200.

The suit was brought for $15,000, so that by skill and artifice the counsel might obtain for themselves $7,500, without enduring any pain or loss or suffering, and of course common honesty would forbid them to exact such a share if they thought the plaintiff entitled to receive $15,000. At the commencement of the action the counsel unjustly served notice, claiming a lien for $7,500, and thus their excessive claims have barred the defendant from making a just settlement with the plaintiff. The attorney's lien given by statute is for money due in the hands of the adverse party. § 6875. When money is due, the law implies a contract to pay it, and it may be recovered in an action of assumpsit But surely in case of assault and battery, libel, false impris-

onment, and personal injury, the law does not imply a promise to pay. The cause of action is not a debt, and it may not be assigned or mortgaged or liened. In the Greenleaf Case the majority decision was not well considered; it is erroneous. 30 N. D. 115, 151 N. W. 879, Ann. Cas. 1917D, 908. The statute permits an attorney to make a reasonable and fair contract in regard to his fees, but it does not permit him to exact or contract for an unreasonable fee. That is simply piratical, and the court may and should forbid any extortion by its officers. In this case the contract fee should not have exceeded $1,000. As the counsel for defendant refused to obey the orders of the court by preparing the questions for submission to the jury, it would serve him right to affirm the judgment. If he had submitted proper questions, there might have been no necessity for an appeal. It is in no way probable that the jury intended to find a verdict giving the attorneys $7,500 and the plaintiff $7,500.

This has been a vexatious and protracted suit, which should be settled without further delays and expense. The defendant should be permitted to settle the case for such sum as the plaintiff may accept, and to settle the attorneys' fees by paying to the clerk of the court for them a sum not exceeding $1,000. Neither party should recover any costs on this appeal.

MINOT PLUMBING & HEATING COMPANY, Appellant, v. C. B. BACH, Administrator, Respondent.

(177 N. W. 507.)

Husband and wife — contracts between — where husband, living with his wife, the wife being the record owner of the house, has improvements done with wife's knowledge, but without her entering into the contract, husband alone is liable.

The mere fact that the wife was the record owner of a certain house occupied by her and her family, including her husband, as a home; and that she

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NOTE.—That a contract is binding upon a wife whenever the husband is shown to have been invested with the power of agent in regard to the management of her property, will be seen by an examination of the cases collated in a note in L.R.A. 1918F, 20, on liability of husband, as agent for wife, for services of one employed by him.

knew that the plaintiff was installing or altering certain plumbing therein,—does not make her liable for the work so performed by the plaintiff, where it appears that the services were performed under a contract made by the husband alone; that plaintiff performed the work and extended the credit solely to the husband, charged the amount of the indebtedness to him upon its books, received partial payment from him, brought suit and recovered judgment against him alone for the balance due on the account, and had execution issued upon the judgment.

Opinion filed December 27, 1919.

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

Affirmed.

W. H. Sibbald, for appellant.

"An agency, like any other fact, may be proved by circumstances and the conduct of the parties and the relation that had previously existed between them." 2 Jones, Ev. § 256; Grant Co. Bank v. Northwestern Land Co. 28 N. D. 479; Lake Grocery Co. v. Chiostri, 34 N. D. 399; 31 Cyc. 1574.

"Where one dealt with an agent who failed to disclose his principal, his right to proceed against the principal was not dependent upon the diligence used in discovering the fact of the concealed agency." Baldwin v. Garrett, 111 Ga. 876, 36 S. E. 966.

"Where goods are purchased by an agent, without disclosing the name of his principal, the latter may be held liable for the debt when he is discovered." Partick & Co. v. Grand Forks Mercantile Co. 13 N. D. 12; 31 Cyc. 1267 and cases cited.

"An unsatisfied judgment against the agent in favor of the third person is not conclusive of the election to hold the agent and to discharge the principal; the principal is not discharged short of satisfaction of the judgment against the agent. Maple v. Cincinnati, H. & D. R. Co. 40 Ohio St. 313, 48 Am. Rep. 685; Beymer v. Bonsall, 79 Pa. 298; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 511; 21 R. C. L. 894.

Bradford & Nash and *E. T. Burke*, for respondent.

Under an allegation of express contract no recovery can be made on a *quantum meruit*. To permit recovery upon an implied contract

would be to change the cause of action as originally presented. Lowe v. Jensen, 22 N. D. 148, 132 N. W. 661.

"This power (the power to amend) rests in the sound legal discretion of the trial court, to be exercised in furtherance of justice and upon such terms as may be just." Satterlee v. Beall, 12 N. D. 129.

When the agency has been disclosed before suit is filed a judgment therein against the agent, although unsatisfied, is a bar to an action against the principal. Jones v. Ætna Ins. Co. 14 Conn. 501; Kingsley v. Davis, 104 Mass. 178; Weil v. Raymond, 142 Mass. 206.

CHRISTIANSON, Ch. J. On the 17th day of June, 1917, the plaintiff submitted to one James Longevan a written proposal to change certain fixtures, and install a complete plumbing system, in a certain house in the city of Minot, for a consideration of $595. The proposition was accepted by James Longevan in writing. The plaintiff thereupon performed the work according to the written agreement. Plaintiff also claims that it performed certain extra work which made the aggregate of its charge for the work so performed and materials furnished $634.72. Longevan afterwards paid the plaintiff sums aggregating $500, leaving a balance unpaid (according to the plaintiff's claim) aggregating $134.72. This amount remaining unpaid, plaintiff instituted an action against James Longevan in justice's court in Ward county, in this state, for said sum, and recovered a judgment therefor on the 20th day of February, 1918. Execution was subsequently issued on such judgment, and on the 4th day of March, 1918, a levy was made upon certain personal property belonging to the said James Longevan. Thereafter the plaintiff instituted this action against Bertha Longevan, the wife of James Longevan, wherein it averred that the services were performed and materials furnished for her, at her instance and request, acting through her agent James Longevan. The action was commenced in a justice's court, and was brought by appeal to the county court of Ward county, where it came on for trial before the court and a jury on January 17, 1919. In the meantime Bertha Longevan had died, and her administrator, C. B. Bach, was substituted as party defendant. At the close of all the testimony, the trial court directed a verdict in favor of defendant. Judgment was entered upon the verdict, and plaintiff has appealed.

The controlling question in the case is whether the trial court was justified in directing a verdict in favor of the defendant. A careful consideration of all the evidence in the case leads us to the conclusion that the trial court properly directed such verdict. In our opinion there was no evidence in the case from which reasonable men, by the exercise of judgment and reason, could find that the plaintiff had entered into any contract with Bertha Longevan, or furnished any materials or performed any work for her at her request. On the contrary the only deduction which could reasonably be drawn from the evidence was that the plaintiff contracted with James Longevan personally, and not with him as agent for his wife; that whatever credit it extended it extended to James Longevan, and not to Bertha Longevan.

As already stated, the evidence shows that on June 17, 1917, the plaintiff submitted a written proposal to James Longevan, which was accepted by him. The written proposal was prepared by the plaintiff, and James Longevan signed his name on a line at the bottom, which was followed by the word "owner." The plaintiff, in its books of account, charged James Longevan alone. It is not contended that the credit was extended to his wife, or on the belief that she was to be charged. On the contrary the plaintiff disclaims any knowledge or notice that she was a party to the transaction, until long after the work had been done. At the time the contract was made and the services performed, the plaintiff assumed that it was contracting with James Longevan and performing the services for him. It had no intention of extending any credit to Bertha Longevan, but did intend to extend credit to her husband. Later it brought suit and recovered judgment against him, and had execution issued thereon and levied upon his property. The evidence does not show what was done with the property seized under the execution. It does not appear whether the levy was released, or the property sold and the proceeds applied upon the judgment.

In this state "the wife, after marriage, has, with respect to property, contracts, and torts, the same capacity and rights and is subject to the same liabilities as before marriage;" and she may enter into any engagement or transaction with her husband or any other person, respecting property, which she might if unmarried. Comp. Laws 1913, § 4411; McDowell v. McDowell, 37 N. D. 367, 164 N. W. 23. When

it is sought to hold the wife liable for a contract claimed to have been made by the husband as her agent, the person who seeks to enforce the contract must establish the agency of the husband. This may be established the same as in other cases. The agency may be express or implied. It may be established by direct or by circumstantial evidence the same as any other fact. And in weighing the evidence the surrounding circumstances, including the relation of the parties, will be considered. But there must be some competent evidence from which reasonable men can reasonably draw the inference that the agency existed. The mere relation of the parties is not enough. For "a husband has not, by virtue of the marital relation, any authority to act as agent of his wife, or to make any agreement on her behalf binding her rights without her consent." 13 R. C. L. p. 1168, § 194.

The only evidence adduced by the plaintiff for the purpose of establishing a right to recover against Bertha Longevan was that the record title to the premises was in her name; that she was living in the house with her husband at the time the work was being performed, and hence had actual knowledge that it was being done; that upon one occasion she telephoned plaintiff and made some inquiry about the work; and that, while the work was being performed, the men who were doing it at times made inquiry from her in regard thereto. Manifestly there was nothing in the acts of Bertha Longevan which tended to differentiate the transaction from one in which similar work is being done in a home, the title to which is in the husband's name, and where he alone is charged with liability therefor. As was well said by the supreme court of Wisconsin in Wright v. Hood, 49 Wis. 235, 5 N. W. 490: "There is nothing in these simple and common acts and words of the wife, in respect to the common and ordinary conduct of family and household affairs, at all incompatible with her entire exemption from all liability or responsibility in reference to these materials, so contracted for and furnished by and for the husband, although to improve her house, for the use of her family, including her husband."

We are entirely satisfied that the evidence as a whole failed to establish a prima facie case against Bertha Longevan or the administrator of her estate. Holmes v. Bronson, 43 Mich. 562, 6 N. W. 89; Hillier v. Eldred, 91 Mich. 54, 51 N. W. 705; Fries v. Acme White Lead & Color Works, 201 Ala. 613, 79 So. 45; Rees v. Shepherdson, 95 Iowa,

431, 64 N. W. 286; Jones v. Walker, 63 N. Y. 612; Fisher v. Darsey, 21 Ga. App. 583, 94 S. E. 839. See also McCausland v. King, 60 Mich. 70, 26 N. W. 836.

Judgment affirmed.

FLORENCE LEIFERMANN, Respondent, v. FRED DANIELS, Appellant.

(176 N. W. 9.)

Assault and battery — indecent assault — verdict held not to be excessive.

In an action for indecent assault, where the plaintiff, the mother of two little children, was employed by the defendant, a bachelor fifty-nine years old, as his housekeeper, and where, during a period of two weeks' employment, the defendant attempted at various times to take indecent liberties with the plaintiff, finally culminating in a bolder attempt, which compelled the plaintiff to leave the defendant's employ, to protect her virtue and integrity, all of which occasioned to her suffering, humiliation, and disgrace,—it is *held* that a verdict of $2,500 is not so excessive as to disclose the result of passion and prejudice of the jury.

Opinion filed December 31, 1919.

Action for indecent assault in District Court, Barnes County, *Coffey*, J.

From a judgment for the plaintiff and an order denying a new trial the defendant appeals.

Affirmed.

M. J. Englert, for appellant.

Excessive damages appearing to have been given under the influence of passion or prejudice, and insufficiency of the evidence to justify the verdict, are grounds for a new trial. Comp. Laws 1913, § 7660, subds. 5, 6; Wagoner v. Bodal (N. D.) 164 N. W. 147; Carpenter v. Dickey, 26 N. D. 176, 143 N. W. 964; Williams v. Budgett (Iowa) 172 N. W. 283.

A. P. Paulson, for respondent.

The evidence shows that there was physical and nervous impairment,

and humiliation and mental suffering and sickness, which condition has persisted for a number of months, and that this condition was likely to continue for an indeterminate period and perhaps permanently, and for that reason the verdict and judgment of $2,500 cannot be said to be excessive, and must be sustained. Comp. Laws, § 7165; Rev. Codes 1905, § 6582; Civ. Codes 1877, § 1967; Rev. Codes 1899, § 4997.

Measure of damages in tort is the same as at common law. Needham v. Jalvorsen, 22 N. D. 594, 135 N. W. 203.

Damages are recoverable even when the injury is proximate, and could not be reasonably anticipated. Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Newell v. Witcher, 53 Vt. 589, 38 Am. Rep. 703; Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 279; Shoemaker v. Sonju, 15 N. D. 518.

In an action for damages for an indecent assault, a verdict may be rendered on the uncorroborated testimony of the plaintiff, though a conviction could not be had thereon in a criminal prosecution for rape. Rogers v. Winch, 76 Iowa, 546, 41 N. W. 214.

The jury may consider not only the physical injury and suffering, and expense and loss of time and wages, but the mental anguish, shame, and dishonor suffered by the injured party. Ward v. Blackwood, 48 Ark. 396, 3 S. W. 624; Kaber v. Hutson, 5 Ind. 322, 61 Am. Dec. 96; Wolf v. Trinkle, 103 Ind. 355, 3 N. W. 110; Lucas v. Finn, 35 Iowa, 9; Marden v. Murphy, 85 Iowa, 669, 52 N. W. 62.

Declaration of defendant, of his criminal intentions against plaintiff, are proper evidence to show aggravation of the damages sustained by plaintiff. Pratt v. Ayler, 4 Harr. & J. 448.

Under a declaration alleging sickness and pain to have been caused by an assault, a permanent bodily infirmity produced or aggravated thereby may be shown. Johnson v. McKee, 27 Mich. 471.

The aggravation of an existing disease or injury by an assault is as reasonable ground of complaint and as proper an element to be considered in estimating damages as the creation of a new one. Elliott v. Van Buren, 33 Mich. 49.

A person receiving a wilful injury from another is entitled to recover compensatory damages therefor, irrespective of the motive of the wrongdoer. Boyle v. Case, 18 Fed. 880.

Prospective damages are recoverable in trespass for assault and battery. Barlow v. Lowder, 35 Ark. 492.

Where plaintiff proves that he sustained the actual damage by defendant's attack, he is entitled to recover as much in value as his proof showed he suffered, whatever the amount may be. Tatnall v. Courtney, 6 Houst. (Del.) 434.

Plaintiff is entitled to recover such an amount of damages as will compensate him for the injury sustained. Jones v. Jones, 71 Ill. 562.

Plaintiff may recover damages accruing after the commencement of the suit. Morgan v. Kendall, 124 Ind. 454, 9 L.R.A. 445, 24 N. E. 143; Kelley v. Kelley, 8 Ind. App. 606, 34 N. E. 1009; Reddin v. Gates, 52 Iowa, 210, 2 N. W. 1079.

Mental pain is the natural and inevitable result of personal injuries. Damages for such pain may be recovered, though there is no allegation of damages based thereon in the declaration. Gronan v. Kukkuck, 59 Iowa, 18, 12 N. W. 748; Newell v. Whitcher, 53 Vt. 589, 38 Am. Rep. 703.

A new trial will not be granted on the ground of excessive damages unless it appears that the jury were influenced by passion, prejudice, corruption, or wilful disregard of law, in assessing such damages. Hence a verdict for $8,150.87 held not excessive. Brown v. Evans, 17 Fed. 912; May v. Steele, 9 Pac. 112; Alcorn v. Mitchell, 63 Ill. 553.

A verdict for $1,250 for an unjustifiable assault and battery on plaintiff by two persons, by whom he was severely beaten, causing severe physical injury, held not excessive. Scott v. Hamilton, 71 Ill. 85; Wolf v. Trinkle, 103 Ind. 355, 3 N. E. 110.

Where the evidence shows that defendants took plaintiff to a field, where they stripped and severely beat him, and then forced him by threats to leave his home, a verdict of $4,000 damages is not excessive. Morgan v. Kendall, 124 Ind. 454, 9 L.R.A. 445, 24 N. E. 143; Armstrong v. Jackson, 37 La. Ann. 219.

In a case of violent and unprovoked assaults, the court will not grant a new trial on account of excessive damages. Chancellor v. Vaughn, 2 Bay, 416; Birchard v. Booth, 4 Wis. 67.

A verdict of $1,200 for spitting in a woman's face is not necessarily so excessive as to be set aside. Draper v. Baker, 61 Wis. 450, 50 Am. Rep. 143, 21 N. W. 527.

The amount of damages which may be awarded in an action for assault is so largely in the discretion of the jury that it is in extreme cases only that the court is justified in interfering. Lake Street Elev. R. Co. v. Collins, 118 Ill. App. 270; Ragsdale v. Exell, 20 Ky. L. Rep. 1567, 49 S. W. 775; Barr v. Post, 56 Neb. 698, 77 N. W. 123.

BRONSON, J. The plaintiff recovered a verdict of $2,500 for indecent assault; the defendant has appealed from the judgment rendered and the order of the trial court denying a new trial. The defendant is a bachelor, fifty-nine years of age, engaged in farming; he hired the plaintiff as his housekeeper; the plaintiff was a married woman with two little children, having left her husband for his failure to support her. The plaintiff was needy and so worked out in an endeavor to support herself and her two little children. The agreed compensation for this work was $5 per week. She remained in the employ of the defendant about two weeks. There is evidence in the record that the defendant, at the beginning of the employment, attempted to take indecent liberties with the plaintiff; that his attempts in this direction continued at intermittent periods, finally culminating in a bolder attempt to have sexual intercourse with the plaintiff. All of these attempts the plaintiff resisted. She was compelled to, and did, leave his employ. The main contention of the defendant is that the damages awarded are so excessive as to show the influence of passion and prejudice of the jury. The trial court, in a memorandum opinion denying a new trial, comments upon the record testimony, observing particularly the ladylike demeanor of the plaintiff and the testimony which discloses her effort as a good, virtuous woman to perform hard work in order to maintain herself and her two little children, and, in contrast, the acts of the defendant and the testimony in the record to the effect that he claimed such privileges with housekeepers that might work for him. We agree that the trial court did not err in denying a new trial. The fact that the plaintiff, shamed and humiliated, wept while on the stand as a witness, does not warrant the conclusion of this court that the jury were influenced thereby through passion or prejudice. The question of damages was properly a question of fact for the jury. It was eminently the duty of this defendant to protect the plaintiff as a woman and as a mother in every manner. The assault, as found by the jury, was aggravated, and

severely deserves condemnation in law. We find no error in the record. The judgment is affirmed, with costs to the respondent.

CHRISTIANSON, Ch. J., and GRACE, and BIRDZELL, JJ., concur.

ROBINSON, J. (dissenting). This is a personal-injury suit, in which defendant appeals from a verdict and judgment for $2,500, and interest from March, 1918. The complaint avers that in March, 1918, at his farm home in Barnes county, defendant feloniously assaulted the plaintiff with intent to ravish her, to her damage, $5,000. Now an assault is an unlawful attempt, with force and violence, to do a corporal hurt to another. Comp. Laws, § 9545. Three is not in the record a particle of evidence that defendant ever assaulted the plaintiff or ever did her a corporal hurt or injury. She is a grass widow of twenty-eight years, with a daughter eight years and a son five or six years. At the age of seventeen she wedded a worthless fellow, with whom she has roamed about the country and has lived in three or four places in each of three different states,—in South Dakota, in North Dakota, and in Montana. Like gypsies she and her husband have been moving from place to place and post to pillar, leaving their characters behind them and at times living on the county. Her mode of life has been such that several times she has had to go to the hospitals.

On March 17 or 18, 1918, she was taken by a casual acquaintance—a young man whom she met on the train—to the home of defendant. They got there and had supper about 8 P. M. She at once found employment as housekeeper at $5 a week, with bed and board for herself and children. After supper she sat in a chair, rocking her child to sleep, and then she says he pinched her leg and said, "You have a nice leg." Then, as she says, "In three or four days he came to my bed at night, touched my arm, and said he came to sleep with me. I said, 'Get out of here,' and he did. Then for several days he was all right, helped me with the washing, carried the water and helped with the housework." Then on Sunday morning, March 31st, as she says, he pulled her onto his lap, pulled up her dress and said he was in the habit of doing business with his housekeepers, and, as she broke away from him, he said: "Damn you, you are tired from your operation, and I will get you yet."

Now, the defendant is a wealthy bachelor of fifty-nine or three score years. He has not been roaming from place to place. For nearly forty years he has been on the same farm in Barnes county. Working hard himself and giving employment to others; he has scorned delights and lived laborious days. When the fair grass widow went to his house he had no helper. He was getting up at 4 o'clock in the morning, feeding his thirteen head of horses, his cows, his pigs and poultry, cleaning the stables, milking the cows, doing all the farm chores. While she remained in his employ for half a month, he continued to do all his chores and part of the housework. He built the fires, carried in the water, and helped with the washing, as a gentleman should. She and her children ate at his table, and there is no claim that he ever said to her or the children an unkind or improper word, except on said three occasions.

Now, of course, the plaintiff had the burden of proof and her testimony is flatly contradicted by the defendant. It is in no way corroborated and it is highly improbable. She was entirely safe in testifying to anything that she pleased in regard to the sayings of the defendant, and she was under a great temptation to do all she could to recover a large verdict. Her shrewd counsel was likewise under some temptation to aid her and to receive half of the judgment. The result of it all was a verdict for $2,500, and interest, a sum equal to the earnings of the fair lady for ten years,—and she was not injured one red cent. She had not been assaulted; no words, however rude, do constitute an assault or a cause of action.

Now in the scale of probability and common knowledge, let us weigh the testimony: Defendant is a bachelor of three score years. By hard work he has accumulated a nice property. As a man grows in years and in property he grows more and more prudent and conservative. He learns to beware of widows. His youthful passions no longer burn; there is a limit to his store of energy. He does not at first sight edge up to a widow, give her a little pinch and say: You have a nice leg. He does not, without courtship, run into her bedroom and offer to sleep with her. He does not, after an acquaintance of a few days, pull her onto his lap and say: Damn you, I'll get you yet. Such testimony is not in anyway credible; it is plainly false and preposterous.

But there is the verdict, and how shall we account for it? The first

point to be noted is the overzeal and want of tact shown by defendant's attorney. For hours he persistently cross-examined the fair lady, drove her into appealing tears and hysteria, while her own counsel shrewdly made no objection and gave him all the rope he asked for. Of course the jurors looked on with pity, anger, and indignation, and, when the cause was submitted to them, the expert examiner "got it in the neck," and got just what he deserved. If defendant had appeared without an attorney and had told a plain story, as he did, the chances are that the jury would not have found against him.

(2) Another point or reason is that in cases of this kind jurors and judges are apt to have a bias and a desire to plume themselves and their righteousness by an expression of horror at a mere accusation of wrong. In the words of the Pharisees we are still disposed to say: "God, I thank thee that I am not as other men are, extortioners and adulterers and even as this publican." Thus it was that when Judah—a judge of Israel—was told that Tamer, his daughter-in-law, had played the harlot, he said, "Bring her forth and let her be burned." In that way he proclaimed his own righteousness and his horror of wrong; but when Tamer was brought forth "she had the goods on him;" she had his pledge, his signet, his bracelets, and his staff. He had to own up and confess that he was the guilty party, and that she was more righteous than himself.

(3) Plainly defendant did not have a fair trial. Even the pious judge fell under the spell of the tearful enchantress. He argued her case to the jury, assuming that her words were as true as gospel, misstated the law, and in his memoranda went out of the record to denounce the defendant and to charge against him gross and libelous matter. In his charge to the jury the court repeats, and reiterates, and gives undue emphasis to, the false complaint, and assumes that there is evidence of an assault on the plaintiff, an attempt to ravish her, and of injury and humiliation by reason of the same. It is said: "If you find from the evidence that defendant made an indecent assault on the plaintiff in the manner testified to by her, then the plaintiff is entitled to a verdict." Plainly that was an error because the plaintiff had not testified to any assault. Then it was said: "The law affords protection from indecent advances, and requires anyone violating the law in that respect to respond in damages for any detriment suffered

by such violation." Now, no charge could be more grossly erroneous. When a man is alone with a woman he incurs no legal liability by exhausting all his powers of persuasion. Under the charge it would be very unsafe for any man of means to be alone with an adventurous woman. Thus it was with virtuous Joseph, he found it unsafe to be alone with Potiphar's wife and to refuse her advances. Whatever may be said or thought of the wandering widow, it is certain that, in bringing this suit, she has shown a disposition to rob the defendant of his property. The conclusion must be that she is not honest; neither is she truthful, because those virtues go together. To allow her any recovery would be a reproach to the court.

Judgment should be reversed and action dismissed.

ART HARSHMAN, Respondent, v. THOMAS SMITH, Appellant.

(176 N. W. 3.)

Sales — passing of title — notifying garage that plaintiff was owner of automobile and removal of tools from automobile completed sale.

In this case defendant appeals from a judgment for $700 and interest. For a Cadillac car he paid, in cash, $1,600, and turned over to plaintiff a Hudson auto valued at $700. The Hudson car was in possession of the Minot Auto Company for repairs. Both parties went together and notified the company of the trade, and plaintiff took and carried away the tools of the Hudson car. *Held*, that the plaintiff at once became the owner of the Hudson car, and the Auto Company became his bailee, regardless of the fact that defendant had agreed to pay for the repairs.

Opinion filed December 31, 1919.

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

Reversed and dismissed.

B. A. Dickenson and *Greenleaf & Wooledge*, for appellant.

A bailor may sell the subject-matter of the bailment and thereby confer on the purchaser an immediate and valid title thereof. Hodges v. Hurd, 47 Ill 363; Chamversburg Nat. Bank v. Buckeye Iron &

Brass Works, 46 Ill. App. 526; State v. Fitzpatrick, 64 N. W. 185; Erwin v. Arthur, 61 N. W. 386; Heine v. Anderson, 2 Duer, 318; Smith v. Ball, 9 Mo. 873; Hall v. Griffin, 10 Bing. 246; Riddle v. Blair, 148 Ala. 461, 42 So. 560.

The bailee's interest after such sale remains as theretofore, with the substitution of a new bailor. Hardy v. Lemons, 36 La. Ann. 146.

One who is injured in his person or property by the wrongful or negligent acts of another is bound to exercise reasonable care and diligence to avoid loss or to minimize the resulting damage. 8 R. C. L. p. 442; 24 R. C. L. p. 85.

John C. Lowe, for respondent.

"It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them." Laws 1917, §§ 41, chap. 202, 43 (3).

The tender must be equally unconditional as if of money. Parsons, Contr. 764; Schneider v. C. H. Little Co. 151 N. W. 587; Laws 1917, § 43 (3) chap. 202.

ROBINSON, J. This suit is the result of an automobile trade. The complaint avers that on October 6, 1917, at Minot, North Dakota, plaintiff sold to the defendant a Cadillac car for $1,600 in cash and a Hudson car valued at $700. For an alleged failure to deliver the Hudson car the plaintiff recovered a judgment for $700 and interest.

On October 6, 1917, at Minot, North Dakota, the plaintiff, a shrewd dealer in automobiles, sold defendant a Cadillac for $1,600 in cash and a Hudson car valued at $700. The Hudson car was for repairs at the garage of Minot Auto Company. The parties went to the garage, looked at the car, made the trade, and then went to the manager of the Auto Company and told him of the trade, and told him to make the repairs at the expense of defendant and to deliver the car over to plaintiff. Then, as the owner of the Hudson car, the plaintiff took from its tool box and carried away all the tools, being such as commonly go with a car. He kept the tools and never offered to return them or to rescind the trade. In due time the repairs were made and defendant paid for the same $110, by check of November 29, 1917. Then there was made a storage charge of $4.33, which defendant paid December 18, 1917. He was not looking for trouble The plaintiff did not care for the old Hudson, which was probably not worth over $400;

he wanted an excuse for delivering it back to defendant at $700. The storage charge gave him the excuse; he and the Auto Company were playing the game together, and doubtless they played into each other's hands. When the trader sold the car and received $1,600 in cash, he made a good profit; the old Hudson was merely an extra profit. The list price of the Cadillac was $2,080, and of course that included a good profit to the dealer. The plaintiff claims that were it not for the storage charge he could have sold the Hudson for $700, yet he was willing to incur the hazard and expense of a lawsuit to sell it back to the defendant at $700.

Of course the testimony of traders must be weighed in the scale of probabilities, and taken with some allowance. The judges must use their own knowledge concerning the ways of trading, the price of cars, the profits which dealers make. Then we know this is a time when traders are not much disposed to allow scruples of conscience to stand between them and their big profits But the value of the Hudson car is of no consequence. When the trade was made it was complete; when the title to the Cadillac passed to defendant, the title to the $1,600 and the old Hudson passed to the plaintiff. When both parties met the manager of the Auto Company and notified him of the sale or trade, the title passed to plaintiff regardless of the fact that defendant had agreed to pay for the repairs. Then he became the owner of the Hudson and the tools that he took and carried away. He had a perfect right to take the car as he took the tools Defendant retained no possession or control over the car, and there is no claim that he interfered with the car or made any claim to it. Had the defendant gone into bankruptcy, or had the car been attached as the property of the defendant, the plaintiff would have been quick to assert his title against any claims of creditors. The old car was identified; it was there in the presence of both parties and the manager of the Auto Company, the bailee. The company, when it was notified of the trade and when plaintiff took and carried away the tools, became the bailee of the plaintiff. There was a complete transfer of title, regardless of any lien for repairs or expense. In case the defendant had failed to pay for the repairs, the remedy of the plaintiff was to rescind the entire trade or to pay for the repairs and recover the money in an action against the defendant; and if defendant is good for a judgment of $700, it must

be that he was good for $4.33,—a very small item on a big deal. Big dealers should learn to treat their innocent customers in a spirit of manhood and fairness. There is no honesty in killing the goose that lays the golden egg.

Judgment reversed and action dismissed.

BIRDZELL, J., concurs.

GRACE and BRONSON, JJ., concur in the result.

CHRISTIANSON, Ch. J. (concurring). In this case both parties moved for directed verdicts, and the case was decided by the trial judge. There is no material conflict in the evidence. Substantially it is as stated by Mr. Justice Robinson, and, in my opinion, it justifies only one conclusion; namely, that reached in the opinion prepared by Mr. Justice Robinson. I do not believe, however, that there is anything in the evidence to justify the statement that "he (Harshman) and the Auto Company were playing the game together, and doubtless they played into each other's hands."

FIRST STATE BANK OF LUCCA, Respondent, v. FIRST NATIONAL BANK OF CASSELTON, Appellant.

(176 N. W. 4.)

Bills and notes — accommodation note — note given for accommodation only cannot be collected by party accommodated.

Defendant received from the plaintiff bank an accommodation note for $5,000 and interest, and subsequently deducted the amount of the note and interest, $5,208.63, from the account of the plaintiff. Hence, judgment against the defendant for the sum deducted is affirmed.

Opinion filed December 31, 1919.

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

Affirmed.

Lawrence & Murphy, for appellant.

Where an officer of a bank, without authority to do so, borrowed money in the name of this bank and pledged certain of the bank's assets as security for the loan, and the borrowed money was received and used by the bank, and the transaction was such that the directors had, or ought to have had, knowledge of it, the corporation is estopped to deny the authority of its officer to make the contract in its behalf by which the money was procured. First Nat. Bank v. State Bank (N. D.) 109 N. W. 62.

Engerud, Divet, Holt, & Frame, for respondent.

Neither Carver nor any other officer of the bank possessed or could be given either express or implied authority to bind the bank on accommodation paper. 1 Morse, Bkg. 5th ed. §§ 65, 156, 158; 7 Cyc. p. 724, note 7.

An accommodation note cannot be enforced by the party accommodated against the accommodation maker, for the obvious reason that as between those parties it is without consideration. 7 Cyc. 725, b.

By a secret deal between Carver and Kittel the latter was enabled to conceal on the Casselton books what that credit was really given for.

It is obvious that the Lucca Bank could not be bound by these secret manipulations between Carver and Kittel even if Carver had assumed to act in the name of the Lucca Bank. Atlantic Mills v. Orchard Mills (Mass.) 17 N. E. 491; Emerado Elevator Co. v. Bank, 20 N. D. 270; Citizens Bank v. Iverson, 30 N. D. 497.

ROBINSON, J. This is an appeal from a judgment against defendant for $5,000 and interest,—the precise amount of an accommodation note made by the plaintiff, or its president, to R. C. Kittel, the president of the Casselton Bank. On the books of the Casselton Bank the note has been charged up against the account of the plaintiff.

As it appears, in March, 1915, L. C. Carver, cashier of the plaintiff bank, made to R. C. Kittel, president of the Casselton Bank, an accommodation note for $5,000, payable in six months, and the note was used by the Casselton Bank at the First National Bank of Duluth. When it became due Kittel obtained a renewal note which he sent to the Duluth Bank. The note is in evidence. It is dated September 1, 1915, and signed "First National Bank of Lucca, by L. C. Carver, President." Mr. Carver claims that when he made the note it was signed only by himself, and not by the Bank of Lucca; but if that is

true, the note was given so that it might be changed and used just as Kittel desired to use it. Carver made his signature on the second line of the blank promissory note so that it was easy to write over it the name of his bank. However, it is a matter of no consequence. The Casselton Bank took back the note from the Duluth Bank, and listed it as bills receivable, and charged it to the account of the Lucca Bank. That was on October 25, 1915. Then, on November 3, 1915, the Casselton Bank did charge to the Lucca Bank interest on the $5,000 note, $208.63. On October 30, 1915, the monthly statement of the Casselton Bank showed a credit to the Lucca Bank amounting to $18,357.66,—and that was the correct amount. The books of the two banks agreed exactly. But, by the general ledger of the Casselton Bank, under date of October 30, 1915, the balance of the Lucca Bank was only $13,357.66. The $5,000 note had been charged on the ledger account, but not on the monthly statement. Then the interest, $208.63, was charged on November 3, 1915.

In November, 1915, Kittel was put out of the Casselton Bank. On December 1, 1915, the Casselton monthly statement was sent to the Lucca Bank, and it showed a deficit balance of $5,000, plus $208.63, making $5,208.63. Then a letter was sent to the Casselton Bank:

December 4, 1915.

Your statement of account does not agree with our books by $5,208.63, and we call for this much more of a balance than shown by the statement. In your statement the $5,000 error is in starting the balance, as your statement for October shows the balance, $18,357.66. We have no record of the $208.63 charge of November 3d. We return statement for correction by giving credit for $5,208.63.

L. C. Carver,
President.

Manifestly there is no proof of any credit for the $5,000 note. It was given as an accommodation, and the note charged up to the Lucca Bank and deducted from its account, in the same manner as if the Casselton Bank had given full value for the note, whereas it gave no value for the $5,000 note. Of course on that point there is some dispute and contention, but the fact is entirely clear, and, as the case turns on a simple question of fact, there is nothing to be gained by protracting the discussion.

Judgment affirmed.

MARIE H. GRAY, Appellant, v. OSCAR F. GRAY, Respondent.

(176 N. W. 7.)

Divorce and separation — jurisdiction of the supreme court — supreme court will not modify decree of divorce on original application.

1. In divorce actions the supreme court has appellate jurisdiction only (Const. §§ 86, 87), and cannot entertain an original application for modification of a decree of divorce so as to allow an increase of alimony.

Divorce — order requiring plaintiff wife to comply with decree in her favor as to deed to homestead not prejudicial to her.

2. For reasons stated in the opinion it is *held* that the order appealed from in this case, in effect, merely required the plaintiff to comply with the provisions of a final decree of divorce, and hence plaintiff is in no position to assert that the order is erroneous.

Opinion filed December 31, 1919.

Appeal from the District Court of Cass County, *Cole,* J.

Plaintiff appeals from an order requiring her to comply with the provisions of a final decree of divorce.

Affirmed.

M. A. Hildreth, for appellant.

The court, under the showing made, is not justified in making the order; and, second, that the order is one that does not appeal and cannot appeal to the equitable side of this court. See Rindlaub v. Rindlaub, 19 N. D. 353; Rindlaub v. Rindlaub, 28 N. D. 168.

The adjudication as to the real property and the lien cannot be modified by this court. See A. D. Baker Co. v. Booher, 153 Wis. 319; Blake v. Blake, 35 N. W. 551; Hamilton v. McNiel, 129 N. W. 480; Tuttle v. Tuttle, 128 N. W. 695; Mayer v. Mayer, 117 N. W. 890; Kinney v. Kinney, 129 N. W. 826; Newell v. Newell, 130 N. W. 743; Zanger v. Zanger, 126 N. W. 703.

The cost of the transcript, the clerk's fee in the district court for the record in this court, ought to be paid by this defendant. He should be required to reimburse Mrs. Gray by the payment of all the expenses of this application and by the allowance of reasonable attorney's fees. Gray v. Gray, 31 N. D. 618.

This court has jurisdiction of the appeal. It likewise has jurisdiction over this application. An application of this kind can be made

in this court, because it not only has jurisdiction over the district court, but it likewise has jurisdiction over the person and subject-matter of the plaintiff and defendant in this cause. Rindlaub Case, 19 N. D. 353, and same case in 28 N. D. 168.

The provision of the divorce decree for future monthly payments by defendant until the further order of the court, being for an indefinite time and amount not yet accrued, is not a definite liability or a judgment for a specific sum which may become a lien upon his property. Mansfield v. Hill (Or.) L.R.A.1916B, 651, 107 Pac. 473.

A decree granting permanent alimony does not become a specific lien on the husband's estate unless so provided by statute, and the jurisdiction of a court of equity over alimony cannot ordinarily be extended so as to authorize the creation of such a lien. 14 Cyc. 783.

Future payments of alimony cannot be made a lien on the husband's property. Kurtz v. Kurtz, 38 Ark. 119.

Alimony should not be declared a lien on the husband's land as it embarrasses alienations. Casteel v. Casteel, 38 Ark. 477.

In the absence of express statutory authority, the court has no power to make a decree for permanent alimony a lien on the defendant's personal property. Johnson v. Johnson, 22 Colo. 20, 43 Pac. 130.

A decree for alimony to be paid in instalments is not a lien on defendant's land unless a charge thereon by the decree itself. Hungerford v. Hungerford, 10 Ohio, 268; Olin v. Hungerford, 10 Ohio, 268.

Where a judgment for alimony does not provide for a lien on the estate of the divorced husband, only a personal liability created. Campbell v. Trosper, 108 Ky. 602, 57 S. W. 245.

A decree for the payment of alimony to become due does not become a lien upon the real estate of the person against whom it is entered, unless it is made so by statute, or the decree itself recites that it shall become a lien. Enoch v. Walter, 209 Ill. App. 619.

Lawrence & Murphy and *Herbert G. Nilles,* for respondent.

The supreme court has no power or jurisdiction to modify the decree of the district court by increasing the amount of alimony to be paid Marie H. Gray. N. D. Constitution, §§ 86, 87, 103; Comp. Laws 1913, §§ 4406, 7339; Tonn v. Tonn, 16 N. D. 19.

The supreme court has no power or jurisdiction to grant appellant

Marie H. Gray counsel fees and expense money as prayed in her petition. Tonn. v. Tonn, 16 N. D. 17; Cariens v. Cariens, 50 W. Va. 113, 55 L.R.A. 930.

Alimony is only cognizable as between parties united by a marital relation, that imposes upon the husband the legal duty to support the wife. There is no jurisdiction to award alimony as between parties divorced from bed and board, as incident to the pendency of divorce by fraud, and before the decree is successfully assailed. Chapman v. Parsons, 24 L.R.A.(N.S.) 1015; Croder v. Speaks, 37 Or. 105, 51 Pac. 647.

CHRISTIANSON, Ch. J. On the 27th day of April, 1916, a judgment was duly entered in favor of the plaintiff and against the defendant in a divorce action. In that judgment it was, among other things, ordered, adjudged, and decreed that the defendant should pay to the plaintiff $2,500, in lieu of the homestead situated in Casselton, in Cass county in this state, within thirty days after the entry of the decree of divorce; and that, upon payment of said sum, the plaintiff should execute and deliver to the defendant a quitclaim deed releasing any and all right, title, interest, and claim in and to said homestead, and in and to any and all real property owned by the defendant. The decree also provided for the payment to the plaintiff by the defendant of $55 per month as alimony. The plaintiff was awarded the custody of the minor child, issue of said marriage; and it was provided in the decree of divorce that the defendant should have the right to visit such child at the home of the plaintiff at least once a month, if he so desired, each visit not to exceed two hours in length.

In May, 1919, the defendant presented an affidavit to the trial court wherein he stated that he had complied with the terms of the judgment by paying to the plaintiff the sum of $2,500 within thirty days after the entry of the decree of divorce, but that plaintiff had failed, neglected, and refused to execute and deliver to the defendant a quitclaim deed of the homestead and the other real property owned by the defendant; that the plaintiff had further refused to permit the defendant to visit said minor child; and that when he had attempted to do so she had prevented him from seeing the child. The trial court issued an order to show cause, citing the plaintiff to show cause why she should not be

required to execute the quitclaim deed, and why she should not be required to permit the defendant to visit the child as provided in the decree of divorce. The matter came on for hearing on June 6, 1919; both parties appeared in person and by counsel.

Both parties were sworn and examined orally. The plaintiff testified that she had never refused to execute a quitclaim deed for the homestead, and that she had at all times been ready and willing to do so. She further testified that she had never refused to permit defendant to visit the child, and that she had at no time prevented him from so doing. During the course of her examination she was asked the following question:

"Do you know of any reason why, if the court should make a provision that Mr. Gray would be permitted to see the boy on the first Tuesday afternoon of each month say, do you know of any reason why that would not be satisfactory to you and fair to both of you?" To which she made answer thus: "That would be perfectly satisfactory." She admitted that defendant had paid her the $2,500, and that he had paid her the monthly instalments of $55, although she says that, in some instances, she received these payments two or three days late.

The trial court made an order requiring the plaintiff to execute and deliver a quitclaim deed to all the real property owned by the defendant. The order also contained this provision: "Both parties having requested that a date should be fixed for such visits (visits to be made by the defendant to see his son), and both having agreed to the time set, it is ordered that the time of such visits shall be in the afternoon of the first Tuesday of each month." The court further ordered that the defendant pay the next month's instalment of alimony to plaintiff's attorney. It also appears in the order that the defendant furnished a surety bond in the sum of $1,000, conditioned that the defendant would comply with the provisions of the judgment by paying to the plaintiff the sum of $55 per month as and for alimony. And the order provided that the judgment for such monthly payments should not constitute a lien upon any real property owned by defendant, or which he might thereafter acquire. Plaintiff has appealed from the order.

We are entirely satisfied that this court may not entertain an original application for increase of alimony. In divorce cases this court has

appellate jurisdiction only (Const. §§ 86, 87), and can only review rulings made by the district courts. The practice adopted in Rindlaub v. Rindlaub, 19 N. D. 352, 125 N. W. 479, 28 N. D. 168, 147 N. W. 725, has no application here. In that case an appeal was taken, and the case was tried anew in this court under the provisions of the so-called "Newman Law." This court set aside the judgment rendered by the trial court, and directed the entry of a new judgment, and reserved jurisdiction to make further orders in the future. 19 N. D. 391, 392. In this case no appeal has been taken from the judgment of divorce. Clearly this court may not entertain an original application to modify it.

We are also of the opinion that the order appealed from must be affirmed. The primary purpose of the order was to require the plaintiff to comply with the terms of the decree. The decree had been entered for more than three years. It was in favor of the plaintiff, and apparently was satisfactory to her, for she did not appeal therefrom, neither has she ever applied for a modification. In so far as the order requires her to execute a quitclaim deed, it merely directs her to do what the decree provided she should do. In so far as it relates to the opportunity to visit the child, no additional privilege is granted to the defendant. The right to visit remains precisely as fixed in the decree; but instead of the time being left indefinite, the order fixes a definite date,—a date which plaintiff said would be "perfectly satisfactory." Manifestly the plaintiff is in no position to assert that the trial court erred in entering an order requiring her to comply with the decree.

The provision in the order, that one month's instalment of alimony be paid to plaintiff's attorney, could in no event harm the plaintiff, as it appears that her attorney turned the moneys over to her.

Nor do we believe that the trial court erred in providing that the decree for monthly payments of alimony should not constitute a lien upon real property then owned, or which might hereafter be acquired, by defendant. In fact we do not believe that this recital in the order altered the status of the parties in any particular. There is no contention that the decree directed that the monthly allowances therein provided for should be a lien upon defendant's real property. On the contrary it appears that the decree provided that, upon defendant

paying $2,500, all real property then owned by him should be released from any and all claims which plaintiff might have against the same. A judgment for alimony is personal. If the party against whom it is rendered fails to make payment as therein provided, he may be proceeded against under the statute relative to contempt. This is generally a far more effective and expeditious means of enforcement than that provided for the enforcement of an ordinary judgment.

In rendering judgment in a divorce action the court is given great discretion. If it deems it necessary to do so, it may require the party against whom a judgment for alimony is rendered to give security for providing maintenance or making payments. Comp. Laws 1913, § 4406. We are entirely satisfied that under our laws a judgment for the payment of alimony in monthly instalments in no event becomes a lien upon the real property of the person required to make such payments unless the judgment expressly so provides. See Scott v. Scott, 80 Kan. 489, 25 L.R.A.(N.S.) 132, 103 Pac. 1005; Mansfield v. Hill, 56 Or. 400, 107 Pac. 471, 108 Pac. 1007. Such monthly allowance is a continuing liability, no part of which is due when the decree is rendered. The liability may be terminated at any time, or it may continue during the entire period stipulated for in the decree. It may be altered by the court as the circumstances of the parties might warrant. No one dealing with the defendant could, with any degree of accuracy, compute the amount of the payments which he would be required to make under the decree in this case. If the decree constituted a lien upon his real property for such monthly payments, then the effect would be to prevent defendant from dealing with his property at all, since he could not pay off the lien, except as each monthly instalment becomes due. Assuming, without deciding, that the court had power to provide that a decree for payment of monthly instalments of alimony should be a lien upon all real property owned or acquired by the judgment debtor while liability for such payments continued, clearly the intention to so provide cannot be assumed, in the absence of express recital in the decree declaratory of such intent.

In our opinion the order appealed from in no manner changed the status of the parties. So far as the plaintiff is concerned, the order merely required her to comply with the terms of the decree,—the benefits of which she has accepted; so far as the defendant is concerned he

received nothing under it which he was not entitled to receive under the decree.

The original application made in this court for an increase of alimony is denied, and the order appealed from is affirmed.

ROBINSON and BIRDZELL, JJ., concur.

GRACE and BRONSON, JJ., concur in the result.

CLARISSA ARNDT, Respondent, v. PAUL C. REMINGTON and CHAS. F. ELLIS, Appellants.

(177 N. W. 646.)

Brokers — application of money by broker — where broker paid sum not authorized by owner, the broker becomes liable for the same — where such payment is made by broker he is entitled to be subrogated to judgment creditors.

The plaintiff employed the defendants to make for her a loan of $800 on a homestead, and out of the loan to pay expenses, liens and claims against the land. Defendants paid $158.07 which was not a lien or legal claim against the land, and withheld the same from the plaintiff. *Held:* That in this case judgment was justly given against the defendants for $158.07, with interest and costs; also, that defendants having paid a judgment in favor of J. M. Hanley are entitled to be subrogated as judgment creditors.

Opinion filed December 31, 1919.

Appeal from the District Court of Morton County; Honorable *W. L. Nuessle,* Special Judge.

Modified and affirmed.

Sullivan & Sullivan, for appellants.

In construing the phrascology the words "mortgage" "lien" or "encumbrance," "judgments" and "taxes" do not limit the word "claims," but rather extends the meaning of the word "claims" which might be thought not to include such liens, judgments, encumbrances, or taxes. Concrete Steel Co. v. Illinois Surety Co. (Wis) 157 N. W. 543.

The word "claim" implies that the right is in dispute and is sug-

gestive of contention, litigation, and something left for future determination. Re Cutting (Cal.) 161 Pac. 1137; See 11 C. J. 816; Marsh v. Benton County (Iowa) 39 N. W. 713; Gorgeon v. Wageman (Neb.) 108 N. W. 1067.

All that is required to make a valid claim (not necessarily enforceable) is pretension. Sheldon v. Gage County Soc. of Agriculture (Neb.) 98 N. W. 1045; Orvis v. Jennings, 6 Daly, 436; People v. Fields, 58 N. Y. 491.

Nuchols & Kelsch, for respondent.

Where the appellant appeals from findings of fact, conclusions of law and judgment only the supreme court is without authority to review the evidence, and the findings of fact of the trial court are binding and conclusive upon the supreme court. Edmondson v. White, 8 N. D. 73; State ex rel. McClory v. McGruer, 9 N. D. 566; Whitney v. Akin, 19 N. D. 637.

Where appellant appeals from judgment only, the supreme court is precluded from considering the evidence to ascertain whether the trial court did not err in its findings of ultimate facts. Security Improv. Co. v. Cass County, 9 N. D. 553; Bank of Park River v. Norton, 14 N. D. 143.

In construing findings of fact made by the trial court, the appellate court will consider all the findings together, in order to determine what was intended. Moore v. Booker, 4 N. D. 543.

The judgment of J. M. Hanley was not a valid lien or valid claim against the premises as determined by this court in the cases of: Foogman v. Patterson, 9 N. D. 254; Farmers Bank v. Knife River Grain & Lumber Co. 37 N. D. 371.

ROBINSON, J.: This is an appeal from a judgment against defendants for $158.07, with interest and costs amounting to $225.07. There are no facts in dispute. The plaintiff owned a quarter section of land on which she resided as a homestead, and she had acquired the same under the homestead laws of the United States. Prior to the issuing of a patent for the land, J. M. Hanley obtained and docketed in Morton county a judgment for $135, and interest, amounting to $158.07, against the plaintiff and Clara Arndt. Then, to secure for her a loan of $800, the plaintiff made to defendants a mortgage on her home-

stead, viz: S.W.¼ Sec. 12, Twp. 132, Rge. 85, and defendants for good value agreed to secure for her the loan of $800 and to pay the same to her, after deducting certain expenses, liens and claims against the land; but though said judgment amounting to $158.07 was not a claim against the land, the defendants paid the same and withheld from plaintiff the amount of the judgment. Hence the trial court very justly gave judgment against the defendants, which must be affirmed, with costs, but as the defendants have paid the judgment amounting to $158.07, they ask as a matter of favor, that the satisfaction of the same be set aside and that they be subrogated to the rights of the judgment creditor. As that motion is equitable, it is allowed, and on payment of the judgment herein, with interest and all costs, the district court will add this addenda to the judgment, viz.: That the satisfaction of the judgment in favor of J. M. Hanley be set aside and that the defendants having paid the same be subrogated to the rights of the judgment creditor.

Modified and affirmed, with costs, and case remanded forthwith.

CHRISTIANSON, Ch. J., and BIRDZELL and GRACE, JJ., concur.

BRONSON, J. I concur in the affirmance of the judgment. After the argument and submission of this case before this court, the appellants requested that, since this court had indicated, during the oral argument, that the judgment should be affirmed, the judgment involved should be reinstated, and the appellants subrogated to the rights of the judgment creditor. The majority opinion, herein, has allowed this request as a motion and modified the judgment accordingly. This request or motion, as it appears, was first made before this court. I am of the opinion that this motion should be addressed to the trial court, and that the judgment should not be reinstated as a full lien of a docketed judgment, unless it clearly appears to the trial court that no intervening rights would be thereby prejudiced.

JOHN A. JORGENSON, Appellant, v. FARMERS & MERCHANTS BANK OF ROBINSON, NORTH DAKOTA, a Corporation, Respondent.

(170 N. W. 894.)

Courts — conflicting jurisdiction — justices of the peace.

1. By the terms of § 112 of the Constitution of the state of North Dakota and § 9006, Compiled Laws 1913, justices of the peace have concurrent jurisdiction with the district court in all civil actions when the amount in controversy, exclusive of costs, does not exceed $200. These provisions are as applicable to an action sounding in tort as to one on contract.

Justices of the peace — jurisdiction — amount.

2. In an action in the justice court for damages for tort, the amount claimed in the summons was $200, with interest. *Held* that the interest commenced from the date of the summons, and not from the time of the commission of the tort; that the amount in controversy did not exceed $200.

Garnishment — affidavit of adverse claim — liability to repay.

3. Where one has been duly and legally served with an affidavit of garnishment and garnishee summons, and then or at any time prior to return day has or acquires knowledge that the funds or property in his possession or under his control are claimed by another than the garnisher, and fails to make affidavit or answer disclosing such knowledge before or on return day, as required by law, and permits judgment to be taken against him by the garnisher, and pays the money or property over to the garnisher, either voluntarily or by order of the court, cannot complain if he is compelled to repay the amount of funds or property under his control to the person whom he knew claimed the same, if, in a subsequent action against the garnishee, it should be made to appear that that person had a superior right to such funds or property.

Opinion filed January 2, 1919.

Appeal from the County Court of Stutsman County, North Dakota, Honorable *John U. Hemmi,* Judge.

Judgment reversed.

John A. Jorgensen, pro se.

"A deposition of a witness taken by plaintiff and filed in the suit is properly excluded on plaintiff's objection that the witness is present." Schmitz v. St. Louis (Mo.) 23 L.R.A. 250, 24 S. W. 472; Nielson v.

Hartford, 67 Conn. 486, 34 Atl. 620; Fest v. Kane, 92 Ga. 187, 22 L.R.A. 315, 18 S. E. 18; McClure v. Sheek, 68 Tex. 426, 4 S. W. 552; Anderson v. Brass, 127 Wis. 273, 106 N. W. 1077; R. Co. v. Ennis, 109 Ark. 206, 159 S. W. 214.

"If the bailee permits the goods in his hands to be attached or levied on as the property of a third person, delivery under such process will afford no protection." McDonnell v. Buffalo, 193 N. Y. 92, 85 N. E. 801, affirmed in 119 App. Div. 245, 104 N. Y. Supp. 625; Ball v. Liney, 48 N. Y. 6, 8 Am. Rep. 511; Rogers v. Weier, 34 N. Y. 463; Barnard v. Kebbe, 3 Daly, 35; Kelly v. Patchell, 5 W. Va. 585; Hardy v. Hunt, 11 Cal. 343, 70 Am. Dec. 787.

"The interests of third persons cannot be affected by garnishment proceedings of which they had no notice and to which they were not made parties." 20 Cyc. 1147 and cases cited note 25.

"Any payment by a garnishee not based upon a valid judgment will afford him no protection in an action against him by his original creditor or those claiming under him." Id. note 32; 20 Cyc. 1148 and cases cited note 31; 20 Cyc. 1149 and cases cited note 34.

Thorpe & Chase, for respondent.

"Where a deposition is lost, a copy may be substituted." Gage v. Eddy (Ill.) 47 N. E. 200; Gilmore v. Buttz (Kan.) 59 Pac. 645; 6 Enc. Pl. & Pr. p. 583.

The grounds for the suppression of this deposition were not sufficiently and definitely stated. Thompson, Trials, § 810; Burton v. Briggs, 20 Wall. 125; Ueland v. Bealy, 11 N. D. 529; Stebbins v. Duncan, 108 U. S. 32; 6 Enc. Pl. & Pr. pp. 587, 588.

The motion to suppress a deposition must be made before the commencement of the trial and under its decisions the trial had commenced in this case. Anderson v. Bank, 6 N. D. 497; Walters v. Rock, 18 N. D. 45; Ueland v. Dealy, 11 N. D. 529; 13 Cyc. p. 974; Code Civ. Proc. § 7906.

The bank had not sufficient notice and no legal demand was made for this fund before the action was commenced; see First Nat. Bank v. Staff (Ind.) 112 Am. St. Rep. 214; 1 Morse, Bkg. 4th ed. § 313; Aurora Nat. Bank v. Dills (Ind.) 48 N. E. 19.

GRACE, J. The appeal is from a judgment of the county court of Stutsman county, North Dakota, Honorable John U. Hemmi, judge.

A complete statement of the facts in this case and also the facts in the case of Frank McHale v. John Lang, out of which the instant case originated, the judgment roll of which is before us in this case, will be very conducive to a clear understanding of the questions presented in the instant case for decision.

McHale sued Lang in the justice court for damages alleged to have been received by reason of an assault and battery committed by Lang upon McHale. The summons was dated the 30th day of October, 1916, and was returnable on the 10th day of November, 1916. The defendant defaulted and judgment was entered against him on November 10th, 1916, for the sum of $200, the amount sued for and $24 costs. The summons specified the amount to be recovered was $200 with interest. The defendant, in due form and manner, after the entry of judgment, perfected an appeal to the district court. Notice of appeal was admitted by plaintiff's attorney, one Munson, on December 1st, and duly filed in the district court on December 6th, 1916. The appeal was heard in the district court at Steele, North Dakota, on the 16th day of July, 1917, both parties appearing in person or by their attorney, and the action having been called for trial, the defendant moved that all proceedings had in the justice court be reversed and set aside and the action be dismissed for want of jurisdiction of the justice of the peace, or this court (meaning the district court) over the subject-matter of the action, which motion was granted and an order by the district court, Honorable Judge Nuessle, made, dismissing, setting aside, and reversing all proceedings had in the justice court. The judgment was entered by the district court in harmony with the order, on the 19th day of July, 1917, also awarding the defendant costs for $37. On the 30th day of October, plaintiff procured a writ of attachment from the justice court; the same was served upon the Farmers' & Merchants' Bank of Robinson, North Dakota, in which the defendant had deposited certain funds. On the 10th day of November, and after the entry of judgment, the plaintiff's attorney made an affidavit that unless an execution was issued before the expiration of ten days he would be in danger of losing his claim. The court thereupon issued such execution immediately. Plaintiff's attorney then made a

garnishment affidavit and served a garnishee summons upon the bank and also improperly served it upon the defendant. The garnishee summons was returnable November 18, 1916. On that day the garnishment proceedings, previously commenced, were dismissed. A new affidavit of garnishment and a new garnishee summons were issued on the 18th day of November, returnable November 25th, and were served upon the bank. On the 25th day of November, court opened at 12 o'clock noon, the time in which the garnishee summons was returnable, and, after waiting one hour and the garnishee, the Farmers' & Merchants' Bank, having made no appearance but made default, judgment was entered against the garnishee in favor of the plaintiff for $226.75. This garnishment proceeding was in aid of execution. The court ordered the garnishee, the bank, to pay to A. D. Brown, deputy sheriff, the sum of $150 and thereby be discharged from all liability as garnishee. Brown appeared before the court with said money and the same was paid over to the plaintiff by the court.

On the 16th day of November, 1916, the defendant, John Lang, executed the following instrument:

"In consideration of professional services to be rendered for money by John A. Jorgenson, attorney at law of Jamestown, North Dakota, I hereby assign, set over, and transfer to him all the money now belonging to me in the hands of the Farmers' & Merchants' Bank of Robinson, Kidder county, North Dakota, or due me from said bank or shall now be garnished in the hands of said bank in the case of Frank McHale, Plaintiff, v. John Lang, Defendant, and said bank, garnishee, brought before Bert Wagner, a justice of the peace, of Kidder county, North Dakota.

"Dated this 16th day of November, A. D. 1916.

"Witness: H. H. Chance. "Signed: John Lang."

At about noon, or a little after noon, on the 18th day of November, plaintiff in the instant case called by telephone the Farmers' & Merchants' Bank of Robinson, North Dakota, and conversed with the cashier, R. G. Meyers, and notified him of the assignment of the money that was on deposit at the bank. The plaintiff, in the instant case, brought suit against the Farmers' & Merchants' Bank to recover by virtue of his assignment of November 16th, 1916, the amount then on deposit to the credit of Lang in the bank, which money the bank paid over to Brown, the deputy sheriff, in the manner as above stated.

Plaintiff in the instant case has placed much stress upon the alleged lack of jurisdiction of the justice court in the case of McHale v. Lang. His objection is that the justice has no jurisdiction to try an action for damages sounding in tort. There is no merit in the contention and the justice court has jurisdiction to try all civil actions where the amount claimed is not in excess of $200. Section 112 of the Constitution of the state of North Dakota, contains the following language:

"The justices of the peace herein provided for shall have concurrent jurisdiction with the district court in all civil actions when the amount in controversy, exclusive of costs, does not exceed two hundred dollars."

Our statute on the subject, Comp. Laws 1913, § 9006, is in harmony with this provision of the Constitution. There can be no doubt, so far as the character of the action is concerned, that the justice court has jurisdiction to try and determine an action for damage even though such actions sound in tort where the amount demanded or in controversy does not exceed $200. The plaintiff, in this case, presents the further point that the summons having named the sum of $200 with interest, the amount claimed is more than $200. He supports this point with the theory that the jury in trying a tort action could or could not allow interest from the time of the injury or the commission of the tort complained of. We do not think it is necessary in this case to enter into a lengthy discussion of that principle. We do not believe it is involved in this case. The amount stated in the summons was $200. It was an ordinary printed summons with the words "With interest" printed thereon. The amount for which recovery is sought is $200 and that is written in both in words and figures. With these facts plainly evident from the summons itself, it is clear the intention was to charge interest from the date of the summons. The amount in controversy is the amount stated in the summons. Fair construction of the summons in this action discloses that there is $200 in controversy, and the interest is held to be claimed from the date of the summons, that is, October 30th, 1916. As we view this case, the defendant can have no relief by reason of the attachment. To all intents and purposes, it appears to us the attachment was abandoned, and reliance had entirely upon the garnishment in aid of execution. The money was turned over in pursuance of the garnishment, and not the attachment nor execution. The justice's docket and the execution so discloses.

If the defendant, in this case, could not successfully defend by reason of the garnishment proceedings, the judgment should have been against him.

From the 18th day of November, 1916, until the 29th day of November, the defendant, at all times, knew that Jorgenson was claiming the money of Lang on deposit in the defendant's bank, and knew that he had an assignment thereof, for Jorgenson had so informed him at about noon on the 18th. Having this knowledge, the defendant failed and neglected to appear on the return day, the 25th day of November, nor did he file any answer nor affidavit, as he might have done, stating that the money was claimed by Jorgenson. Instead, he permitted the plaintiff in the former action to take judgment against him as garnishee, and he afterwards paid the amount of money over, which was in the bank, to wit, $150, thus wholly ignoring Jorgenson's claim to the money. This he could not do. As we view it, he, having absolute knowledge that Jorgenson was claiming the money in the bank, should have filed his affidavit, either before or not later than the return day fixed in the garnishee summons, setting out the fact that Jorgenson claimed the money which was garnished. The court could then have ordered Jorgenson impleaded, and the question as to who was entitled to the money could have then been fairly determined by the court. The garnishee, upon Jorgenson being impleaded and after decision of the matter by the court, could have paid his money into court and thus been relieved of further liability. The law provides a plain and adequate method by which the garnishee, the defendant here, could have fully protected himself against the possibility of repayment or a second payment of the amount garnished in his hands or under his control, where it appears the same is claimed by other parties than those by whom the garnishment proceedings are being maintained. If the garnishee fails to take advantage of these provisions of law which are for his protection and benefit and pays the money, etc., to the wrong party, or pays it into court for the wrong party, and makes no disclosure of his knowledge of a claim to it by another party, he is in no position to and should not be heard to complain if he is compelled to repay the money to one who has shown a superior right to it, and who has shown himself lawfully entitled to the same.

Under § 7889, Compiled Laws 1913, is set forth the facts, some of

which must exist upon which the authority to take and use a deposition is predicated. Among other facts which are required to exist before the authority to take a deposition exists, are: First, that the witness does not reside in the county where the action or proceeding is pending or is sent for trial on change of venue, or is absent therefrom; second, when from age, infirmity, or imprisonment, the witness is unable to attend court, etc. It would appear that a deposition could not be used even if taken, if, at the time of the trial, the witness was present in court. Under § 7904, Compiled Laws 1913, when a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that for some cause specified in § 7889, the attendance of the witness cannot be procured. It clearly appearing in this case before the close of the trial that the witness was present in court, he should have been called if it were desired to have his testimony or to use him as a witness, and this not having been done, the deposition should have been, for this reason, suppressed.

Exhibit B was by motion of defendant's attorney asked to be made part of the deposition. Exhibit B, plaintiff's assignment of the money in the bank, became lost with the original deposition. A copy was offered and received in evidence by the plaintiff. It is evidence in the case independent of the deposition, and it clearly appears from all the testimony that plaintiff did have an assignment dated the 16th day of November, 1916, of the money in the bank belonging to Lang. If, however, the deposition had been admitted and should not be suppressed, it clearly shows that the assignment was made to plaintiff, and that he was a proper party to bring suit thereon; that the same had been assigned to him for fees. The majority of the court, but not all of the members thereof, is of the opinion that the evidence in the case shows that the claim was assigned to Jorgenson as collateral security for his claim, and that he is required to turn over to his assignor all moneys in excess of the fees and disbursements coming to Jorgenson. And they are therefore of the opinion that Jorgenson's recovery in this case should be limited to the amount which is coming to him.

Judgment appealed from is reversed and a new trial ordered. Plaintiff is entitled to statutory costs on appeal.

CHRISTIANSON, Ch. J., and BIRDZELL and ROBINSON, JJ., concur.

BRONSON, J., concurs in the result.

HENRY MUNSTER, Respondent, v. W. E. STODDARD, Appellant.

(170 N. W. 871.)

Contracts — price of work — admissibility of evidence.

1. Where, in an action on an express parol contract to perform certain threshing at an agreed price, there is a conflict between the parties as to which of two figures was the agreed price, evidence of the reasonable value of the work is admissible as bearing upon the probability of the one or the other being correct.

Trial — instructions.

2. The court's instructions to the jury should be considered and construed as a whole.

Appeal and error — harmless error — instructions.

3. Mere verbal inaccuracies or technical defects in instructions, which are not likely to have misled the jury to appellant's prejudice, constitute no ground for reversal.

Appeal and error — ruling of motion for new trial — sufficiency of evidence — review.

4. Where there is any substantial evidence to support a verdict, the granting or denying of a new trial on the ground of insufficiency of the evidence rests in the sound, judicial discretion of the trial court, and its ruling will not be disturbed unless an abuse of such discretion is clearly shown.

Opinion filed January 7, 1919.

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

Defendant appeals from the judgment and an order denying a new trial.

Affirmed

M. S. Odle, for appellant.

Parties are, or should be, bound by their agreement, and therefore there is no ground for implying a promise when there is an express contract. Shaw v. Armstrong (Mich.) 50 N. W. 248.

It is error for the jurors to act upon their personal knowledge of any particular transaction involved in a case for their consideration. Douglas v. Ange (Iowa) 99 N. W. 550; Hydinger v. C. B. & Q. Co. (Iowa) 101 N. W. 746; Chicago, B. & Q. R. Co. v. Krayenbuhl, 59 L.R.A. 920, 91 N. W. 880; Sloss-Sheffield Steel Co. v. Hutchinson, 40 So. 114.

Jacobsen & Murray, for respondent.

Error in admission of evidence offered by one party is cured where

practically the same evidence is introduced by the adverse party. Mahler v. Beishline (Colo.) 105 Pac. 874; 38 Cyc. 1423, 1432; Nagle v. Fulmer (Iowa) 67 N. W. 368; Taylor v. Austin (Minn.) 20 N. W. 157; Missouri, O. & G. Ry. Co. v. Miller (Okla.) 145 Pac. 368; Williams v. Towl (Mich.) 31 N. W. 835.

CHRISTIANSON, Ch. J. Plaintiff brought this action to recover $224.62, which he alleges is the balance due him for threshing defendant's grain in the fall of 1915. The complaint alleges that the threshing was performed under an agreement, under the terms of which the plaintiff agreed to perform such threshing at the following prices: "Wheat, 11 cents per bushel; oats, 6 cents per bushel; flax, 24 cents per bushel; and a certain portion of wheat at 9 cents per bushel, and a certain portion of wheat at 6 cents per bushel." The complaint further sets forth the number of bushels of the different kinds of grain. According to such averments the total amount due for such threshing, at the prices stated in the complaint, was $1,124.62. The complaint further alleges that defendant has paid only $900, leaving a balance of $224.62, still due and owing to the plaintiff.

The defendant in his answer denies the terms of the contract, and alleges that the plaintiff agreed to thresh the grain in question at the following prices, viz.: A certain portion of wheat at 10 cents per bushel, another portion at 8 cents per bushel, and still another portion at 6 cents per bushel; flax at 20 cents per bushel, and oats at 6 cents per bushel. The defendant also denies that plaintiff threshed the number of bushels of wheat and flax alleged in the complaint, and avers that the $900, which he paid to the plaintiff not only paid off and discharged the thresh bill, but actually overpaid the bill in the sum of $56.67, for which amount defendant asks judgment as upon a counterclaim. The defendant also counterclaims in the sum of $14, for certain potatoes and coal, which he claims to have furnished to, and certain services which he claims to have rendered for, the plaintiff. The cause was submitted to the jury which returned a verdict in favor of the plaintiff for the amount claimed in his complaint, less $14, the amount of defendant's second counterclaim. Judgment was entered pursuant to the verdict, and defendant appeals from the judgment and from the order denying his motion for a new trial.

The evidence shows that the plaintiff and defendant had two different conversations with respect to the threshing. The first conversation took place on defendant's farm; the second took place in Mott. Defendant testified that the agreement between them was made at the first conversation and that during this conversation the plaintiff agreed to thresh defendant's grain at the prices set forth in the answer. The plaintiff, however, positively denied that any agreement was made during the first conversation; and he testified that the agreement was actually made during the second conversation; and that plaintiff then agreed to thresh defendant's grain at the prices mentioned in the complaint. The defendant produced one witness who claimed that he was present at and heard the first conversation and his testimony tended to corroborate defendant's testimony as to what was said during that conversation. After the plaintiff had testified as to the prices agreed upon, he was permitted, over objection, to testify that the prices named were reasonable prices for threshing such grain. Defendant assails this ruling as erroneous. He contends that inasmuch as both parties were claiming under an express contract, it was error to admit testimony bearing upon the reasonable value of the services. It is true there can ordinarily be no recovery upon an implied contract in a suit based upon an express contract; but the plaintiff in this case did not seek to recover upon an implied contract, and his testimony as to value clearly was not offered for that purpose. While in a suit upon an express contract there can be no recovery as upon an implied contract, it does not necessarily follow that all evidence relating to the reasonable value of the services, or the property involved in such contract, is inadmissible. It is true such testimony may not be admitted for the purpose of proving a contract different from that alleged in the complaint, but such evidence is generally deemed to be admissible "for the purpose of showing the likelihood of whether a contract was entered into, or to establish what the price actually fixed on was." 13 C. J. 774. And although there is some conflict, the great weight of judicial authority sustains the rule that where the parties to an express contract for services are in dispute as to the compensation fixed by the contract, evidence of the value of the services is admissible as bearing upon the probabilities of the case. That is, such evidence is admissible for the reason that it affords some reasonable aid to the

jury in determining which of the conflicting statements is more likely to be true. See Edelen v. Herman, L.R.A.1915C, 1208, and authorities collated in the note appended to this opinion.

It may also be mentioned that in the case at bar the defendant and his witnesses were permitted to testify without objection as to the prices charged by others for threshing similar grain in that vicinity in the fall of 1915.

The court instructed the jury: "Now, after you determine what the contract was between these parties, if any,—*Now, if there is no contract then the reasonable value, and under this complaint here both sides allege a contract.* The plaintiff alleges the contract was six, eleven and twenty-four and the defendant alleges that the contract was six, ten and twenty. Then it will be necessary for you, gentlemen of the jury, to determine what was the contract between these parties."

The defendant predicates error upon that portion of the foregoing instruction, which we have italicized. It will be noted that the instruction complained of is merely a portion of an instruction. In considering the correctness of instructions, the charge should be considered and construed as a whole. McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261, Ann. Cas. 1917E, 141; Soules v. Northern P. R. Co. 34 N. D. 7, L.R.A.1917A, 501, 157 N. W. 823. It appears that the court at the outset instructed the jury that the first question to determine was the matter of the contract. Shortly before the instruction complained of was given, the jury was instructed: "If the plaintiff entered into a contract with the defendant to thresh for a certain price why he is bound by such agreement, and he is compelled to thresh for the price agreed upon, *irrespective of other considerations.*" The instructions in this case were oral. It is not at all improbable that when the court used the words, "Now, if there is no contract, then the reasonable value," that he was about to instruct upon the right to recover as upon an implied contract. But when he got that far he apparently recalled that the suit was one upon express contract; that both parties claimed there was an express contract. He thereupon proceeded to state that "here both sides allege a contract," and then recited the contentions of the parties as to the terms of the contract, and concluded by saying, "It will be necessary for you,

gentlemen of the jury, to *determine what was the contract* between these parties."

Defendant also contends that the court, in effect, charged the jury that in deciding the case they might take into consideration their own personal knowledge of the particular transaction involved in this action. Again, defendant has singled out a portion of an instruction. We do not believe that the instruction, considered as a whole, is susceptible of, or that the jury could have attributed to it, the meaning contended for by appellant. The language complained of was contained in an instruction wherein the jury were told that they were "the sole and exclusive judges of the credibility of the witnesses, and the weight to be given to their testimony," and that they had a right to take their knowledge and information into consideration in weighing the evidence. We are not prepared to say that the instruction as given was entirely perfect; but we have no hesitancy in holding that, upon the record in this case, there is no showing that it was prejudicial. It has not been shown that a single juror had any personal knowledge of the particular transaction involved in this case. It must be assumed that they were qualified, and examined as to their qualifications before they were accepted and sworn as jurors. It will be apparent from the statement of the contentions of the respective parties heretofore made, that the principal issue in this case was one of veracity. If the plaintiff told the truth he was entitled to recover the prices which he claimed, and if the defendant told the truth plaintiff was not entitled to recover at all, but had in fact been overpaid. In view of this, it is inconceivable that the jury could have been misled, or the defendant prejudiced by the instruction complained of. It should be remembered that "courts of error do not sit to decide moot questions, but to redress real grievances." And "that no judgment will be reversed on account of the giving of erroneous instructions, unless it appear probable that the jury were misled by them." Thomp. Trials, § 2401.

Defendant also contends that the court should have granted his motion for a new trial on the ground that the verdict is contrary to the evidence. It is contended: (1) "That the evidence conclusively shows that the plaintiff agreed to thresh" defendant's grain at the prices testified to by the defendant; and, (2) "that the evidence conclusively shows that after the threshing was done the parties hereto

agreed to take elevator weights for the number of bushels of macaroni wheat instead of the machine weights, and the jury returned a verdict allowing the plaintiff the machine measures and weights."

The first contention has already been noticed. As already stated there was a square conflict between the parties as to the prices agreed upon. It was for the jury to say which one of them told the truth.

With respect to the second contention there is also a conflict in the evidence. Plaintiff says that when he presented his bill to defendant, and defendant complained of short weights, he (plaintiff) stated that if defendant would haul the grain at once he would accept the elevator weights for the macaroni wheat. It appears, however, that defendant did not haul the wheat until next winter and spring. In the meantime it was lying in bins covered with hay or straw. The defendant admitted that he hauled none of the grain himself, and that his testimony as to the amount of grain was based solely upon the information given him by the men who hauled the grain and the weight slips which they delivered to him. And for a considerable portion of the grain he was unable to state the gross elevator weights, but could state only the net weights,—*i. e.*, the weights after the deduction of the dockage. The man who operated the separator testified as to the number of bushels threshed, according to the machine weigher. He also testified as to the operation and testing of the weigher. The plaintiff testified that when defendant complained of short weights, he (plaintiff) voluntarily made a deduction of 500 bushels of wheat, and that this deduction is allowed in the complaint herein. The testimony of the plaintiff and the man who operated the separator, if true, showed that plaintiff had threshed not only the number of bushels he claimed in the complaint, but 500 bushels more.

The jurors who heard the testimony and saw the witnesses in this case by their verdict said they believed the plaintiff's version of the matters in dispute between the plaintiff and defendant. The trial judge, who also heard the testimony and saw the witnesses, as well as the jurors and attorneys, and was familiar with all the incidents of the trial, by his order denying a new trial said in effect that he was aware of no justifiable reason for granting a new trial. It is well settled that where there is any substantial evidence to support a verdict, the granting or denial of a new trial on the ground of insuffi-

ciency of the evidence rests in the sound judicial discretion of the trial court, and the ruling will not be disturbed unless a clear abuse of discretion is shown. Hayne, New Tr. & App. § 97; Malmstad v. McHenry Teleph. Co. 29 N. D. 21, 149 N. W. 690. This judicial discretion should be exercised in the interest of justice, and it is presumed to have been so exercised. In this case no abuse of discretion has been shown. The judgment and order appealed from must be affirmed. It is so ordered.

GEORGIA A. LIVINGSTON, Appellant, v. G. T. ERICKSON, Respondent.

(171 N. W. 832.)

Gifts — sale — evidence.

Under a judgment for household necessaries, the defendant caused a span of mares to be sold as the property of the plaintiff's husband. There is no merit in the claim of the plaintiff that she owns the mares under an oral gift from her husband.

Opinion filed March 15, 1919.

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

Affirmed.

W. H. Sibbald, for appellant.

"When the court directs a verdict for either party the evidence of the opposite party must be considered as undisputed, and it must be given the most favorable construction for him that it will properly bear, and he must have the benefit of all reasonable inferences arising from his testimony, and it is only when his testimony, thus considered, could not legally sustain a verdict in his favor that a court is warranted in directing a verdict against him." Pirie Vickery v. Burton, 6 N. D. 253; Warnken & Co. v. Langdon Merc. Co. 8 N. D. 243; Hall v. N. P. R. Co. 16 N. D. 62; Nystrom v. Lee, 16 N. D. 568; Richmire v. Gale Elevator Co. 11 N. D. 455.

"The party making such motion must base it upon a state of facts

that will warrant the court in granting it without trespassing upon the province of the jury to be the judges of all the facts of the case." Ætna Indemnity Co. v. Schroeder, 12 N. D. 120; Nelson v. Grondahl, 12 N. D. 130; Meehan v. Great Northern R. Co. 13 N. D. 441; Houghton Implement Co. v. Vavrosky, 15 N. D. 312.

"It is a presumption where there is nothing shown to the contrary that a conveyance by husband to wife is for her support and as a proper provision for her comfort." Kjolseth v. Kjolseth (S. D.) 129 N. W. 752; 21 Cyc. 1290, 1297.

Palda & Aaker, for respondent.

There can be no gift without an intention to give and a delivery, either actual or constructive of the thing given. There must be both a purpose to give and the execution of this purpose. Knight v. Tripp (Cal.) 54 Pac. 267.

A "gift *inter vivos*" is complete where there is an intention to give accompanied by a delivery of the thing and acceptance by the donee. §§ 5538, 5539, N. D. Comp. Laws 1913; Fouts v. Nance (Okla.) 155 Pac. 610, L.R.A.1916E, 283 and note; Reese v. Philadelphia Trust, S. D. & Ins. Co. (Pa.) 120 Am. St. Rep. 880, 67 Atl. 124.

In order to constitute a valid gift of personal property *inter vivos,* the delivery of the property must clearly appear, and the donee must lose all control over the same. Luther v. Hunter, 7 N. D. 544; 20 Cyc. 1223; Fouts v. Nance, L.R.A.1916E, 283; Veeder v. Veeder (Iowa) 168 N. W. 249; Farrow v. Farrow, 72 N. J. Eq. 421, 129 Am. St. Rep. 715; Davis v. Green (Cal.) 55 Pac. 9.

"Gift to take effect in future is merely promise to give and promise to give is no gift." Williams v. Tam (Cal.) 63 Pac. 133; Taylor v. Henry (Md.) 30 Am. Rep. 486.

Robinson, J. The plaintiff brings this action to recover from defendant $300 for the conversion of a team of mares which the sheriff sold to him under a judgment and execution against her husband and her son. In 1915 she lived and kept house part of the time in Sawyer, North Dakota, and part of the time on an adjacent farm which was run by her husband and son, James, Sr., and James, Jr. Defendant furnished groceries and dry goods for both houses to the

amount of $400. Then, in a suit to recover for the same, he obtained judgment against the father and son and levied on the horses in question and two other horses as the property of defendants, and caused the same to be sold by the sheriff for $526.80, and refunded to the defendants, $13.87.

The plaintiff claims the horses in question as a gift from James, Sr. Her daughter-in-law claims the other two horses as a gift from James, Jr. The jury gave the plaintiff a verdict for $350. The court gave judgment for defendant notwithstanding the verdict.

The question now presented is, Was there any evidence sufficient to sustain the verdict. Of course the plaintiff claims that the horses were given to her before the levy of the execution and were not given for any fraudulent purpose. She also claims that she worked and from her own earnings contributed about $28 toward the price of the horses. However, it appears that her husband bought and paid for the horses. He has ever kept possession of them and used them as his own and mortgaged them as his own. She has had no use of the horses and she never used them—never drove them at all. There is not the least evidence of a gift or a delivery to the plaintiff or any change of possession for even a moment.

There is positive evidence that the judgment was for household necessaries furnished the plaintiff and her husband; they were jointly liable for the debt, though she was not joined because no one supposed that she had any property. The appeal merits no consideration.

Affirmed.

CHRISTIANSON, Ch. J., and BRONSON and BIRDZELL, JJ., concur.

GRACE, J., concurs in the result.

W. J. BRUGMAN, Respondent, v. J. CHARLSON and Jalmer Jacobson, Appellants.

(4 A.L.R. 400, 171 N. W. 882.)

Deeds — validity — blank name of grantee.

1. A deed delivered with the name of the grantee therein blank, with no proper authorization shown to fill in the name of the grantee, is void in law on its face.

Specific performance — offer of performance by plaintiff — ability to convey title.

2. In an action for specific performance to enforce a contract for the sale of land by the vendor, where such vendor has tendered, or has offered to perform by the delivery of a deed delivered to him by his grantors with the name of the grantees therein blank, and where the vendor does not show an ability to furnish a title, or a conveyance directly from his grantors to the purchaser, or from himself to the purchaser, which is reasonably free from doubt, equity will not decree specific performance.

Specific performance — tender of title — fraud of creditors.

3. Where a vendor of a contract to convey real estate seeks to enforce specific performance thereof, and where it appears that the title to such vendor is evidenced by a deed delivered to him with the name of the grantee therein blank, so taken for the purpose of avoiding notoriety of his title, equity will not aid him in specifically enforcing his contract, where he seeks to furnish this deed as a title direct from his grantors to the purchaser, and to avoid thereby possible claims and demands of his judgment creditors.

Opinion filed March 18, 1919.

Action for specific performance.

From a decree entered therefor in District Court, Ward County, *Leighton*, J., defendants appeal.

Reversed, with instructions to enter judgment for defendants.

Halvor L. Halvorson, for appellants.

Greenleaf, Wooledge & Lesk, for respondent.

NOTE.—As to whether a deed blank as to the grantee, in the chain of title, is such a defect as will prevent specific performance of contract for the sale of real estate, see note in 4 A.L.R. 408, on specific performance of land contract where there is a deed blank as to grantee in chain of title.

On the question of execution of deed with the name of the grantee in blank, see note in 10 Am. Rep. 267.

BRONSON, J. This is an action for specific performance to enforce a contract for the sale of land. The facts substantially are these: On March 30, 1917, the defendants made with the plaintiff a written contract, which provided that the plaintiff agreed to sell, and the defendants agreed to buy, 160 acres of land in Mountrail county, for a consideration of $1,500, taxes and interest to be paid to date. At the time the contract was made, the title to the land stood of record in the names of C. H. Reynolds, C. H. Fiegenbaum, and Anne L. Keogh, in fee. At the same time there was outstanding of record, and in fact, a mortgage made by such fee owners for the sum of $1,400. The plaintiff claims to be the owner of the land. He received a warranty deed therefor from the grantors with the name of the grantee therein left blank. This deed he tendered to the defendants and he testified that he was willing to fill in the names of the defendants, as grantees therein. He further testified he had a written privilege to fill in such blank from C. H. Reynolds, but this written privilege was not introduced in evidence. He did not tender to the defendants any deed from himself as vendor; he had no deed from such grantors excepting the deed in blank. He testified that his mother was holding, and had been holding, for some two months, this blank deed, as well as the $1,400 mortgage, and the satisfaction thereof, as collateral security for moneys his mother had advanced to him. The defendants refused to perform, basing their objections largely upon an alleged oral understanding that the plaintiff would furnish the money to finance the transaction, or the means so to do; and that the plaintiff had not carried out his oral promise. It appears that there were some judgments against the plaintiff, the amounts of which are not shown. The plaintiff testified that the defendants did not want a deed through him, because of these judgments, and because, further, it would cloud the title. The answer of the defendants sets up two defenses: First, that the written contract in question did not contain all of the agreements made between the parties; and, second, that the plaintiff was not the owner of the property, and never tendered performance on his part. Upon trial, the district court, pursuant to findings made, rendered a decree of specific performance, requiring the defendants to pay $1,635 and costs, and upon refusal so to

do, to be subject to execution therefor. From this judgment the defendants appeal, and ask a trial *de novo* in this court.

Clearly, upon well settled principles of law, the plaintiff upon the record herein is not entitled to specific performance of the written contract.

Section 7220, Comp. Laws 1913, provides: "An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt."

In Easton v. Lockhart, 10 N. D. 186, 86 N. W. 697, this court said that it was well settled that a purchaser of land cannot be compelled to accept, or to pay the purchase price, in a case where the vendor's title is so clouded by claims and demands that the same is not a marketable title. See also Black Hills Nat. Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071.

It matters not whether the written contract in question, or the actions or attitude of the parties with reference thereto, be construed to mean that the title was to proceed from the original grantors named, or from the plaintiff. Under either construction the plaintiff shows neither a readiness nor even an ability in the record herein to convey a marketable title or a title free from reasonable doubt. McVeety v. Harvey Mercantile Co. 24 N. D. 245, 139 N. W. 586, Ann. Cas. 1915B, 1028; Brugger v. Cartier, 29 N. D. 575, 151 N. W. 34.

On its face, the deed delivered to the plaintiff with the name of the grantee therein blank, with no proper authorization shown to fill in the name of the grantee, was void and conveyed no title. Henniges v. Paschke, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350; Ballou v. Carter, 30 S. D. 11, 137 N. W. 603; Lund v. Thackery, 18 S. D. 113, 99 N. W. 856; Clark v. Butts, 73 Minn. 361, 76 N. W. 199; Tiffany, Real Prop. vol. 2, page 867.

The delivery of this deed, so in blank, or even with the names of the defendants therein inserted without proper authorization shown from the original grantors, would still remain, on its face, void, and would convey no title. Burns v. Lynde, 6 Allen, 305; Dal v. Fischer, 20 S. D. 426, 107 N. W. 534; Ingram v. Little, 14 Ga. 173, 58 Am. Dec. 549.

Furthermore, § 5499, Comp. Laws 1913, provides that the redelivering of a deed to the grantor or the canceling of the same does not

operate to transfer the title. This statute was given effect in Russell v. Meyer, 7 N. D. 340, 47 L.R.A. 637, 75 N. W. 362, by the recognition of the well-known principle of real property law that the redelivery of a deed or its cancelation by the grantee, and the issue of a new deed from the original grantor to another and subsequent grantee, does not serve to devest the title of the former grantee. What might be the rights of the parties in equity in such cases, upon principles of equitable estoppel, is another matter. Matheson v. Matheson, 139 Iowa, 511, 18 L.R.A.(N.S.) 1167, 117 N. W. 755. See note in 18 L.R.A.(N.S.) 1170; McCleery v. Wakefield, 76 Iowa, 529, 2 L.R.A. 529, 41 N. W. 210; Garland v. Wells, 15 Neb. 298, 18 N. W. 132.

The defendants are entitled to receive a title fair and legal on its face. It is clear from the record that the plaintiff has shown no ability to furnish such title from the original grantor. He has not even shown that the original grantors are willing to issue a new deed direct to the defendants. Through himself, the plaintiff cannot upon the record furnish a proper title as required. Clearly he has no legal title. Even though he did, he can furnish the same only subject to the claims and demands of judgment creditors.

Furthermore, the plaintiff's claims do not appeal to the conscience of the court. He seeks in a court of equity to gain the advantage of a business transaction which ordinarily and in course of law should be subject to the claims of judgment creditors, and to have the court protect him, as well as the defendants, against their demands, and forsooth without their knowledge of his property rights in the premises. The law demands notoriety of his title. He has sought to have it secret and hidden. Equity will not aid him in these purposes.

The judgment of the trial court is reversed with instructions to enter judgment for the defendants with costs in both courts.

ROBINSON and GRACE, JJ., concur.

BIRDZELL, J. I concur in the result and in the reasons assigned therefor, but I see no occasion for any discussion relative to the proper authorization to fill the blanks in a deed. What would constitute a proper authorization is, of course, not involved in this case, and what is said on that subject is obviously a mere dictum.

BRONSON, J. (addendum) In the opinion of the court herein the following principle of law is stated: "On its face, the deed delivered to the plaintiff with the name of the grantee therein blank with no proper authorization shown to fill in the name of the grantee was void and conveyed no title."

Justice Christianson, in his concurring opinion, attempts to dissent concerning this principle and contends that such principle is not necessarily involved in this case.

In order that there may be no misunderstanding upon a possible petition for a rehearing, further views are herewith expressed in this addendum opinion to show that this principle is involved, and that this principle of law so announced is well settled, not only in this state, but by the overwhelming weight of authority, and that the same is fundamental in real property law.

Justice Christianson attacks the principle stated, and then begs the question by admitting the principle stated. He states that no one will contend that a deed without a grantee is a complete valid deed. Thereupon he proceeds to quote authorities concerning when a deed with the name of the grantee therein blank may become valid pursuant to an implied, oral, or written authority given to fill in the name of a grantee. In other words, he is attempting to assume that the principle as stated in the opinion is that a deed delivered to the plaintiff with the name of the grantee therein blank is void and conveyed no title. This is not the principle stated or asserted. His improper assumption is apparent. He does not contend, nor are any of his authorities quoted in point to demonstrate, that a deed delivered to a grantee with the name of such grantee therein blank, *with no proper authorization to fill in the name of any grantee,* is a valid deed on its face.

In Drury v. Foster, 2 Wall. 24, 17 L. ed. 780, a blank in a mortgage deed by the wife was filled in by the husband, before delivery, held that parol authority was sufficient.

In White v. Vermont & M. R. Co. 21 How. 578, 16 L. ed. 223, the subject-matter was negotiable bonds delivered in blank.

In Threadgill v. Butler, 60 Tex. 599, parol authority was shown to fill in the name of the grantee or that of any other name in a deed delivered with the name of the grantee therein blank. In that case the deed, the subject-matter of the suit, had therein named a grantee.

In Board of Education v. Hughes, 118 Minn. 404, 41 L.R.A. (N.S.) 637, 136 N. W. 1095, the court quoted the well-settled rule that a deed that does not name a grantee is a nullity and wholly inoperative as a conveyance until the name of the grantee is inserted, citing, Allen v. Allen, 48 Minn. 462, 51 N. W. 473; Clark v. Buttz, 73 Minn. 361, 76 N. W. 199; Casserly v. Morrow, 101 Minn. 16, 111 N. W. 654. In that case the deed was delivered to Hughes with the name of the grantee therein blank. Thereafter Hughes filled in his own name as grantee. It was held that implied authority could be shown under the circumstances. It will be noticed in that case that the deed involved did in fact, have a grantee when presented to the court for consideration. In the same state, in Casserly v. Morrow, 101 Minn. 16, 111 N. W. 654, it was held that where the assignment of a mortgage was executed with the name of the assignee blank, and thereafter someone, not the mortgagee, but unknown to the plaintiff, the mortgagor, and the mortgagee, inserted the name of the defendant, Morrow, in the paper and filed it for record, no authority being shown so to do from the mortgagee, the instrument was a blank and a nullity.

In Fennimore v. Ingham, — Tex. Civ. App. —, 181 S. W. 51, it was held that where a deed was given with the name of the grantee therein blank, with the understanding that the purchaser could insert the name of the purchaser from him, this constituted a power coupled with an interest, which passed impliedly to the subsequent purchaser, and that when the name of the subsequent purchaser was inserted as grantee, the whole title passed to him, devesting all equitable interest of the previous vendors of the land. This holding is peculiarly to be noticed in connection with our specific statutory provisions, § 5499, Comp. Laws 1913, prescribing against the redelivery of a deed. Upon similar principles is the holding in Schleicher v. Runge, — Tex. Civ. App. —, 37 S. W. 982.

In South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535, the subject-matter involved was a bond and it was held that when authority is given to a person to fill up blanks, and thus perfect the instrument, its validity cannot be controverted.

In Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. 262, it was held that a blank in a deed left for a grantee's name may be filled by an agent under authority given by parol by the maker of such deed.

In Lamar v. Simpson, 18 S. C. Eq. (1 Rich.) 71, 42 Am. Dec. 345, where a title was taken for the benefit of the state in the name of a solicitor, and the legislature authorized him to convey to Henry Shultz, or to such person as he shall direct for his own use and benefit, and deeds were executed with the names of the grantees therein blank, it was held that authority was shown to fill in the name of a grantee therein.

In Seifert v. Lanz, 29 N. D. 139, 150 N. W. 568, the simple proposition involved is that where a wife executed a deed with some of the minor details of a description of a particular piece of land not supplied, and the husband filled the same in, the deed is not thereby invalidated. In Hall v. Kary, 133 Iowa, 465, 119 Am. St. Rep. 639, 110 N. W. 930, the principle is announced in the case as stated by Justice Christianson for the state of Iowa, but it will be noticed that in that case, as well as in the other cases, the deed in each instance involved was an instrument where the name of the grantee in fact had been filled in or inserted.

It is not necessary in this case to decide the questions upon the promise, improperly assumed by Justice Christianson, when an authority to fill in the name of a grantee is sufficient to make a deed valid; whether it must be in writing; whether, if resting in parol, it must be before delivery; or whether it may be after delivery; whether it may under certain circumstances be implied; or under what circumstances an equitable estoppel arises upon the grantor. These questions are not involved in the principle as stated, and it is perfectly so apparent upon a plain reading of the principle as stated.

The principle as stated is involved in this case, and directly so. The plaintiff claims to be the owner of the premises. His only monument of title is a deed delivered to him with no designated grantee therein; the deed still so remains. The record discloses no authority to him from the grantors to designate therein a grantee, either himself or someone else. This is an action for specific performance. What his equitable rights are in the premises, the defendants are not compelled to know or to assume. Surely, on its face this deed did not convey title to the plaintiff, until, at least his name as grantee is therein designated. Either the legal title is in the grantors of such deed, or it is in the plaintiff. If it is in the grantors, then title from the grantors

to the defendants can be transferred only by a deed from such grantors to the defendants direct, or if, as Justice Christianson, contends, the blank deed is good for such purpose, by the delivery of such deed to such defendants with authority of some kind shown on the part of the plaintiff from such grantors to insert their names as grantees. The record does not show that the plaintiff is either ready or able or has any authority to give either of such requisite deeds:

Furthermore, if the title, either in law or in equity, is in the plaintiff, then such deed from the grantors to the defendants will not transfer plaintiff's title. Our statute, § 5499, Comp. Laws 1913, affirms this principle: If the redelivery of this deed to the grantors would not serve to revest such grantors with title, either legal or equitable, under the plain words of the statute, it is difficult to see how the redelivery of such deed by plaintiff to the defendants, would serve to revest plaintiff's title from himself to the defendants.

Furthermore, the principle announced is *stare decisis,* and well settled in this state. Justice Christianson's contention serves to either overrule or throw doubt upon this principle as heretofore announced in this state.

In Henniges v. Paschke, 9 N. D. 489, 495, 81 Am. St. Rep. 588, 84 N. W. 350, *it was contended that a deed delivered to one Walker was void because no grantee was named therein.* An action was brought to foreclose a real estate mortgage. The plaintiff was possessed of a mortgage prior in time to the date of defendant's deed. The notes securing the same were transferred to him before maturity. No written assignment was made of the mortgage. The plaintiff sought to have the title of the defendant subjected to the lien of the mortgage. The defendant relied upon the record title. He received a deed from one Walker who was the mortgagee in such mortgage. He also received a satisfaction of the such mortgage from such mortgagee. The plaintiff contended that the deed in the chain of title from Walker to the defendant was void. The deed in question so far as material read: "Know all men by these presents that I. F. T. Walker and Maggie J. Walker, his wife, of Sioux county and state of Iowa, in consideration of the sum of $1,000 in hand paid by John P. Walker, of Walsh county, North Dakota, do hereby quitclaim unto

the said———all right, title, and interest in and to the following described premises, etc."

This court said: "The objection to this instrument is that it does not designate a grantee. If this is true, it is without validity and effect, for it is an undoubted rule of law that a deed of real estate, to be effective as a conveyance, must designate a grantee; otherwise no title passes. The designation of a grantee is just as necessary to the validity of the grant as a designation of the grantor and the description of the property. 9 Am. & Eng. Enc. L. 132, states the rule as follows: 'The deed must designate the grantee; otherwise it is a nullity and passes no title. If not named, the grantee should be so described as to be capable of being ascertained with reasonable certainty; and, if named, the name should be sufficient to identify the person intended, though it need not, as a matter of law, be accurate in every respect.'"

Concerning this contention and objection, this court held in that case that the deed in question did designate a grantee; that it designated John P. Walker by name as grantee with entire certainty, and was therefore a valid instrument. It is therefore readily apparent that this court has directly passed upon the principle stated.

The deed before this court herein is a deed with the name of the grantee therein blank. It is wholly beside the point to argue what might be the effect if a grantee therein had been inserted. The precise fact is that the deed has been and is still a deed with a blank grantee; and no authority has been shown in the record to fill in or write therein any grantee.

Furthermore, it will be well to see where the logic of Justice Christianson's argument would lead upon fundamental principles of real property law, concerning delivery, recordation, and the Statute of Frauds.

Is it the policy of the law, outside of equitable considerations between the parties, to promote the secret and covert conveyancing of real property, with the consequent uncertainty of titles resulting, or is the proper policy to promote a notoriety of title for the security of the parties as well as the public?

It requires merely a casual observation of the history of real property law to understand and appreciate that, to prevent fraud, imposition, insecurity in titles, the policy of the law both English and Amer-

ican, for a period extending over nine centuries of time, has been to require a notoriety of title. At first it was evidenced by the old feoffment with the requirement of a "livery in seisin." Then following the obviating attempts through uses and trusts by means of the bargain and sale conveyance and covenants to stand seized to uses, whereby the frauds imposed upon the public and the insecurities of title became notorious. To remedy which there followed the celebrated Statute of Uses, the State of Enrolment and the Statute of Frauds. Our modern warranty deed is a combination of the old common-law feoffment and the bargain and sale conveyance. The old common-law requirement of a "livery of seisin" is symbolized in the modern deed by the necessity of a delivery of the deed to pass title, all of which was persistently intended to require a notoriety of the vesting of title. Our statutes have directly affirmed these principles and this policy of real property law.

A deed of the freehold must be in writing. Comp. Laws 1913, § 5511. A deed must be delivered in order to pass title. Comp. Laws 1913, § 5495. An express trust relation in real property cannot be created by parol. Comp. Laws 1913, § 5364; Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088. Every disposition of real property must be made directly to the person in whom the right to the possession and profits is intended to be vested. Comp. Laws 1913, § 5362. Every person who by virtue of any transfer is entitled to the actual possession of the realty and the receipts of the rents and profits is deemed to have a legal estate therein. Comp. Laws 1913, § 5360. Deeds are required to be recorded to be valid as against subsequent purchasers in good faith, etc. Comp. Laws 1913, § 5594. There can be no question that the policy of the law of this state is to require a notoriety of title. If the principles for which Justice Christianson at least indirectly contends, should obtain, it would be possible for A to receive the delivery of a deed with the grantee's name therein blank. In a day or a month thereafter, A might sell the property to B, and transfer the title to B by turning over this blank deed. B thereafter might again dispose of the property and transmute a pretended title thereto by simply delivering this blank deed to C. Thereafter C might again transfer the property and finally insert thereafter the name of D, the final purchaser who had full notice of the whole transaction. All

during this time the title of A and of B and of C, whatever it may be in law or equity, is covert and secret. Such persons would remain, as far as the records show, in at least a position of security as against claims of creditors or other legal demands. Furthermore, under this theory, if the logic is sound, A might, after he received his deed, insert his name as grantee and the next day change his mind, erase his name and insert the name of B. If he could insert his own name without authority there is no reason why, upon the same grounds of logic and reason, he should not be permitted to erase his own name as grantee and insert thereafter some other name that might suit the exigencies of the situation. We know of no better way of trying to promote a destruction of the fundamental landmarks of real property long established to promote a notoriety of title.

CHRISTIANSON, Ch. J. (concurring specially). I concur in the result reached in the opinion prepared by Mr. Justice Bronson, but am not prepared to hold that Brugman is without authority to insert the name of the proper grantee in the blank space provided for that purpose in the deed which he received from the owners of the land. Of course no one will contend that a deed without a grantee is a valid deed. But it does not follow that a person who negotiates for the purchase of land pays the consideration agreed upon, and receives from the owner a deed complete and fully executed, save that the name of the grantee is left blank, is without authority to insert the name of the proper grantee therein. Unquestionably the authorities are in conflict. Some of the courts—including that of our sister state South Dakota—have held, not only that a deed wherein the name of the grantee is left blank is void, but that the blank left for that purpose in the deed cannot be filled in, except by an agent authorized in writing to do so. Lund v. Thackery, 18 S. D. 113, 99 N. W. 851. This rule does not, however, seem to have the support of the weight of prevailing current authority. The Supreme Court of the United States said: "Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient." Drury v. Foster, 2 Wall. 24, 17 L. ed. 780. The opinion in White v. Vermont & M. R. Co. 21 How. 578, 16 L. ed. 223, is to the same effect.

Mr. Dembitz (Dembitz, Land Titles, 242), believes the old "doctrine not now recognized in most of the states, but is generally exploded as too technical to fit into modern American law." Judge Redfield condemned the old rule, saying it was technical, rather than substantial, and that the prevailing current of American authority and the practical instincts and business experience of our people are undoubtedly otherwise. 1 Redfield, Railways, 124. See also Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. 262; Lamar v. Simpson, 18 S. C. Eq. (1 Rich.) 71, 42 Am. Dec. 345; South Berwick v. Huntress, 53 Me. 90, 87 Am. Dec. 535; Seifert v. Lanz, 29 N. D. 139, 150 N. W. 568. In Texas it has been held that the authority to fill in the name of the grantee in the blank provided for that purpose is "a power coupled with an interest," vested by the vendor in the purchaser for the latter's benefit, and therefore irrevocable, which passes to successive purchasers. Fennimore v. Ingham, — Tex. Civ. App. —, 181 S. W. 513. See also Threadgill v. Butler, 60 Tex. 599; Schleicher v. Runge, — Tex. Civ. App. —, 37 S. W. 982.

Of course, in those jurisdictions in which it has been held that written authority is necessary, the question of implied authority cannot arise; but in those jurisdictions in which parol authority is held to be sufficient, the question has frequently arisen as to whether, in absence of specific parol instructions, an implied authority is conferred upon the person to whom the instrument is delivered to fill in the blank. In Hall v. Kary, 133 Iowa, 465, 119 Am. St. Rep. 639, 110 N. W. 930, the supreme court of Iowa announced as the settled law of that state that a deed in which the name of the grantee is left blank, but otherwise fully executed, vests title in the person whose name is subsequently inserted therein by the one to whom it is delivered. The supreme court of Minnesota, in Board of Education v. Hughes, 118 Minn. 404, 41 L.R.A.(N.S.) 637, 136 N. W. 1095, held that where a grantor receives and retains the consideration and delivers to the purchaser a deed, complete and fully executed save that a blank space for the name of the grantee is not filled out, the purchaser has implied authority to fill the blank. The same rule prevails in Nebraska. See Montgomery v. Dresher, 90 Neb. 632, 38 L.R.A.(N.S.) 423, 134 N. W. 251.

I have not entered into the foregoing discussion to obtain a deter-

mination of what constitutes a "proper authorization" to insert the name of the grantee in a deed (complete and fully executed save that the name of the grantee is left blank), but to show the importance of, and the divergent views upon, this proposition. In my opinion the question is not necessarily involved, nor should it be determined, in this case. The question, however, is one of importance. It has never been determined by this court. And in my opinion it should be determined only when it becomes necessary to do so, and after full argument and consideration.

I concur in all of the remainder of the opinion prepared by Mr. Justice Bronson, and for the reasons there advanced I am of the opinion that the plaintiff is not entitled to have specific performance enforced against the defendants, even though he has implied authority to insert either his own name or the name of the defendants as grantee in the deed which he received from the record owners of the land.

STATE EX REL. W. E. BYERLEY and Theodore G. Nelson, Petitioners v. THE STATE BOARD OF CANVASSERS, Thomas Hall, Secretary of State, William Langer, Attorney General, John Steen, State Treasurer, Carl H. Kositzky, State Auditor, and N. C. Macdonald, Superintendent of Public Instruction, Respondents.

(172 N. W. 80.)

States — suit in name of state — rights of taxpayers and electors.

1. Where an application is made for the prerogative writ of this court upon the relation of private individuals as taxpayers and electors, without first securing the consent of the attorney general or his refusal to maintain the action in behalf of the state, and its interests, and where the matter concerns only the state, its sovereignty, its franchises, or prerogatives, or the liberties of its people, no right of the relators or of any citizen of the state being immediately threatened with invasion or abrogation, this court will refuse to take jurisdiction.

Constitutional law — legislative power — initiative amendment of Constitution.

2. A proceeding for the amendment of the Constitution initiated by the

people, in the exercise of their sovereign power under the provisions of the initiative and referendum (article 16) is the exercise of a political power, legislative in its character, and the agencies and instrumentalities designated for securing the expression of the sovereign will exercise a political function.

Constitutional law — initiative constitutional amendment — canvass.

3. The State Board of Canvassers in determining and certifying to the vote of the people given upon a proposed amendment to the Constitution initiated by the people under the provisions of the initiative and referendum (article 16) exercises a political function legislative in its character.

Constitutional law — initiative constitutional amendment — canvass of returns — political power.

4. Where the State Board of Canvassers have not refused to canvass the returns upon an initiated proposed amendment to the Constitution, and where it is sought to exercise the judicial power to compel such board to canvass such returns in a particular manner upon the ground that their action taken is unwarranted in law, this court has no jurisdiction to interfere, the action of such board being political in its character.

Courts — rules of decision — stare decisis.

5. Where the legislative expression and enactment and the judicial construction had concerning the meaning of a particular phrase, "a majority of all the legal votes cast," has been consistently followed and adopted in this state ever since statehood, and has been repeatedly followed by decisions of this court, thus establishing a rule of construction affecting personal and property rights, the rule of *stare decisis* obtains.

Elections — "vote" — "votes cast."

6. *Held*, following State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360, and other cases:

(a) That a "vote" is the registration in accordance with law of the preference or choice of an elector on a given subject.

(b) That "votes cast" are the totals of the separate votes or expressions of voters' preferences for or against a proposed amendment to the Constitution.

Constitutional law — initiative amendment — majority of all legal votes cast at general election.

7. *Held*, following State ex rel. McCue v. Blaisdell, supra, and other cases, that the phrase, "a majority of all the legal votes cast at such general election," contained in subdivision 2 of article 16 of the amendment to the Constitution, means a majority of the votes cast upon the particular amendment submitted to the electors.

Constitutional law — initiative amendment — certificate of state board of canvassers — correctness.

8. *Held*, further following State ex rel. McCue v. Blaisdell, supra, and other cases, that the determination and certificate of the State Board of Canvassers,

stating that the amendments initiated by the people and submitted to the electors at the last general election in November, 1918, were adopted by having received, each of them, an affirmative vote equal to a majority of the votes cast on each amendment respectively, was proper, and correct.

Opinion filed January 31, 1919.

Application for and original writ of certiorari.

Denied.

W. H. Stutsman, for relators.

"A majority of all the legal votes cast means a majority of all votes whether they voted for the amendments or not." Const. subd. 2, § 202; State v. Babcock (Neb.) 22 N. W. 372; State v. Anderson, 42 N. W. 421; Tecumseh Nat. Bank v. Saunders (Neb.) 71 N. W. 779.

It does not mean a majority of those voting on the question to be submitted, but a majority of all the legal voters of the county. People ex rel. Davenport v. Brown, 11 Ill. 479; People v. Wiant, 48 Ill. 263; Chestnutwood v. Hood, 68 Ill. 132; 15 Cyc. 390; State ex rel. v. Foraker, 46 Ohio St. 677, 6 L.R.A. 422, 23 N. E. 491; Re Denny, 156 Ind. 104, 51 L.R.A. 722, 59 N. E. 359; State v. Lancaster, 9 Neb. 474; State v. Swift, 69 Ind. 505; Enyart v. Trustees, 25 Ohio St. 618; State v. Bechel (Neb.) 34 N. W. 342.

William Langer, Attorney General, *Edw. B. Cos,* Assistant Attorney General, and *Albert E. Sheets, Jr.,* Assistant Attorney General, for respondents.

"If the meaning of such provision is clear and unambiguous, legislative construction thereof is entitled to no weight; but if the meaning is doubtful, a practical construction thereof by the legislature will be followed by the courts if it can be done without using violence to the fair meaning of the words used in order to sustain the constitutionality of a statute." 8 Cyc. 737; State v. Blaisdell, 18 N. D. 31.

"The general policy of the American people is to test the sufficiency of any vote by vote on a particular question; and not by a vote on some other question." State v. Langley, 5 N. D. 594.

"A majority of all votes cast means all the votes cast for or against that particular proposition." V. T. Loan & T. Co. v. Whitehead, 2 N. D. 82, 49 N. W. 318; State v. Moorhouse, 5 N. D. 406, 67 N. W. 140; Hanson v. Deering, 7 N. D. 288, 75 N. W. 249; Law-

rence Co. v. Mead Co. 6 S. D. 528, 62 N. W. 131; United States v. Sanders, 22 Wall. 492; Oakland v. County, 118 Cal. 160, 50 Pac. 227; State v. Smilie, 65 Kan. 240, 69 Pac. 199; Gillispie v. Palmer, 20 Wis. 544; State v. Barnes, 3 N. D. 319, 55 N. W. 883; State v. Langley, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958; State v. Porter, 11 N. D. 309, 91 N. W. 944; State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360.

When a constitutional provision is taken by one state from the Constitution of another, the interpretations which have been placed thereon are also taken with it. Jasper v. Hasen, 4 N. D. 1, 58 N. W. 454, 23 L.R.A. 58; Stafford v. Company, 2 N. D. 6, 48 N. W. 434; Peo v. Ritchie, 12 Utah, 193, 42 Pac. 209; White v. Chicago R. Co. 5 N. D. 308, 41 N. W. 730; Bank v. Gutterson, 15 S. D. 486, 90 N. W. 144; Cass Co. v. Imp. Co. 7 N. D. 528, 75 N. W. 755.

BIRDZELL, J.: Subdivision 2 of § 202 of the Constitution of North Dakota provides for amending the Constitution by the process known as the initiative. At the last general election certain amendments, for which petitions had been previously circulated, were referred to the electors of the state in accordance with the provisions of this section. At the election some of the amendments, though receiving a clear majority of all the votes cast for and against them, did not receive the affirmative votes of a majority of all the electors participating at the general election. The Board of Canvassers, acting under the authority of § 1025, Comp. Laws 1913, canvassed the votes cast and determined the result by certifying the number of votes cast for and against each amendment separately, and, by the majority of the board, by certifying that the amendments had been carried and adopted by the voters. The relators in this action apply for a writ of certiorari directed to the defendants, the Board of Canvassers, requiring the certification of the record to this court, to the end that we may review its action in making the determination above referred to, and, if the court should be so advised, vacate and annul the proceedings claimed to be in excess of the jurisdiction of the board. The petitioners, two in number, allege that they are citizens and taxpayers of the state, that they are beneficially interested in this proceeding and in the relief demanded. No facts are alleged, however, showing any in-

terest in them that is not common to every other citizen and taxpayer in the state. Upon the filing of the petition an order to show cause was issued, directing the defendants to show cause why the writ of certiorari should not issue as prayed for, the question of jurisdiction being expressly reserved. Upon the return day the attorney general appeared on behalf of the respondents and moved to dismiss the proceeding for lack of jurisdiction. A return was also made and the issues raised by both the motion and the return were presented in order that the court might determine such questions in relation to the matter as, upon consideration, it might deem to be properly before it.

Under the provisions of § 202 of the Constitution, amendments proposed by initiative petition are required to be referred to the people at the succeeding general election, and it is provided that: "should any such amendment or amendments proposed by initiative petition and submitted to the people receive a majority of all the legal votes cast at such general election, such amendment or amendments shall be referred to the next legislative assembly; and should such proposed amendment or amendments be agreed upon by a majority of all the members elected to each house, such amendment or amendments shall become a part of the Constitution of this state." Further provision is made for a second reference to the people at the succeeding general election if the amendment or amendments do not receive the approval of the legislative assembly. In the instant case we are not concerned with the sufficiency of the original petitions, nor is any question raised involving the proceedings had prior to the certification by the canvassing board. In a prior proceeding in this court it was held to be the duty of the secretary of state to submit the proposed amendments to the people at the last election. (State ex rel. Twichell v. Hall, File No. 3647, post, 459, 171 N. W. 213). We are now asked to interfere in the midst of the proceedings looking toward the ultimate amendment of the Constitution, for the purpose of determining the legality of one of the intermediate steps. In the case of State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281 (the capital removal case), this court held that it had ample jurisdiction to intercept a proposed amendment to the Constitution at its initial stage, on the ground of the nonexistence of a law authorizing the filing of a petition and the submission of the proposition; and in the case of State ex rel.

Baker v. Hanna, 31 N. D. 570, 154 N. W. 704, it was held that the court could properly exercise its original jurisdiction to determine whether or not a valid referendum petition had been filed against existing legislation, which, if filed, would have had the effect of suspending the operation of the particular law. In the former of these two cases it will be noted that jurisdiction was entertained for the purpose of preventing a ministerial officer from taking a step that was conceived to be wholly without warrant of law, and in the second case it was entertained to compel compliance with an existing law as to which, it was contended, no valid proceedings suspending the law had been had. These cases are not authority for the proposition that the court should interfere at the instance of the citizen wherever it is thought that, in the process of amending, a step has been taken which is not in strict conformity with the requirements of the Constitution. The exercise of jurisdiction upon a ground as broad as this would be subversive of the American constitutional theory of government through co-ordinate branches.

It is not contended that the court would have authority to interfere with the process of legislation as such. In fact, it is conceded that a legislative body, whether of the state or of a minor municipality, must be left free to make its own mistakes and that it cannot be judicially interfered with during the process. With the advent of the initiative and referendum, situations frequently arise where the principle of noninterference would seem to be applicable by analogy to the action of the voters. The conclusion that it is so applicable, however, is hardly warranted in the light of the inherent nature of our government. In a democratic republic the law is exalted. It is above the individual and it is above the office holder, however important his office may be. In order to vindicate its mandates it is sometimes necessary to resort to compulsion and restraint through judicial processes directed to those occupying responsible executive positions—even to the governor himself. If, in matters concerning direct legislation, the analogy of the relations between the judiciary and the legislative assembly be strictly and logically followed, it would result that every ministerial officer intrusted with a power necessary to facilitate the operation of the plan would be as free from judicial interference as would be the speaker or the chief clerk of the house of representatives or

the lieutenant governor as presiding officer of the senate in the performance of their respective functions. But we are of the opinion that this analogy cannot be followed to such an extreme. It would result in absurdity. It would exalt the executive officer rather than the law which determines his ministerial duties. The legislative assembly exercises a degree of control over its officers that it is impossible for the people to exercise over the ministerial officers whose participation in matters of direct legislation is essential to its orderly operation. By virtue of the inherent difficulty of exercising such a degree of control over ministerial officers as will facilitate the operation of the initiative and referendum and render it free from the whim or caprice of a designated officer, a court cannot be thought to be trenching upon the legislative power when it interferes merely for such limited purposes. To a limited extent this is also true as applied to the exercise of a restraining power during the initial stages in the interest of securing a legal ballot and a free, untrammeled election.

In commenting upon the result of the Colorado and South Dakota decisions (People ex rel. O'Reilly v. Mills, 30 Colo. 262, 70 Pac. 322, and State ex rel. Cranmer v. Thorson, 9 S. D. 149, 33 L.R.A. 582, 68 N. W. 202), Dodd, in his excellent work on the Revision and Amendment of State Constitutions, at page 232, says: "The courts have no power to interrupt the process of amendment before it is complete, to restrain a popular vote upon a constitutional proposal, even though they may be clearly of the opinion that the popular vote will be ineffective because of defects already apparent in the method of proposal. They must wait until the amending process is fully completed, and then pass upon the validity of the amendment if this question is properly presented in litigation before them. In accordance with this view it would seem that the courts should compel by mandamus administrative acts incident to the amending process; that is, the administrative acts should be treated as duties commanded by the Constitution after the legislative proposal, which may be regarded as presumably valid, and not subject to review in an ex parte proceeding. Under this view the courts may neither restrain the submission nor decline to compel it, because either of these is a direct interference with legislative action, the one positive in absolutely preventing submission, the other negative in that it does not enforce a purely minis-

terial duty in aid of the amending process." According to this view, the amending process is not to be frustrated, but is to be aided, where necessary, by compelling the performance of ministerial duties by those over whom the great body of legislators have no other means of control. It would seem that the basic principle of noninterference with the affairs of a co-ordinate branch of the government is sometimes best observed in the case of the initiative and referendum by a resort to the apparent anomaly of judicial compulsion as applied to the acts of ministerial agents.

The contention of the petitioners, however, is directly contrary to the principle suggested. They claim the right to intercept the proceedings in their midst, and this, though they show no interest that is not common to every other individual. The judicial department of the government is bound to assume that the legislative department would act with the same conscientious regard for the Constitution that actuates it.

It is said that, while engaged in a consideration of constitutional amendments, the legislature is not acting in a legislative capacity and that judicial interference with this function does not infringe upon any other department of the government. It matters little whether or not participation in the amending process is considered to be legislative in its character. Identical considerations apply, nevertheless. Jameson, in his work on constitutional conventions, a work which is devoted largely to the thesis that constitutional conventions are creatures of the power which creates them, takes the position that a convention is bound to observe whatever limitations may be prescribed by the act which authorizes the calling of the convention. Jameson, §§ 307–313. Dodd, on the other hand, takes the position that the constitutional convention, once assembled, is independent of exterior control and that it has the power to propose anything but (probably) to conclude nothing. Dodd, Revision & Amendment of State Constitutions, pages 80 to 117. While Jameson's view seems to minimize the authority of the created agency, it necessarily involves the proposition that the process is essentially legislative, in that it restricts it within bounds set by the legislature. While, if the view held by Dodd be considered correct, it is still unimportant whether the process be considered legislative; for, according to this view,

the agency is independent of other departments of the government, even of the legislature, and constitutes a sort of a fourth branch of the government. See Dodd, Revision & Amendment of State Constitutions, p. 80; Constitutional Conventions, by Roger Sherman Hoar, pp. 89, 160; 29 Harvard L. Rev. 520; and Carton v. Secretary of State, 151 Mich. 337, 115 N. W. 429. In Carton v. Secretary of State, supra, at page 340, it is said: "The convention is an independent and sovereign body whose sole power and duties are to prepare and submit to the people a revision of the Constitution or a new Constitution to take the place of the old one. . . . The Constitution clearly leaves this convention free from and untrammeled by any other department of government."

It was said by the judiciary committee of the constitutional convention of New York of 1894, of which committee Elihu Root was chairman, in a report denying the right of the courts, through prohibition, to interfere with a proceeding to determine the election of a member: "A constitutional convention is a legislative body of the highest order. It proceeds by legislative methods. Its acts are legislative acts." See Rev. Records N. Y. Constitutional Convention 1894, vol. 1, page 245, and at page 250 of the same records, it is said by the same committee: "It is of the greatest importance that a body chosen by the people of this state to revise the organic law of the state, should be as free from interference from the several departments of government, as the legislative, executive and judiciary are, from interference by each other." See also Sproule v. Fredericks, 69 Miss. 898, 11 So. 472, and for an authority expressing a contrary view, Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563. Also Woods's Appeal, 75 Pa. 59. Hoar, in his recent work, after presenting the foregoing authorities, has the following to say (page 91): "Thus the weight of authority is to the effect that the convention, when in session, is a fourth branch of the government, with the same immunity from interference as that possessed by the other three. The executive and judiciary have no more right to interfere with the fourth branch than they do with the other legislative branch, namely, the legislature. The legislature has no right to interfere with a legislative body of higher standing." While the foregoing discussion relates primarily to the powers of constitutional conventions, it concerns itself nevertheless with the lega-

character and status of the subject-matter with which the convention deals, namely the highest written law of the state in process of formation. The nature of this subject-matter is obviously the same whether created by a convention or by an amending agency. We refer to this matter here, merely as characterizing the nature of the function rather than as embodying considerations which would necessarily be controlling in any judicial proceedings ultimately brought to determine what provisions are legally incorporated in the Constitution. As was recently said by this court in the case of State ex rel. Fargo v. Wetz, 40 N. D. 299, 5 A.L.R. 731, 168 N. W. 846: "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." We are clearly of the opinion that, regardless of the particular governmental character of the acts, as a result of which Constitutions are formed, submitted, or amended, both sound policy and the weight of authority concur in holding that the process is one to be carried on generally without any restraining judicial interference.

In the instant case, we are asked to review the action of a board of canvassers before the result of the various steps in the amending process can be known. It would doubtless be conceded that the canvassers cannot legally give official sanction to a vote received by merely declaring it to be legal or to have a given effect. There are further steps to be taken by constitutional officials whose action might make wholly unnecessary any resort to judicial proceedings. In legal contemplation, the petitioners present a situation that is in every way analogous to an application for certiorari, where an appeal from the action complained of is both simple and expeditious. The legislature is clearly free to act upon every consideration which, in the mind of the petitioners, vitiates the certificate of the canvassing board. It is elementary that certiorari is not a proceeding to be resorted to where there are other speedy and adequate remedies (Comp. Laws 1913, § 8445), and it is the duty of the courts to assume that legislative action will conform to the Constitution. It is also elementary that the issuance of the writ is largely discretionary, and should not be resorted to where complications of a public nature might follow its use. 6 Cyc. 748; 11 C. J. 130. This proceeding is clearly distinguishable

from the proceeding in People v. Stevenson, 281 Ill. 17, 117 N. E. 747. In that case the supreme court, at the instance of a states' attorney who petitioned on behalf of the people, issued a writ of certiorari and reviewed the action of the canvassing board which had declared a proposed amendment adopted and to have become a part of the Constitution. The proceedings, however, were not begun until after every step had been taken to incorporate the amendment into the Constitution. The action having been brought on behalf of the people and the amending process having been completed, it was, of course, proper for the court to review the proceedings for the purpose of determining the effect of the vote as certified to.

A situation somewhat analogous to the present case was recently presented in the district court of the United States, in the southern district of Ohio, in the case of State ex rel. Erkenbrecher v. Cox, 257 Fed. 334. An attempt was there made to enjoin the governor of Ohio from submitting to the legislature for ratification or rejection the proposed amendment to the Federal Constitution (which has since been adopted) prohibiting the manufacture, sale, or importation of intoxicating liquors within the United States and all territory subject to its jurisdiction. The suit was, like this one, a taxpayer's suit. In an opinion filed on the 4th day of this month (January), Judge Hollister held that the plaintiff showed no interest which entitled him to maintain the action, and, furthermore, that the court was powerless to take any action that could result in preventing the legislature from performing its own functions in connection with the proposed amendment. In the opinion it is said:

"It is not open to doubt that every member recently elected to the General Assembly knows of the existence of the proposed amendment, and everyone knows that the subject is of such interest in the state of Ohio, as well as elsewhere, that there are members of the General Assembly about to sit who will see to it that the subject is brought to the attention of the General Assembly. . . . Whatever injury, if any, may result by the consideration by the General Assembly of the proposed amendment, will follow whether the governor acts or not. The governor's threatened act cannot of itself do plaintiff any injury of any kind, and therefore the suit will not lie against him. . . . It cannot be assumed in advance that the

General Assembly of Ohio will take any action violative of the Constitution of the United States. Moreover, if the two houses of the General Assembly should take a vote on the subject, one cannot say in advance what the result would be. The proposed amendment may be rejected because the members of the General Assembly may think the proceedings at Washington were not in consonance with the Constitution, or because of insufficient votes in the affirmative. Indeed, the General Assembly may take no action at all. . . .

"Moreover, if the plaintiff is injured, that injury does not arise until the proposed amendment is adopted by the respective legislatures of three fourths of the states. . . .

"The judicial department of the government . . . cannot interfere with the preliminary proceedings of either the executive department or the legislative department with respect to matters committed by the Constitution to their charge. So far as this court is aware, judicial action has never been taken, or even thought of, against any step of the legislative department leading up to the enactment of a law, however subversive of the Constitution. It is only after proceedings are taken to enforce the unconstitutional law that the courts are called upon to act at all; indeed, the question whether the courts had any power in such case was not settled until sometime after the adoption of the Constitution. . . .

"It may be plaintiff has no adequate remedy, or any remedy, at law; but it does not necessarily result that for that reason alone he is entitled to an injunction. Plaintiff says his rights are injured by the failure of the houses of Congress, in passing the resolution, to observe the requirements of the Constitution, and, since he has suffered a wrong there must be a remedy. His conclusion is good, but his premise is bad. His right does not arise, and the wrong is not suffered, until the legislatures of three fourths of the states have voted to adopt the amendment. Then will be the time for him to show, if he can, that the resolution of the two houses of Congress was no resolution at all, and the action of the states thereon a futilit

"For this reason also this suit cannot be maintained. . . . ,1,

"Moreover, plaintiff's rights do not arise, and no wrong is ned to him, until the attempt to delegate the reserved power is a es of ie elec-

apparently consummated and something is done in the exercise of the power. . . .

"No present constitutional right is involved in this behalf, and the same may be said, once for all, of every alleged deprivation of constitutional rights in this case. . . .

"By the decision of this case against him, the plaintiff loses no constitutional right, and there is no Federal question alleged."

We are of the opinion that, so far as jurisdiction is concerned, there is no substantial difference between an application for injunction to prevent a canvassing board from certifying the result on the ground of a false showing and a proceeding in certiorari in which it is sought to change the effect of the certification for the same reason while the amendatory proceedings are pending and incomplete. The rights alleged to be threatened are the same, and the suitor has the same recourse to an appropriate co-ordinate branch. Conceding that that portion of the certificate of the canvassing board in the instant case which purports to determine the result is void, because based upon either a false determination of the requisite number of votes or because of an erroneous conception of the legal effect of the election, it does not follow that all injurious consequences may not be obviated by the body in which the Constitution vests the power of approval or rejection. Nor is it conceivable that that body could be prevented by anything that might be done in this proceeding from performing what it perceives to be its constitutional functions.

There is a sense, however, in which the opinion of the legislature, in regard to its constitutional functions, is not a finality. The judiciary is required to determine the law applicable to any given controversy and to apply it, and its judgment as to whether or not a legislative act is valid must ultimately be the controlling one. Being of the opinion that the courts cannot properly intercept a constitutional amendment which has been voted upon by the people, while it is in process of being submitted to the legislature, we could not, with propriety, determine the matter in such a way as to interfere G[illegible]h legislative action on the subject. The opinion of the court upon the question during the pendency of legislation would amount to no self [illegible] than an advisory opinion, for the guidance of the other depart- not lie Under the Constitution, we are not authorized to perform such

a function. A proposal to vest such a power in the supreme court was expressly repudiated in the constitutional convention. Debates, Constitutional Convention 1889, pages 231, and 251 to 275. Furthermore, it may be observed that the experience of those courts, upon whom the duty of rendering advisory opinions has been expressly enjoined by the Constitution, has been of the character that does not commend the practice beyond the strict limits of the duty imposed. See correspondence passing between Governor Dineen of Illinois and the judges of the supreme court for a complete discussion of this matter, 243 Ill. 9.

For the foregoing reasons, we are satisfied that, at the time the order to show cause was issued, this court could not properly exercise its original jurisdiction, nor, indeed, could any court have properly exercised jurisdiction to determine the legality of the steps in the amending process which had been taken prior to the time the application was made. It may be stated here too, that, in connection with the application, the petitioners asked for a temporary restraining order, but the court considered that it would be improvident to grant such a request and counsel did not press the application. Since the proceedings were instituted, however, and in fact very soon after the arguments were held, it is common knowledge, and hence within our judicial cognizance, that the legislature proceeded to consider the amendments referred to and adopted them. In the light of these facts it is obvious that a decision of this court rendered at this time upon the additional question argued will tend in no way to influence either the legislative or the executive branches of the government in the exercise of what they conceive to be their constitutional functions concerning the amendments. One of the chief reasons, therefore, for the nonexercise of jurisdiction by this court no longer exists, and we conceive it to be proper at this time to express our views upon the other question presented. There is no longer any question of delicacy due to appropriate deference to and respect for the co-ordinate branches of the government and we feel that it is no longer necessary to refrai from discussing such reasons as there may be for the refusal to is the writ. The matter has been fully argued and upon such a ments it appears to the court that there is an additional and con sive reason why the writ should not issue.

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As an original question, the writer of this opinion confesses to a considerable degree of doubt as to whether or not paragraph 2 of § 202 of the Constitution could be properly construed to require only a majority of the votes cast upon a given initiated proposal, and were the question presented now for the first time, it would seem to him that the language employed with reference to the number of votes is indicative of a legislative intention to differentiate in this respect between amendments initiated by petition and amendments proposed by the legislative assembly under the first paragraph of the section, where it is explicitly provided that amendments of the latter sort are ratified by a majority of the electors voting thereon. In view of the fact, however, that other provisions of the Constitution which are substantially identical with the language of the second paragraph of § 202 had, long prior to the adoption of the latter paragraph, received a construction at the hands of this court which would seem to give to it a clear legal signification and meaning, we are not at liberty to examine the question as an original one. The legislature is responsible for the language found in this paragraph. It has stated that such amendments require a "majority of all the legal votes cast at such general election." If it used this expression in the light of the judicial definition previously placed on such an expression by this court, the court should be very reluctant to redefine the expression so as to deprive it of the meaning previously given. This consideration is of especial importance in this case by reason of the fact that the legislature now sitting has apparently adopted the previous interpretations of this court and has held the amendments to have received a sufficient vote. A brief reference to the prior decisions and to the constitutional setting of substanially the same language will indicate to what extent the meaning adopted by the legislature is warranted.

In the first case, that of State ex rel. Larabee v. Barnes, 3 N. D. 319, 55 N. W. 883, this court had occasion to determine whether or not the article of the Constitution prohibiting the manufacture and sale of intoxicating liquors was adopted. Section 8 of the Enabling Act provided for elections to be held in the territories to which the act was applicable, at which the voters should vote directly for or against self executing proposed Constitutions and for or against any articles or propositions which could not lie separately submitted, and it was provided that "*if a majority*

of the legal votes cast shall be for the Constitution, the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon, and upon separate articles or propositions." Though the Enabling Act further provided (§ 24) that the constitutional convention might provide for the election of officers for the state governments, and though the constitutional convention, in the schedule adopted, did provide for the election of officers at the same election as that at which the Constitution was adopted (§ 12 of the schedule), this court held that the expression "majority of the legal votes cast," as used in the Enabling Act, meant "votes cast for or against the adoption of the Constitution or the articles separately submitted." While Congress did not require all the elections to be conducted at the same time, it nevertheless required that there should be separate votes upon the Constitution and upon different articles that might be submitted, of which prohibition was one, and anticipated that officers might be elected at the same time.

It seems that the constitutional convention placed a similar construction upon the Enabling Act. In § 20 of the schedule it was expressly provided that "if a majority of all the votes cast at said election for or against prohibition are for prohibition, then said article 20 shall be and form a part of this Constitution and be in full force and effect as such from the date of the admission of this state into the union, but if a majority of said votes shall appear according to said returns to be against prohibition, then said article 20 shall be null and void and shall not be a part of this Constitution."

In the case of State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958, this court had occasion to construe a statutory provision governing an election to determine the relocation of a county seat wherein it was provided that if "any one place has two thirds of the votes polled" such place shall be the county seat. The statute in question required the question of the relocation of the county seat to be submitted at a general election and it was held that the expression "votes polled" meant the vote polled upon the particular question.

Again, in the case of State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360, this court construed the following language contained in § 168 of the Constitution: "All changes in the boundaries of organized counties before taking effect shall be submitted to the elec-

tors of the county or counties to be affected thereby at a *general election* and be adopted by a *majority of all the legal votes cast* in each county *at such election.*" After an exhaustive discussion of the question presented in that case, this court, unanimously, speaking through Mr. Justice Spalding, held that the case of State ex rel. Little v. Langlie, was directly in point, and that the foregoing language meant a majority of the votes cast upon the particular question. In that opinion the court referred to the lack of uniformity in various parts of the Constitution wherein provision is made for voting upon particular questions and accounted for it by the fact that in the constitutional convention different committees had jurisdiction over different subjects. However, in the article of which § 168 is a part we find two other sections, §§ 170 and 171, in which reference is made to matters in relation to county government to be voted upon by the people. In § 170 it is made the duty of the legislature to provide for county government through township organization "whenever a *majority of all legal voters of such county, voting at a general election, shall so determine,*" and it is further provided that "the management of the fiscal concerns of said county by the board of county commissioners may be dispensed with by a *majority vote of the people voting at any general election.*" In the next section it is provided that in any county which may have adopted a system of government by chairmen of township boards, "the question of continuing the same may be submitted to the electors of such county at a general election in such a manner as may be provided by law, and *if a majority of all the votes cast* upon *such question* shall be against said system of government, then such system shall cease, etc." Thus, in the very article in which the language construed in the Blaisdell Case, supra, was employed, and in connection with the very subject of county government, we find language which clearly and *expressly limits* the majority of the votes *to the particular question,* as in § 171; whereas in the third section preceding it this court held that it was so limited by *implication,* the limiting expression not being there used. So far as any argument may be drawn in the instant case from proximity of context, it would also be equally applicable to the question as presented in the Blaisdell Case.

The case of State ex rel. McCue v. Blaisdell, supra, has been referred to with approval in State ex rel. Davis v. Willis, 19 N. D. 209-225,

124 N. W. 706; in State ex rel. Miller v. Flaherty, 23 N. D. 313, 321, 41 L.R.A.(N.S.) 132, 136 N. W. 76, and in State ex rel. Minehan v. Thompson, 24 N. D. 273, 139 N. W. 960.

It would be futile to attempt to add to the reasons previously assigned by this court for the construction given to the language referred to. All that need be said now is that we can conceive of no distinction between the expression "majority of all the votes cast at such general election" as found in paragraph 2 of § 202 of the Constitution, and the expression "majority of all the legal votes cast in each county at such election," as found in § 168 of the Constitution, it being clear that the election referred to in § 168 is a general election at which the question is authorized to be submitted. There being no satisfactory distinction to be drawn between the two expressions referred to and the language having been repeatedly interpreted by this court before it was employed in § 202 of the Constitution, we do not feel at liberty to change the well established legal construction. See 12 C. J. 706. This is a substantive, and to our minds an altogether conclusive, reason for the denial of the writ.

For the foregoing reasons the writ is denied without costs.

GRACE, J., concurs.

BRONSON, J. This is an original application to this court for the issuance of a writ of certiorari to the State Canvassing Board for the purpose of reviewing the action and the determination of such board in certifying the adoption of several amendments to the state Constitution proposed by initiative petitions, by the vote given at the general election held on November 5, 1918. Pursuant to the order to show cause issued therefor, the attorney general, in behalf of such board, has filed a motion to quash these proceedings, challenging the jurisdiction of this court and the cause of action of the relators, and an answer and return setting forth the proceedings of such board and alleging that the same were due and regular as provided by law.

The admitted facts necessary for an understanding of this proceeding are as follows: At the general election held on November 5, 1918, there were submitted to the voters five proposed amendments to the state Constitution known respectively as the taxation, debt limit, Con-

stitutional amendments, emergency measures and public ownership proposals. These were so submitted under initiative petitions proposed by the people under the provisions of the Gibbens Amendment to the state Constitution, known as article 16 of the Amendments, subdivision 2. At such election these proposed amendments received, respectively, majorities of those voting on such proposals, ranging from 12,000 to 14,000, but less than a majority of all the voters who voted at such election. For instance, the public ownership proposed Amendment received 46,830 votes for and 32,574 votes against the same, a majority of 14,256 upon the question but 198 less than a majority of all the voters who voted, as found by such State Canvassing Board. Section 1025, Compiled Laws of 1913, concerning the canvassing of any proposed amendment to the Constitution provides that the state board shall ascertain and determine the result and shall certify under their hand a statement of the whole number of votes given for, and the whole number of votes given against, such amendment, and they shall thereupon determine whether such amendment has been approved and ratified by a majority of the legal electors voting thereon, and shall make and subscribe on such statement a certificate of such determination.

The said state board found, determined, and certified that each of such proposed amendments had been carried and adopted inasmuch as a majority of the voters voting on said proposed initiated amendment had voted in favor of the same. In this regard the Gibbens Amendment to the Constitution, under which the initiative petitions in question were submitted to a vote of the people, provides as follows: "Should any such amendment or amendments proposed by initiative petition and submitted to the people receive *a majority of all the legal votes cast at such election,* such amendment or amendments shall be referred to the next legislative assembly."

The relators maintain that this constitutional provision required a majority of all the legal voters who voted at such election. For instance that inasmuch as the board determined that there were 94,055 legal votes cast at such election, on the public ownership proposal, the constitutional provision required a vote of 47,028, in order that the same might carry, and that therefore the determination and certificate of the board so issued was improper and illegal.

The issues presented on these facts raised the following questions for the consideration of this court:

(1) The right of the relators to maintain this action.

(2) The power of this court to assume jurisdiction over the subject-matter at this time.

(3) The question of the due adoption by the people of the initiated proposed amendments.

This case involves a very important political proposition. Able briefs and able arguments have been presented by each of the counsels for the contending parties. Strenuously do the relators contend that it is the duty of this court as a sovereign branch of our state government to uphold the Constitution and to declare by judicial determination the illegality of the proceedings had by the state board, and with considerable insistence the relators further maintain that this court representing the judiciary branch of our government must firmly inhibit any attempt of the other branches of the government to transgress constitutional requirements.

This matter is before this court under unusual circumstances. The political question involved is being discussed on every side. Relators have set up in their brief before this court the contentions made by political organizations on the question involved. A legislative assembly, in the capitol where the court is now sitting, is in session. On the same day that arguments were being made before this court, in the legislative halls, these proposed amendments already were under consideration and were being approved by a branch of the legislative assembly. The very questions proposed to this court are being determined and passed upon by such legislative assembly in exercising its functions as part of our state government, as arguments pro and con by legislators resound throughout the halls. Obviously this court can be neither blind nor deaf as to these surrounding conditions. The application and order to show cause first presented to this court solicited a restraining order temporarily restraining the state board from certifying and referring such proposed amendments to the legislative assembly, pending this hearing, although relators' counsel did not insist upon such order. Grave questions are presented to this court concerning its jurisdiction to interfere at this time. Serious questions likewise are involved concerning the right or the power of this court by its

mandate, decree, or judgment herein, to interfere in any manner with the legislative assembly or with such state board reporting to it in the course of its action, or by its judicial determination, to indicate to such legislative assembly its duty or the manner in which it should act upon any matter now pending before it.

It is the sworn duty of this court to uphold the Constitution. It is equally the sworn duty of the legislative departments of our government to uphold the Constitution.

As stated by Justice Christianson in the opinion in State ex rel. Linde v. Taylor, 33 N. D. 84, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583, wherein he quotes with approval the following:

" 'The legislative and judicial,' said Cooley (Cooley, Const. Lim. 7th ed. pp. 227, 228) 'are co-ordinate departments of the government, of equal dignity; each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the Constitution, is not conferred upon it. The Constitution apportions the powers of government, but it does not make any one of the three departments subordinate to another, when exercising the trust committed to it. The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the Constitution as the paramount law, whenever a legislative enactment comes in conflict with it.

" 'But courts sit not to review or revise the legislative action, but to enforce the legislative will.' " See State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 92, 132 N. W. 769, Ann. Cas. 1913E, 1089.

It is well settled that it is not the function of the courts to in any manner interfere with or inhibit legislative undertakings. To do so would be an invasion of the legislative functions apportioned to another department of government. The question always, therefore, is whether the proceeding involved is legislative in its character, or involves a matter occurring during the course of a legislative proceeding. It is important to premise the opinion of this court by these statements in order that the function of a court may be properly comprehended with

relation to the legislative department of our government, and further to the end that, in times of violent discussion and enactment of political questions involving proceedings of a legislative character, the court may not be made a shuttle cock for the purpose of securing an expression in a judicial way of the legal correctness of proceedings undertaken, the result of which will be either to warn or curb legislative matters then pending. The case therefore involves questions of the highest importance in the exercise of the judicial sovereign power. It has received the earnest and sincere attention of this court. The questions presented therefore all will be discussed even though this court by the decision of one of the points raised need not necessarily pass upon the others so presented.

The respondents contend that the relators have shown no legal right to maintain this action. In the application of the relators each of them state that he is a citizen and taxpayer of the state and that he is beneficially interested in the subject-matter of the proceeding. No other ground of right or of interest is shown. No demand upon, or refusal of, the attorney general to institute or maintain this proceeding is alleged or shown. It does, however, appear that the attorney general is *ex officio* a member of such canvassing board and appears herein for the respondents. The relators seek the prerogative writ of certiorari in the exercise of the original jurisdiction of this court. To warrant the issuance of this original writ, it must appear either, that the relators have such a peculiar interest by reason of which their personal or property rights are being or are about to be infringed or abrogated or denied by the action complained of creating a special reason or peculiar emergency, or, that the subject-matter is *publici juris,* affecting the sovereignty of the state, its franchises, or prerogatives, or the liberties of its people, and involving in some way the general interests of the state at large. State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385; State ex rel. Madderson v. Nohle, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141; State ex rel. McArthur v. McLean, 35 N. D. 203, 213, 159 N. W. 847; State ex rel. Steel v. Fabrick, 17 N. D. 532, 538, 117 N. W. 860.

In State ex rel. Walker v. McLean County, supra, Judge Wallin, in the opinion of the court, stated: "Ordinarily a private person, who volunteers as a champion of only public rights, and as such invokes

the prerogative writs, will be regarded as an intermeddler. It appears by the information and more fully by the briefs of counsel in behalf of the relator, that the relator has suffered no wrongs peculiar to himself, but on the contrary the relator appears in this court as a champion of the state, and for the ostensible purpose of protecting governmental franchises from abuse."

Clearly therefore the right of the relators to maintain this proceeding must be founded upon the latter grounds above stated.

In State ex rel. Linde v. Taylor, 33 N. D. 76, 83, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583, Judge Christianson, in the opinion of the court concerning this original jurisdiction, said:

"It is well settled that this jurisdiction will not be exercised to vindicate private or local rights regardless of their importance, but it is reserved for the use of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises, or the liberties of its people." . . . While it is true that the relator in this case, in his capacity of a citizen and taxpayer of the state, has a sufficient interest to invoke this court's prerogative jurisdiction as a relator, still the real plaintiff is the state. The private relator, in his capacity as a citizen and taxpayer, merely informs the court of the infringement which has been or is about to be made upon the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people, and the court by virtue of the power granted by the Constitution commands that the suit be brought by and for the state, even though the attorney general may refuse to bring this action or consent to its institution.

"This transcendent jurisdiction is a jurisdiction reserved for the use of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises, or the liberties of its people; the state uses it to punish or prevent wrongs to itself or to the whole people; the state is always the plaintiff and the only plaintiff, whether the action be brought by the attorney general, or, against his consent, on the relation of a private individual under the permission and direction of the court." State ex rel. Bolens v. Frear, 148 Wis. 456, 500, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; State ex rel. Linde v. Taylor, 33 N. D. 84, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583.

Under § 157, Compiled Laws 1913, it is the duty of the attorney general to appear for and represent the state before the supreme court in all matters in which the state is interested as a party.

Under § 3376, subd. 9, the attorney general and state's attorneys are the only public prosecutors, in all cases, civil and criminal, wherein the state, or county, is a party to the action.

It is therefore manifestly the proper practice in all cases where the exercise of the original jurisdiction of this court upon a prerogative writ is demanded, and where the state is the real plaintiff, to make the application by or through the consent of the attorney general, or, in the event of his refusal to act, to bring such fact to the attention of this court for its consideration in the allowance or granting of such writ.

The attorney general is the chief law officer of the state. Upon him is the duty imposed to appear for and represent the state in which the state is interested as the State.

Upon the refusal of the attorney general to institute the proceeding requested, the situation is as stated by Judge Bruce in the opinion of the court in State ex rel. McArthur v. McLean, 35 N. D. 212, 159 N. W. 847, wherein he said: "In the case at bar the attorney general of the state has expressed his willingness that the proceedings shall be brought, but has refused to bring them himself, as he considers that it is not a case in which his office should be concerned. The case, therefore, is similar to one in which an application has been made to the attorney general to institute the proceedings, but he has refused to do so, and where an application is made to this court by a private citizen to bring them. It is not, therefore, a case in which the state as a state is seeking to exercise its sovereign power and to assert its prerogative, but a case in which a private citizen and voter and a candidate for public office, who is more or less affected by the matter, seeks the protection of this court on the ground that the sovereign rights of the state or its franchises are after all the sovereign rights and franchises of all its citizens and that all of its citizens are interested in having the political and elective machinery of the state properly administered."

As stated in State v. Nelson County, 1 N. D. 101, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33, these prerogative writs are ordinarily issued upon motion of the attorney general; as chief law officer

of the state, upon whom the duty is imposed to represent and appear for the state when the state's interests are concerned, it is peculiarly proper that matters *publici juris,* affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people involving in some way the general interests of the state at large, and concerning which the prerogative writ of this court is sought, should be first addressed to his attention for his direct action or refusal to so act.

See State ex rel. Taylor v. Lord, 28 Or. 498, 31 L.R.A. 473, 43 Pac. 471.

It is true that the refusal of the attorney general to institute or to consent to the instituting of such proceeding does not prohibit this court from exercising its original jurisdiction in such cases, but it should be made to appear to this court, not only that the chief legal adviser of this state, and representing its interests, has been advised and has refused to institute the action for the state, but also that, nevertheless, under the facts presented, this court should take original cognizance of the subject-matter upon the relation of a private individual. State ex rel. Moore v. Archibald, 5 N. D. 359, 376, 66 N. W. 234; State ex rel. McArthur v. McLean, 35 N. D. 203, 159 N. W. 847; State ex rel. Twichell v. Hall, No. 3647, post, 459, 171 N. W. 213.

Furthermore, a very serious question is presented upon the proposition whether this court should take original jurisdiction of the subject-matter involved at this time upon the application as made by the relators therefor.

No right of the relators or of any citizen of the state, either personal or property, is immediately threatened with invasion or abrogation. Though the matter is affected with a great public interest and although it vitally concerns the fundamental law of this state, the sovereign powers of the state, its franchises or prerogatives, are not in any manner threatened with immediate infringement, whether the writ issue or not, unless it be premised that affirmative action will be taken by the legislative assembly to make such proposed amendments a part of the Constitution of this state.

To warrant the assertion of such original jurisdiction, the interests of the state, the threatened invasion of its franchises or its prerog-

atives, or of the rights and liberties of its people, should be both primary and proximate, not indirect and remote, thereby creating such a contingency which requires the interposition of this court to preserve and protect the same. State ex rel. Moore v. Archibald, supra.

This court does not sit as a monitor for either the legislative or executive branches of our government. It neither advises nor rebukes contemplated action of a co-ordinate branch of the government. Its power necessarily is not only persuasive but compelling. The exercise of original jurisdiction in this matter at this time must necessarily commend by judicial intervention the state board concerning their action on the proposed amendments. This necessarily means that this court must either commend, interrupt, or interfere with the action of the legislative assembly thereupon.

Liberally this court has exercised its original jurisdiction in the issuance of prerogative writs. It has been extended sufficiently far. It should now be recognized and established that this court will not exercise its original jurisdiction in matters of this kind, beyond the limits herein stated.

2. Jurisdiction over the Subject Matter at This Time.

Again, the serious attention of this court is addressed to its very jurisdiction at this time over the subject-matter and to the judicial action necessarily involved in the cognizance or consideration thereof. This, in part, has been mentioned heretofore in this opinion. The primary question with which we are confronted is to determine whether the initiation, submission, adoption and ratification of proposed amendments to the Constitution under the initiative power is fundamentally the exercise of a political or legislative power, or whether the acts of the agencies designated to accomplish such amendment are ministerial in their nature so as to present thereby a judicial question for the courts to review such acts during the course of the proceedings to accomplish such amendment.

It is well settled that the judicial power will not interfere in any action or proceeding which involves by such action or proceeding the exercise of a political or legislative action. The relators do not deny this general principle. They contend that the action of the state

board cannot be classed in any manner as legislative in its character. That it is ministerial and therefore subject to the review of this court.

The question presented is not easily determined and is not free from many difficulties in the construction of the powers of the judiciary in connection with and over the co-ordinate legislative and executive departments of our government in making a change in our fundamental law. The principal question involved also involves the corollary proposition of the right or power of the judiciary to interfere with any proceeding or action, made pursuant to statutory direction, and not contrary thereto, when the effect thereof is to establish a judicial admonition, advice or inhibition of contemplated action by the legislative assembly, a co-ordinate department of the government. If the initiation, submission and adoption of the proposed amendments concerned is from beginning to the end, from the time of the initiative petitions signed by the people to the time of ratification by the legislative assembly, an undertaking, through the exercise of the sovereignty of the people, in a legislative way to formulate the fundamental law of the state, or an amendment thereof, is legislative in its character, and the agencies designated by the sovereign power to accomplish such change or amendment of the fundamental law, are acting within and pursuant to a power conferred, it is clear that the judiciary has no power to interfere.

This broad principle is not only fundamental, but it must also be recognized as basically essential in the preservation of our tripartite theory of government and in the prevention of any judicial usurpation or interference in any legislative proceeding. 4 Federalist, p. 329; State ex rel. Taylor v. Lord, 28 Or. 498, 31 L.R.A. 482, 43 Pac. 471; Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec. 346; State ex rel. Twichell v. Hall (No. 3647) post, 459, 171 N. W. 213; Ohio ex rel. Erkenbrecher v. Cox (U. S. D. C. Ohio, Jan. 4, 1919) 257 Fed. 334.

The relators, however, contend that the initiation and adoption of such proposed amendments is not in any sense a legislative act.

There is a noticeable lack of harmony or uniformity among the authorities and in decisions concerning what constitutes a proceeding legislative in its character so as to inhibit judicial interference. To some extent this lack of harmony can be explained by drawing a sharp

line of distinction between the exercise of the judicial power over an officer or agency which is attempting to proceed in a legislative matter without any power so to do and the exercise of such power, where the officer or agency is proceeding in a legislative matter, pursuant to a power conferred, whether properly or improperly. There is also a distinction to be drawn between the judicial authority compelling the performance of a plain duty or power imposed upon an officer or agency, in a matter legislative in its character, as an instrumentality in the progress of a fundamental legislative enactment to secure the expression of the sovereign will, and the judicial authority interfering with such duties, interpreting the same, and preventing in such legislative proceeding an expression of the sovereign will. The viewpoint involved is the right of the sovereign power acting through one of its co-ordinate and independent agencies, the legislative side, to secure an expression of the sovereign desire in such fundamental legislative matters without judicial direction, admonition, or interference. When the proceedings of such co-ordinate department actually trangresses the constitutional requirements and violates the prerogatives or franchises of the state, or infringes upon the rights and liberties of its people, or of the fundamental law of our United States, contrary to constitutional provisions, the courts will then interfere and set aside such legislative proceedings.

Thus, in State ex rel. Baker v. Hanna, 31 N. D. 570, 154 N. W. 704, a mandamus action against the State Board of Immigration, the question of the validity of legislative action already taken was involved. This depended upon whether there was in fact a sufficient petition filed with the secretary of state for a referendum of the law involved to the people. There being no sufficient petition filed, there was no power conferred to refer and the law was in force. It involved no interference with legislative action. The court passed upon legislative action already taken. It enforced the legislative will. State ex rel. Linde v. Taylor, 33 N. D. 85, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583.

The relators contend and quote authorities to uphold the contention that the legislative assembly in acting upon or providing for the amendment of the Constitution is not exercising a legislative power,

and this likewise applies to actions or proceedings thereupon by state officials or by the people.

In our tripartite system of government where and what is the lawmaking power? Is the exercise of the lawmaking power a matter of legislative character? These questions must be answered and considered upon fundamental grounds, and not upon grounds of narrow construction or of narrow language. It is true that the legislative power is ofttimes meant the power of the legislature pursuant to constitutional delegation, to make, enact, and repeal laws. It is true that in speaking of this legislative power of such legislature it does not mean the power that such legislature has inherently or pursuant to constitutional mandate to initiate the process of amending the Constitution. It is further true that this legislative power so granted by the Constitution does not include a power to trespass upon the executive or judicial departments of the government. The term as thus used revolves around the specific right granted to legislatures to make, alter, and repeal laws.

Within these narrow definitional grounds many of the authorities quoted by the relators are in point.

It is a mere syllogism to state that the exercise of the lawmaking power is legislative in its character. The question still remains unanswered: Where and what is the lawmaking power? The power that creates or formulates a Constitution is lawmaking. The Constitution itself is a law, the fundamental law of our land. The power that changes or amends this fundamental law is lawmaking. This power to so amend or change either resides in the people or in the legislature, or both the people and the legislature. It does not reside in the executive or judicial departments.

In O'Laughlin v. Carlson, 30 N. D. 213, 221, 152 N. W. 675, Judge Christianson in the opinion of the court said, quoting from State ex rel. Standish v. Boucher, 3 N. D. 389, 395, 21 L.R.A. 539, 56 N. W. 142: "All governmental sovereign power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions."

Relators' contention concerning this legislative power would lead to the conclusion that the exercise of this power by the people or the

legislature under article 15 of our amendment to the Constitution, known as the initiative and referendum as to legislation would be legislative in its character because it is simply an exercise of such legislative power, but when a proceeding is similarly had under article 16, the one involved herein to amend the fundamental law, it is not legislative. In either case plain reasoning upon fundamental grounds compels the conclusion that, in the very essence of the matter, the proceedings are legislative and upon broad grounds there appears no reason why the same rule of noninterference of the judiciary should not apply both to proceedings while in their course through the legislature or through the people under this exercise of the legislative power, as narrowly defined, and to proceedings through the legislature and to the people on matters concerning a change of the fundamental law.

Even in the case of Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915, 200, quoted and relied upon by the relators, the court said, "The words 'legislative power' in a constitutional delegation of general legislative authority mean the power or authority under the constitution or frame of government to make, alter, and repeal laws and a 'state Constitution' has been aptly termed a legislative act by the people themselves in their sovereign capacity, and therefore the paramount law. . . . A 'Constitution' is legislation direct from the people acting in their sovereign capacity while a 'statute' is legislation from their representatives, subject to limitations prescribed by the superior authority."

In Ellingham v. Dye, supra, where a secretary of state was restrained from submitting to the voters of the state a proposed new Constitution proposed and approved by the legislative assembly, the court, in its majority opinion, by process of construction of the Constitution and the powers of the legislature thereunder expressly held and stated: "The grant to the General Assembly of "the legislative authority of the state" did not transfer from the people to the General Assembly all the legislative power inhering in the former. But as said in McCullough v. Brown, 41 S. C. 220, 23 L.R.A. 410, 19 S. E. 458, only "such legislative power as may be necessary or appropriate to the declared purpose of the people in framing their Constitution and conferring their powers upon the various departments constituted for the sole purpose of carrying into effect their declared purpose."

In that case the court held that the question was one of power to draft or submit a proposed new Constitution and that the assembly did not have this power, it possessing only that measure of power expressly granted to it by the people speaking through the Constitution and that such power so granted was to be exercised strictly in the mode provided, namely, either by the express provisions in the Constitution providing for the calling of a constitutional convention or by proposed amendments adopted by two successive assemblies. The court also distinguishes the cases of State ex rel. Cranmer v. Thorson, 9 S. D. 149, 33 L.R.A. 582, 68 N. W. 202; Threadgill v. Cross, 26 Okla. 403, 138 Am. St. Rep. 964, 109 Pac. 558, and People ex rel. O'Reilly v. Mills, 30 Colo. 262, 70 Pac. 322, holding to a rule of nonjudicial interference, by stating that those states have different Constitutions.

But, in this state, this court has held and has adhered to the principle of constitutional construction that all governmental sovereign power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions. State ex rel. Standish v. Boucher, supra; O'Laughlin v. Carlson, 30 N. D. 213, 152 N. W. 675.

In fact, this court, in the case of State ex rel. Standish v. Boucher, supra, recognized a distinction between the constitutional provisions of this state and the state of Indiana, and the construction given to the powers of the legislative department under each, concerning the very principle of constitutional construction herein involved and above quoted. In that case, this court said: "State ex rel. Yancey v. Hyde, 121 Ind. 20, 22 N. E. 644, was another instance where the legislature created a state office, and named the incumbent, and empowered him to appoint certain other officers, and to fill vacancies. A provision of the Indiana Constitution, after dividing governmental powers among the three departments, provided that 'no person charged with official duties under one of these departments, shall exercise any of the functions of another except as in this Constitution, expressly provided.' Another provision empowered the governor to fill vacancies in state offices. The court held—three judges against two—that the act of the legislature violated both of these constitutional provisions. A study of the majority opinion shows it to be grounded upon the fact

that there was no express authority conferred upon the legislature by the Constitution to fill such office. The court says: 'Whatever may be said of the Constitutions of other states, it cannot be successfully maintained that, under the Constitution of this state, the legislature possesses latent or undefined power.' If there be any reasoning in that case that does not meet our approval it is based upon a constitutional provision which we do not have. The case of State ex rel. Worrell v. Peelle, 121 Ind. 495, 22 N. E. 654, is in its main feature identical with State ex rel. Yancey v. Hyde."

In the case at bar, there is no question that the people have the *power* to initiate and vote upon proposed amendments to the Constitution. There is no question that the legislative assembly has the *power* to ratify them. The *power* must be and is conceded. Relators' contention, in effect, therefore, is, not that the legislature does not have the *power,* but, is that the proposed initiated amendments having not been duly adopted by the people, the exercise or attempted exercise of such *power* by the legislature would be a useless act and the state board, in consequence should be subjected to the interference of the judiciary thereby enjoining the exercise or attempted exercise of such power by the legislature.

Furthermore a distinction can be drawn between the process of amending the fundamental law through the initiative of the people and the process of amendment initiated by the legislative assembly.

Even though the process of amending the Constitution through the initiation of the legislative assembly by concurrent resolutions agreed upon by two successive legislative assemblies has been deemed a proceeding where the legislature is acting as the agent of the sovereign power, rather than in its legislative capacity (as narrowly defined). Nevertheless, a different conception can readily be applied when the people themselves are proceeding in their sovereign power.

Section 2 of the Constitution provides: "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."

It has heretofore been stated that the principle of governmental construction applies in this state that all governmental sovereign power is vested in the legislature, except that granted to the other depart-

ments, and except that expressly withheld from the legislature by constitutional restriction.

More and more the people in this state, possessing the political power, have been taking unto themselves the right to alter and reform their government instituted by and for them. They have enacted initiative and referendum provisions reserving and giving to the people, in the exercise of their political power, the right to initiate laws, the right to refer laws, the right to initiate amendments to the fundamental law and the right to refer the same to them for their approval or rejection. This is the highest exercise of a political power and is a power which the people inherently possess as a political power as well as a legislative power.

In acting under this broad power they are acting for and by themselves subject only to the restrictions that they themselves have placed upon the exercise of their power in their Constitution.

Under this conception it is readily observed that there is a broad line of demarcation between judicial interference with sovereign agencies of the people, in other departments of the government, in compelling them to perform a duty enjoined, or in restraining them in exercising a power conferred, and a judicial interference with this exercise of the sovereign power of the people themselves, acting in their own right and pursuant to a power expressly reserved to them.

In the exercise of this sovereign power by the people, they have appointed instrumentalities or agencies acting for the people in the exercise of this power in order to give an expression to the sovereign will. These instrumentalities and agencies are not acting as such as a ministerial agent of the executive department or as ministerial agent of the legislative department. It will be readily conceded that the legislative assembly when exercising its pure legislative power in the enactment of a law cannot be restrained by the judiciary, whether the law proposed be unconstitutional or clearly beyond the powers of the legislative assembly. It will further be readily conceded that the clerk of the house or the clerk of the senate or any member of either body will not be restrained by the judiciary in certifying a legislative enactment or presenting the same or in transmitting the same from one body to the other, whether the same is being presented or is about to be presented in an illegal or unconstitutional manner.

Thus in Smith v. Myers, 109 Ind. 1, 58 Am. Rep. 375, 9 N. E. 692, it was held that the court had no jurisdiction to enjoin a secretary of state from transmitting certified returns to the house of representatives as required by the Constitution and statute of Indiana.

So in People ex rel. Sutherland v. Governor, 29 Mich. 320, 18 Am. Rep. 93, the court said: "On the other hand it would be readily conceded that no court can compel the legislature to make or to refrain from making laws, or to meet or adjourn at its command, or to take any action whatsoever, though the duty to take it be made ever so clear by the Constitution or the laws. In these cases the exemption of the one department from the control of the other is not only implied in the frame work of government, but is indispensably necessary if any useful apportionment of power is to exist."

Likewise in Frantz v. Autry, 18 Okla. 561, 91 Pac. 193, it was held that the court had no power to restrain the constitutional convention, its officers or delegates, from exercising any of the rights, powers, and obligations entitled to it by Congress or the people.

Accordingly, in the case at bar the question is not the question of the power of the State Canvassing Board, but of the manner in which it is exercising such power.

Under this general conception of the nature of this proceeding, there can be no question that the judiciary as such has no power to interfere until such time when the proceedings had become a judicial question by directly interfering with the rights of the people or the rights of the state under constitutional provisions. Under initiative and referendum provisions, this conception of the power of the judiciary should obtain in order, not only that a judiciary may retain its proper place as an arbiter of judicial questions and not political question, and further in order that the sovereign rights of the people, while being expressed or seeking expression in a legislative undertaking, may not be subjected to a government by injunction through the courts, advising, directing, or admonishing the expression of the sovereign will by the people.

That under such view point the judiciary should not interfere is well and amply sustained by the authorities. State ex rel. Cranmer v. Thorson, 9 S. D. 49, 33 L.R.A. 582, 68 N. W. 202; People ex rel. O'Reilly v. Mills, 30 Colo. 262, 70 Pac. 322; Speer v. People, 52 Colo.

325, 122 Pac. 768; Duggan v. Emporia, 84 Kan. 428, 114 Pac. 235, Ann. Cas. 1912A, 719; State ex rel. Rose v. Superior Ct. 105 Wis. 651, 48 L.R.A. 819, 81 N. W. 1046; Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564; State ex rel. Bullard v. Osborn, 16 Ariz. 247, 143 Pac. 117; Allen v. State, 14 Ariz. 458, 44 L.R.A.(N.S.) 468, 472, 130 Pac. 1114; People ex rel. Sutherland v. Governor, 29 Mich. 320, 18 Am. Rep. 89; State ex rel. Taylor v. Lord, 28 Or. 498, 31 L.R.A. 473, 43 Pac. 471; State ex rel. Oliver v. Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Frantz v. Autry, 18 Okla. 561, 91 Pac. 193; Mississippi v. Johnson, 4 Wall. 475, 498, 18 L. ed. 437, 441; People ex rel. Billings v. Bissell, 19 Ill. 229, 68 Am. Dec. 591; Dallas v. Dallas Consol. Street R. Co. 105 Tex. 337, 148 S. W. 292; Pfeifer v. Graves, 88 Ohio St. 473, 104 N. E. 533; note in 50 L.R.A.(N.S.) 215 et seq.; Cress v. Estes, 43 Okla. 213, 142 Pac. 411.

In the case of Orman v. People, 18 Colo. App. 302, 71 Pac. 430, it was held that the State Board of Canvassers in canvassing the election returns for the election of representatives to the general assembly were discharging duties political and governmental in their character, and that the court had no power to compel them to act in a particular manner, the said board having not refused to act.

In the case of Dallas v. Dallas Consol. Street R. Co. 105 Tex. 337, 148 S. W. 292, it was said that the court had no power to enjoin a canvassing board from canvassing the election returns on a proposed ordinance for the reason that such board was exercising a political power in so doing.

In the case of Grant v. Hardage, 106 Ark. 506, 153 S. W. 826, it was held that the court had no jurisdiction to restrain the speaker of the house of representatives from declaring that a constitutional amendment had been adopted.

In the case of Frost v. Thomas, 26 Colo. 222, 77 Am. St. Rep. 259, 56 Pac. 899, the court held that it had no power to compel the governor to refrain from putting in force a law for the reason that it was claimed to be unconstitutional, because the governor was performing an executive duty, a function governmental in its nature, with which the judiciary could not interfere.

So, again, in the case of Smith v. Myers, supra, the court held that it was without jurisdiction to restrain the secretary of state from

certifying election returns of the votes cast for lieutenant governor to the house of representatives.

In the case at bar the state canvassing board in performing its duties in connection with the canvassing of the election returns upon the proposed constitutional amendments are performing a political function, legislative in its character; they are performing a function in the exact manner which the statute has required it to do. The board has not refused to act; the complaint is made that it did not act in the proper manner.

It might well happen that the legislative assembly would require or command such board to certify the canvass made by them in the manner that it was made, and thereupon there would be presented the question of the judiciary and the legislative branch of a government exercising its authority over this board; from the views expressed herein it is clear that this court has no jurisdiction to compel or direct such state board concerning the manner in which it shall canvass and certify the election returns upon the amendments in question.

3. The Question of the Due Adoption of the Initiated Proposed Amendments.

Although the primary jurisdictional questions, hereinbefore considered, are sufficient to deny the application of the relators, there is still another valid and potent reason why this court should not exercise its original jurisdiction to grant its prerogative writ herein to control or direct the action of the State Board of Canvassers.

It is considered now wholly proper to consider every point raised by the relators herein contending for the issuance of the prerogative writ of this court. There are no plain and evident reasons why this court should consider every point presented upon the record herein which legally justify this court in refusing to issue its prerogative writ. It is now no secret and this court may take judicial notice (Comp. Laws 1913, § 7983, subd. 59), that the legislative assembly, during the pendency of this cause, have received, passed upon, and adopted the proposed initiated amendments herein; Now, on their face, these proposed amendments are a part of the constitution of this state. This court is not now in an advisory position to the legislature. Its

action herein will not now in any manner interfere with, direct, or control, by its judicial decree, the legislative proceedings upon such amendments, already had. The judicial question presented and now to be considered can be passed upon by this court without any judicial interference with or admonition to the legislative branch of the government:

This question concerns the interpretation to be placed upon the language used in subdivision 2 of the 16th (Gibbens) Amendment for the adoption or approval of initiated proposed amendments by the people at a general election, requiring them to *"receive a majority of all the legal votes cast at such general election."*

The question is: Whether such amendment must each receive an affirmative vote equal to a majority of the electors who were present and voted at such general election; or,

An affirmative vote equal to a majority of the electors who voted on the amendment in question.

In the legislative assembly of 1911 the amendment in question, the Gibbens Amendment, was introduced and adopted in the form of a concurrent resolution amending article 15 of our original Constitution as it had existed since statehood. Chap. 89, Laws of 1911.

At the same session of such assembly there were also introduced and adopted a concurrent resolution known as the Plain Amendment (Chap. 86, Laws of 1911), providing for an initiative and referendum by the people, amending said article 15 and article 2 of the Constitution and requiring on constitutional measures, by the people, a majority of all votes cast thereon, and on legislative matters, a majority of votes cast thereon, also another concurrent resolution, known as the Doyle & Ployhar Amendment (Laws 1911, chap. 94) likewise providing for an initiative and referendum and amending said article 15 and article 2 of the Constitution, requiring on constitutional measures, by the people, a majority of electors voting thereon, and, on legislative matters, a majority of votes cast thereon, and also a concurrent resolution, known as the Bessessen Amendment (Laws 1911, chap. 93) providing for an initiative and referendum on legislative matters and amending said article 2 of the Constitution, § 25, and requiring an approval by the people on matters submitted thereunder of a majority of votes severally cast for and against the

proposition. In the legislative assembly of 1913 all of these amend ments were again introduced, but only two of them, the said Gibbens and Bessessen Amendments were adopted. At the general election held in 1914, these proposed amendments were submitted to the people for approval and ratification and were adopted by large majorities, the Bessessen Amendment now known as art. 15 of the amendments receiving 48,783 votes for and 19,964 against, and the Gibbens Amendment, receiving 43,111 votes for and 21,815 against. This Gibbens Amendment has now been before this court for the third time for interpretation and construction. In 1916 in State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281 (the New Rockford Case), this court, held that the provisions of such amendment concerning the submitting of initiative petitions thereunder to the people were not self-executing and restrained the secretary of state from submitting an initiative petition filed thereunder for the removal of the state capitol. In 1918, in State ex rel. Twichell v. Hall, No. 3647, post, 459, 171 N. W. 213; reversed the holding in the New Rockford Case, held that said Gibbens Amendment was self-executing in its provisions and refused to restrain the secretary of state from submitting the initiative petitions filed for the submission of the proposed amendments to the Constitution that are involved herein and which the relators now claim were not duly adopted by the vote of the people at the last general election held.

It is now interesting to observe our Enabling Act, the constitutional provisions as variously stated therein concerning the specific question herein involved, the judicial construction thereon consistently followed since statehood, and the legislative enactments and legislative policy likewise followed and adopted since statehood.

In the Enabling Act, passed by Congress and approved Feb. 22d 1889, providing for constitutional conventions and the manner of the submission of the proposed Constitutions to the people of the territory of Dakota out of which arose the states of North Dakota and South Dakota, it was provided in § 8 thereof that the proposed Constitution formulated by the constitutional convention for the territory, now the state, of North Dakota should be submitted for ratification or rejection by the qualified voters at an election to be held on the first Tuesday in October, 1889: That at such election the qualified voters

should vote directly for or against the proposed Constitution, and for or against any articles or propositions separately submitted; and further that "the returns of said election shall be made to the secretary of each of said territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same and if *a majority of the legal votes cast* shall be for the Constitution, the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon and upon separate articles or propositions." In section 9 thereof it was further provided that representatives to the 51st Congress and the governor and other officers provided for in such proposed Constitution might be elected on the day of such election.

At such election in October, 1889, the proposed Constitution now the original Constitution of the state consisting of 20 articles was submitted to the voters; also the election of the governor and other state officials. The body of such Constitution, 19 articles, was submitted as one proposition and article 20 thereof, the prohibition clause was submitted as a separate proposition. At such election the vote cast for the body of the Constitution was 27,441 for and 8,107 against; for the prohibition clause 18,552 for and 17,393 against. The total vote cast for governor was 38,098. A certificate of the result of such vote upon the proposed Constitution was made by the governor as required by said Enabling Act to the President of the United States, and pursuant thereto, President Harrison on Nov. 2d, 1889, issued a proclamation admitting this state into the Union wherein he stated in part as follows.

"Whereas it has been certified to me by the governor of the territory of Dakota that within the time prescribed by said act of Congress a Constitution for the proposed state of North Dakota has been adopted and the same ratified by a majority of the qualified voters of said proposed state in accordance with the condition prescribed in said act;

"And whereas it is also certified to me by the said governor that at the same time that the body of said Constitution was submitted to a vote of the people, a separate article, numbered 20 entitled 'Prohibition' was also submitted and received a majority of all the votes cast for and against said article as well as a majority of all the votes

cast for and against the Constitution and was adopted." [26 Stat. at L. 1549.]

In State ex rel. Larabee v. Barnes, 3 N. D. 319, 55 N. W. 883, the relator informed against for violation of such prohibition clause and the statutory enactments made pursuant thereto, sought relief through a writ of habeas corpus in this court, claiming that such prohibition clause was null and void for the reason that it had not been adopted by the majority required under the terms of such Enabling Act since such prohibition clause received only 18,552 votes therefor, or less than a majority of the total votes cast for governor at such election which were 38,098 votes.

Concerning this contention the court said:

"Upon these facts it is urged upon us with great earnestness and force that a 'majority of the votes cast' within the meaning of said § 8 of the Enabling Act, were not in favor of the adoption of said article 20, and hence the same was never adopted. This proposition cannot receive our assent and we will briefly state some of the reasons which irresistibly lead our minds to the opposite conclusion. Said § 8 of the Enabling Act requires (and the requirement is mandatory) that the proposed Constitution, and any specified article that the constitutional convention may direct, be submitted to a vote of the people, and that any such specific article shall be voted upon separately, and that, if a majority of the votes cast be in favor of the Constitution that fact shall be certified to the President of the United States, with a statement of the votes for and against the Constitution and each specific proposition so separately submitted, together with a copy of the Constitution and of any articles separately submitted; and from the data thus certified the President was required to determine whether or not the Constitution was republican in form and whether or not all the requirements of the Enabling Act had been complied with, and, if so, he was required to issue his proclamation admitting North Dakota as a state. Where, in this section, Congress spoke of the votes cast, it had reference to votes cast upon the particular objects which it directed should be submitted to a vote of the qualified electors. Congress had no knowledge that any candidate for offices would be voted for at that same election, and the matter of electing officers was left under the exclusive control of the constitutional convention; and, fur-

ther, it was the vote upon the Constitution and the articles, if any, separately submitted, that was to be certified to the President; and if by the use of the words 'majority of legal votes cast' Congress meant votes cast upon any subject other than those directed to be certified to the President, it would be obviously impossible for that official ever to determine whether or not the Constitution had been legally adopted, and yet under the act, the duty devolved upon him to determine that question at once. These considerations seem to us to conclusively establish that when Congress used the words 'majority of legal votes cast' it meant votes cast for or against the adoption of the Constitution or of the articles separately submitted. Whether or not Congress did not also intend that, in case the Constitution was adopted, the separate articles should stand or fall upon their separate vote, we need not determine."

The relators place the construction upon this case that the decision was based upon the grounds that Congress had no knowledge that state officers would also be voted on at this election, that it was the vote upon the Constitution and articles that was required to be certified to the President, and that if Congress had intended differently it would have been impossible ever to determine whether the Constitution had been legally determined, and furthermore that, if this court had at that time conceived the law to be that a majority of all the votes cast at a general election meant merely a majority of those cast for or against a particular measure, it could easily have said so. This contention is answered when it is observed that Congress specifically provided in such Enabling Act that state officers might be elected at the same election as well as representatives to Congress. Furthermore, in this same act, § 5 thereof, Congress provided that at the election of delegates for the constitutional convention, held in May, 1889, there should be submitted the proposition of the "Sioux Falls Constitution" for approval or rejection by the voters and for the determination thereof by a majority of the votes on such question; and, if the same was approved, for the later submission of the same again by such convention to the voters along with other questions, articles, and propositions and for the determination of the result by a majority of the votes cast on the ratification or rejection of such Constitution. It therefore appears that Congress used language in such act providing in some case for

approval of matters to be submitted to the voters by a majority of votes cast on the proposition and in other case for a majority of the legal votes cast. Nevertheless the interpretation of the territorial Canvassing Board, of the Federal government, and of this court was favorable for the due adoption of the prohibition clause by a majority vote cast on the proposition. Even though this court in State v. Barnes did not specifically determine the meaning of the words "majority of the legal votes cast" aside from the terms of the Enabling Act, its holding is significant in view of the later decisions of this court upon the question.

See also schedule, § 20, N. D. Const.

In our Constitution and in our statutory legislation, anterior to, and concurrent with, the introduction, passage, and adoption of the Gibbens Amendment, expression has been given in various forms to the manner in which a determination may be had of the approval or rejection of measures or propositions submitted to the people.

A few of these may be quoted for purposes of illustration.

In art. 5 § 122 of the Constitution, concerning the elective franchise, it is provided: But 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.*"

In art. 4, § 111, in the Constitution, relating to county courts, it is provided that the jurisdiction of said court may be increased whenever the voters of a county with the requisite population shall so decide *by a majority vote.*

In art. 10 § 168, of the Constitution, relating to county and township organization, the provision is: "All changes in the boundaries of original counties before taking effect shall be submitted to the electors of the county or counties to be affected thereby at a general election and be adopted by a *majority of all the legal votes cast in each county at such election.*"

In § 170 of said art. 10, it is provided: "The legislative assembly shall provide by general law for township organization under which any county may organize, whenever a *majority of all the legal voters of such county voting at a general election* shall so determine, and whenever any county shall adopt township organization, so much of this Constitution as provides for the management of the fiscal concerns

of said county by the board of county commissioners, may be dispensed with by *a majority vote of the people voting at any general election.*"

In § 171 of said art. 10, it is further provided: "In any county that shall have adopted a system of government by the chairmen of the several township boards, the question of continuing the same may be submitted to the electors of such county at a general election in such a manner as may be provided by law, and if a *majority of all the votes cast upon such question* shall be against said system of government, then such system shall cease in said county, and the affairs of said county shall then be transacted by a board of county commissioners as is now provided by the laws of the territory of Dakota."

In § 202 of art. 15 of the original Constitution, providing for future amendments of the Constitution by the adoption of a proposed amendment by two successive legislative assemblies, it is provided for the submission of the same to the people thereupon as follows: "Then it shall be the duty of the legislative assembly to submit such proposed amendment or amendments to the people *in such manner* and *at such time* as the legislative assembly shall provide: and if the people shall approve and ratify such amendment or amendments by *a majority of the electors qualified to vote for members of the legislative assembly voting thereon,* such amendment or amendments shall become a part of the Constitution of this state."

Under § 565 of the Compiled Laws of Dakota Territory for 1887, which pursuant to schedule § 2 of our Constitution became in force in this state when it became a state, it was provided with reference to the removal of county seats: "Whenever the inhabitants of any county are desirous of changing the place of their county seat, and upon petitions being presented to the county commissioners, signed by two thirds of the qualified voters of the county, it shall be the duty of the said board, in the notices for the next general election, to notify said voters to designate upon their ballots, at said election, the place of their choice; and, if, upon canvassing the votes so given, it shall appear that any one place *has two thirds of the votes polled,* such place shall be the county seat."

Under § 1883, Revised Codes 1895, the question of the removal of a county seat was determined at a general election by *"two thirds or more of all the legal votes cast by those voting on the proposition."*

Under § 1886, said Rev. Codes 1895, it was further provided that when such election had been held and at least *two thirds of the votes are not cast* for some other place than that fixed by law as the former county seat, no second election for the removal thereof must be held within four years thereafter, and further under §§ 1887 et seq., when a county seat has been once removed, it could be removed again at a general election when *two thirds of all the votes cast* are in favor of some other location.

In 1915, the legislative assembly amended said § 1883 but not the method of determination, the same still remaining *"two thirds or more of all the legal votes cast by those voting on the proposition"* (Laws 1915, chap. 116). It did amend however, in this respect, said § 1886 by providing as follows: "When an election has been held and at least *two thirds of the votes cast at such election are not cast* for some other place than that fixed by law as the former county seat, no second election for the removal thereof must be held within four years thereafter." (Laws 1915, chap. 117). Again in 1917 the legislative assembly again amended said chap. 117, Laws 1915, but retained the same language concerning the method of determination by vote of the people. Laws 1917, chap. 102.

Attention may also be called to § 4278, Compiled Laws 1913, enacted in 1897, providing for the dissolution of townships by a *majority of all the legal voters in such civil township.* To § 1190, Compiled Laws 1913, last enacted in 1913, providing for a consolidated school by *a majority of votes cast at such election.* To § 4043, Comp. Laws 1913, providing for the increase of the limitation of municipal indebtedness by a *vote of the electors of such municipality* at an election held for that purpose. To § 4015, Compiled Laws 1913, providing for the authorization of municipal bonds *by a majority vote of the qualified electors of such city or municipal corporation voting thereon at an election called regularly for that purpose.* To § 3773, Compiled Laws 1913, last enacted in 1911, providing for the adoption of the commission form of government for cities by a *majority of the votes cast at such election.*

From the constitutional and statutory provisions quoted, it is readily observed that there has been a noticeable lack of uniformity in the

phraseology used to express a method of determining the approval or rejection of propositions submitted to the people.

It is also to be noticed that in the Constitution including the Bessessen Amendment, art. 15, and the Gibben Amendment, art. 16, eight different phrases have been used to express a method of determination of the vote of the people. It is also particularly noteworthy to observe that the phrase *"majority of all legal votes cast"* has been used three times in the Constitution, to wit, in the Gibbens Amendment twice and in § 168 of the Constitution once, and also in the Enabling Act, excepting that the word "all" is not used in Enabling Act phrase. It also is to be observed that when the legislative assembly in 1915, used the phrase *"two thirds or more of all the legal votes cast by those voting on the proposition,"* in chap. 116, Laws 1915, it meant the same as the expression or phrase *"two thirds of the votes cast at such election"* contained in chap. 117, Laws 1915, for both refer to a general election and both refer to the same subject-matter, to wit, the vote necessary to remove a county seat; otherwise these phrases would be inconsistent.

With these premises a consideration may now be had of the holdings and policy of construction followed by this court and other courts upon this phrase "majority of all legal votes cast," and the meaning of the same in the Gibbens Amendment.

In State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958, this court said: "The general policy of the American people is to test the sufficiency of any vote by the vote on the particular question, and not by the vote on some other question. Unless the language is free from doubt we have no right to spell out of the statute by a far fetched inference, a purpose to depart from this general policy."

As otherwise stated, in State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360: "Where there is submitted to a vote of the electors of a given county or other district, a special question, whether so submitted at a general or special election, a majority of the votes cast upon that question only will be sufficient to carry the question or adopt the proposition, unless the legislative will to the contrary is clearly expressed in the law or the Constitution, as the case may be."

Relators have devoted a large part of their brief in explaining, con-

struing, in part contending against and disagreeing with the case of State ex rel. McCue v. Blaisdell, supra. They even urge this court to overrule the principles of law announced in that case upon the subject-matter involved.

The opinion in this case was written by former Chief Justice Spalding, who was a member of the constitutional convention. It is a well-considered and able opinion. It followed and is consonant with the principles of construction applied on this subject-matter by the earlier cases of State ex rel. Larabee v. Barnes, 3 N. D. 319, 55 N. W. 883, and State ex rel. Little v. Langlie, supra. It has not since been overruled. In the case of State ex rel. Minehan v. Thompson, 24 N. D. 273, 314, 139 N. W. 960, the bar of this state were assured that this court then considered such case as an authority. Upon its principles of construction the prohibition clause in our Constitution from statehood has been upheld and a rule of personal and property rights thereunder followed. Likewise upon its principles of construction have the location of county seats and the boundaries of counties been determined. The principles of law announced in this case in placing a construction upon the meaning of *"a majority of all the legal votes cast"* are clear, explicit, consonant with this court's other decisions and the expressed legislative policy and supported by the clear weight of authority upon the meaning of such particular phrase.

In this case of State ex rel. McCue v. Blaisdell, an application was made to this court for an original writ of certiorari. It appeared that in the general election of 1908 several propositions were submitted to the electors of Ward county for the division and creation of new counties therein. At such election none of the propositions received a majority of the votes cast thereon excepting the proposition for the creation of Mountraill county which received 4,207 votes for and 4,024 against. At that election the various candidates for governor received an aggregate vote of 9,259 votes. The sole question presented for determination was the construction to be placed upon the phrase *"a majority of all the legal cast"* contained in § 168, art. 10, of the Constitution, hereinbefore mentioned, relating to the vote necessary to accomplish a change in the boundaries of counties. The relator contended that such section properly construed, required an affirmative vote equal to a majority of the total votes cast for the different candi-

dates for governor, and the respondent contended that such provision required only a majority of the votes cast upon the proposition. To arrive at a determination of the question the court proceeded to define or interpret the meaning of the words, "elector," "voter," "votes cast" and "ballot." In this respect the court said: "We deem it advisable to first consider and determine the meaning of certain words contained in the constitutional provision quoted, stripped of meaningless words, as applied to the present controversy and to simplify matters, we may read that portion of § 168 quoted as follows: all changes in the boundaries of organized counties shall be submitted to the electors at a general election and be adopted by a majority of the votes cast at such election. The word 'electors' may be used to apply to different classes or bodies of people. It is sometimes applied to all persons who are qualified to vote within their respective political subdivisions. At other times it is used as synonymous with 'voters' and in many instances has been used indiscriminately and interchangeably with the word 'voters.' But its meaning in the section in question is not left in doubt, because it is defined by the Constitution itself [quoting § 121, Const. as amended]. We next come to the interpretation of the words 'votes cast,' and to aid us in this we may seek the definition of the word 'voter.' This word, like the word 'elector' is used in various senses, but when used in apposition to or in contrast with, the word 'elector' it has but one meaning. A voter in this sense is an elector who exercises the privilege, conferred upon him by the Constitution and the laws, of voting. He is an elector who does vote, and in the present instance, a voter is one who voted at the last November general election, and on the question in controversy is one who actually voted, either for or against the creation of the new county. . . . An elector is not a voter unless he votes, yet he still retains his qualifications as an elector. The word 'vote' used as a noun is the expression of the choice or preference of the voter. The choice may be exercised in several different manners; *viva voce,* by the use of a ballot; by show of hands; by a division of the house or meeting, and possibly by other methods."

The court further said:

"A ballot, as distinguished from a vote in the legal sense, and in a general way, is the piece of paper upon which the voter expresses his

choice. Under the Australian system, for the reasons above enumerated and many others, the voter is permitted to express his choice or vote upon any offices, and perhaps many questions on the same ballot. It is but an application of the same principle that prevailed when the choice of the voters was expressed *viva voce* or by any of the old methods. In other words notwithstanding he may use but one ballot, the voter casts as many separate votes or expresses his choice as many times, as there are candidates or questions for or against which he votes. To illustrate: He casts a vote for presidential electors, another vote for governor, another vote for member of Congress, and so on through the list of offices to be filled or questions to be voted upon. In the case at bar the statutes of this state require the submission of amendments to the Constitution, creation of new counties, and other similar questions, to the voters on a ballot separate and distinct from the ballot used in voting for various officers, and that it be deposited in a separate box. And it is clear to us that the words 'votes cast' as used in § 168 mean the total of the separate votes of the voters for and against the question submitted. The votes cast for presidential electors have no relation, in the matter of determining who are elected or which party prevails, to the votes cast for governor and *vice versa.* There is no more reason why the votes cast on the question of creating a new county should have any relation to the votes cast for governor than the votes cast for presidential electors should have. Nor is there any logical reason why the votes cast for governor should have any relation to those cast on the question of the creation of a new county." (p. 38.)

"According to the American doctrine the majority is entitled to rule—the preference of a majority on any question is expressed by the vote of those who actually vote, unless a different intention is clearly expressed. The choice of the voter is expressed by the vote he actually casts for or against a proposition. To adopt the relator's theory in this proceeding would be to give as great weight to a vote which was not cast as to one which was cast, and in effect would be to count the electors who voted for governor, and did not vote on the county division question, as voting against the division. It ought to require the plainest language, and that it be so expressed as to leave absolutely no doubt in the mind of the intelligent reader of its meaning to justify

a court in holding that no vote counts precisely the same as though the vote had been cast against the proposition. The correct principle applicable in cases where the meaning is ambiguous, or is not so expressed as to clearly indicate that an elector who does not vote shall be held as voting 'No,' is that electors who do not participate in an election, or are not interested enough in public affairs to attend the polls and cast their vote and express a choice, acquiesce in the result of the votes cast by those who do vote, whatever such result may be. It is equally plain that if an elector enters the booth and votes for some candidates and not for others, or votes for all candidates, but fails to express his choice on a question submitted, he delegates to those who do vote his rights as an elector and acquiesces in the result, be it one way or the other." (p. 39 citing cases.)

These principles of construction announced in this case apply to the case at bar, if that case is an authority, and the doctrine of *stare decisis* obtains unless there can be read into the amendment involved and the surrounding circumstances, outside of the phrase itself, a clearly expressed legislative intention to, obviate such construction.

No process of refinement can make these principles of construction, so clearly announced, as applied to § 168 of the Constitution different when applied to the Gibbens Amendment in question concerning the meaning of the phrase, *"a majority of all legal votes cast."*

The language of the phrase used in both is exactly the same, and the surrounding phraseology, remarkably similar.

Under said § 168 of the Constitution, it is required that the proposition be submitted at a *general* election. Under the Gibbens Amendment, it is likewise required that the proposed initiated amendment be submitted at a *general* election. Relators contend that there is a distinction to be drawn here because in the Gibbens Amendment the phrase used is "a majority of all the legal votes cast at such *general* election," whereas in said § 168 it provides only, "at *such* election" and that the holding of Judge Spalding in the Blaisdell Case in respect thereto, was that the voting on the county division question was, in effect, a separate election and further that the use of this word "general" in connection with the provision in said Gibbens Amendment that the proposed amendment shall be placed upon the ballot to be voted upon by the people at the next general election, manifestly in-

dicated an intention that the proposition should be placed upon the general ballot, or, at least, if placed upon a separate ballot, that it should be considered as a part of the general ballot to all intents and purposes and excluded the idea that a vote on such proposition should be in any manner treated as a special election or as anything except a constituent part of the general election.

Regardless of the violence that this argument to the definitions and principles of construction stated by Judge Spalding, relators' contentions are easily answered. Relators apparently entirely overlooked the case of State ex rel. Miller v. Flaherty, 23 N. D. 313, 41 L.R.A.(N.S.) 132, 136 N. W. 76, as well as the statutory provisions applicable. The Gibbens Amendment is self-executing in its terms. Statutory legislation and expressed legislative policy already existing, not contravening or in opposition to its terms, furnished the law and the intent to carrying into execution its provisions. State ex rel. Twichell v. Hall, post, 459, 171 N. W. 213.

Under § 959, Compiled Laws 1913, proposed constitutional amendments are required to be printed on a separate ballot and to be deposited in a box separate from that provided to receive ballots for public officers.

There was the same statutory provision for a separate ballot and a separate box in which the same were required to be deposited, at the time the question of county division under said § 168 was involved in the Blaisdell Case. The proposed amendments involved herein were printed on a separate ballot and were presumably deposited in a separate box. At the general election in November, 1918, there were four different ballots, the general ballot for congressional, state and county offices, the nonpartisan school ballot for state and county superintendents of schools, and the nonpartisan judiciary ballot for judge of the supreme court. The nonpartisan ballots and the constitutional amendments ballot, each presented a complete separate election simultaneously held with the general election. State ex rel. Miller v. Flaherty, supra.

In this case, concerning this matter, the court said: "As further evidencing the legislative intent, notice also that under our present primary election laws two classes of primary elections are now simultaneously held: Namely, the nonpartisan judiciary primary, a com-

plete separate election at which no test of party fealty can be exacted and is in express terms prohibited; the object of which act is to nominate in a nonpartisan manner, regardless of political affiliations, candidates to be elected in the fall at a similar nonpartisan election then held simultaneously with the general election; in addition, simultaneously there is held the partisan primary, at which the personnel of two or more separate party tickets is chosen to contend for office by election at the ensuing general election upon party platforms. That such elections, though held together, are in law separate elections, see State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360, where it was held that a change of county boundaries amounting to county division and the formation of new counties under § 168 of the Constitution, and therein required to be submitted to the electors and adopted by them at a general election, was no part of the general election at which the question was submitted; but, instead, was a special election simultaneously held upon that one matter, at which a majority only of the votes cast thereon (or in said special election) was necessary, and county division was legally carried when a majority of the votes cast on the division proposition voted affirmatively thereon, although such affirmative votes were not in fact a majority of all votes cast at the general election simultaneously."

Following these decisions, consonant with the legislative expressed policy concerning our election laws pursued since statehood, there remains no room for argument, therefore, that the submission of a constitutional amendment to the people in this state is an independent proceeding or submission and that a "vote cast" is the individual expression of the "voter" upon the particular proposition or upon the particular office to be filled. A "vote cast" is not the aggregate expression of the individual "voter" upon the various propositions or questions and the various offices to be filled. "Votes cast" does not mean the same as "the aggregate number of electors who did vote at an election." Both upon reason and principle this construction, according to the ideas of American democracy, adopted and consistently followed in this state both by legislative expression and judicial construction, should be and is adhered to by this court.

Furthermore, § 1025, Compiled Laws 1913, specifically requires the State Board of Canvassers to ascertain the whole number of votes

given for and against any proposed constitutional amendment submitted to a vote of the people and to determine and certify whether such amendment has been approved and ratified by "a majority of the electors voting thereon." If this section had required such board to determine and certify whether such amendment has been ratified and approved by "a majority of votes cast," it would mean the same as it now provides. Upon the construction placed as stated herein, the legislative expression, the judicial construction continuously followed in this state, and the Gibbens Amendment all agree. But relators contend that there are peculiar circumstances in connection with, and in the passage of, the Gibbens Amendment that show peculiarly an intent for a construction contrary to these established rules and precedents of legislative expression and judicial construction heretofore obtaining in this state. They mention that the Gibbens Amendment states two different phrases as a method of determining approval by the people, one in the first subdivision, the original § 202 of the Constitution before amendment, which requires an approval of a proposed constitutional amendment submitted by the legislative assembly "by a *majority of the electors qualified to vote for members of the legislative assembly voting thereon* and the other, contained in the Gibbens Amendment proper, the phrase in question, *"a majority of all legal votes cast at such general election."* They contend that these two different phrases do not mean the same, and that the fact that a different phrase was used displays an intent to require a majority of the aggregate number of electors who voted on any question or proposition at a general election in order to approve or ratify a proposed constitutional amendment under such Gibbens Amendment. Further, they contend that said § 1025, Comp. Laws 1913, was enacted years ago for purposes of submission of constitutional amendments under § 202 of the original Constitution. They further state that in the legislative assemblies of 1911 and 1913 other proposed amendments to the Constitution were being considered by such assemblies (heretofore mentioned); that these proposed amendments contained phrases concerning the method of determining the approval of the electors showing clearly a requirement of only a majority of votes on the specific proposition submitted; that all of these proposed amendments were defeated in the 1913 Legislative assembly execepting the Bessessen Amendment providing for an initiative and referendum as to legislation (art. 15 of Constitution),

which requires approval of matters submitted thereunder by a majority of the votes cast thereon and not otherwise; that these circumstances show an intent to apply a different meaning to the phrase "a majority of all legal votes cast," contrary to the meaning and construction theretofore given by legislative expression and judicial construction, and therefore the rule of *stare decisis* should not apply, and State v. Blaisdell should be overruled. In the opinion of the court this contention presents the only serious question on the merits raised by the relators. It is answered by a consideration of our various constitutional provisions, and statutory provisions, and expressed legislative policy, even that of the legislative assemblies of 1911 and 1913, concerning the various phrases involved, the general interpretations placed thereon, as well as by settled rules and principles of construction.

Article 10 of the Constitution, concerning county and township organization, was considered and reported to the constitutional convention by the committee on county and township organization. It was considered by the committee of the whole in such convention, section by section. It will be noticed that in this article, in § 168 thereof, the phrase in question, *"a majority of all the legal votes cast"* occurs; in § 171 of the same article, relating to the continuance of township organization for the county, the question of such continuance submitted to the electors depends upon *"a majority of all the votes cast upon such question"* at a general election. Here in the same article the two phrases are used substantially the same as in the Gibbens Amendment. Both of these sections were considered by the constitutional convention: the constitutional debates disclose no intent to impart a different meaning to such phrases. In fact the record of such debates show no question raised concerning the same. Accordingly, the same question, concerning intent, only in a stronger form, was present in the consideration of the case of State ex rel. McCue v. Blaisdell. Judicial construction in this state has said that these phrases mean the same thing. Legislative enactment and expression has likewise construed the same to mean the same. Under § 1007, Compiled Laws 1913, existing as such practically since statehood, inspectors of election are required to determine and certify the number of votes cast for and against each proposition submitted, constitutional amendment, county division matter, or otherwise. Furthermore, in the division of

counties, § 3205, Comp. Laws, 1913, has required for over twenty-four years (Rev. Codes 1895, § 1854) the county commissioners to prepare a form of ballot for voting upon county division pro and con, and for the canvass and return of the votes cast upon the proposition submitted. Likewise, § 3206, Comp. Laws 1913 (being substantially same as § 1855, Rev. Codes 1895), provides, "if it shall appear that a *majority of all votes cast at such election* in each of the counties interested is in favor of the formation of such new county or counties," the county auditor shall so certify to the secretary of state, etc.

The legislative construction so given, not only subsequent, but also anterior and concurrent with, the State ex rel. McCue v. Blaisdell Case, is obvious.

With this construction concerning the phrase *"a majority of all the legal votes cast,"* both legislative and judicial, existing in this state ever since statehood, the Gibbens Amendment was introduced with this specific phrase therein contained and repeated, adding such Gibbens Amendment proper (subdivision 2 of art. 16), merely to the original § 202 of the Constitution. What purpose was intended thereby? Was it the purpose and intent to introduce doubt and uncertainty or was it the purpose to try and make definite and certain the meaning of such phrase? Surely if the purpose was to introduce an uncertainty as to meaning, why should there be used a phrase, practically the identical phrase, which had been passed upon both judicially and in a legislative way ever since statehood. In the Constitution itself, then existing, there was before the legislative assembly many other modes of expression concerning this question of determination of a vote, such as the phrase *"majority of the electors voting at a general election"* contained in § 122, Const., and the phrase *"majority of all the legal voters voting"* contained in § 170, Const., upon which there did not exist such specific legislative and judicial construction. Why were these phrases not used if it should be said that there was any intent to introduce doubt and uncertainty? Every legislator in these legislative assemblies for the years 1911 and 1913 had the right to rely upon the meaning and construction placed upon the phrase "a majority of all the legal votes cast" both by the judiciary and the theretofore legislative expressions and enactments had. Every such legislator had the right to give expression to a different intent by

using a different phrase, or by expressly indicating in a legislative way a different meaning to the specific phrase in question so as to expressly overrule the legislative and judicial construction then obtaining. Such legislative assemblies did not so do. On the contrary they expressly recognized the theretofore interpretation and construction given both in a judicial and legislative way, by the re-enactment of § 1886, Rev. Codes 1895, through chap. 117, Laws 1915. By the re-enactment of chap. 45, Laws 1907, through chap. 77, Laws 1911. Likewise the 1917 legislative assembly again recognized this settled construction by re-enacting chap. 117, Laws 1915, through chap. 102, Laws 1917. Certainly, if it was the intent to make definite and certain a method of determining the approval of the people, and so it is presumed the legislative intent was, a phrase was used which specifically had been determined, both by judicial and legislative construction, concerning its meaning. The fact that other proposed amendments, considered in the same legislative assemblies, used different phrases as a method of determining approval by the people, some specifically mentioning the vote upon the proposition, pro and con; that all of these were finally defeated excepting the Bessessen Amendment (supra) which was adopted and specifically provides for a *"majority of the votes severally cast for and against the proposition"* —does not show a legislative intent to overrule the long-established meaning given to the phrase involved herein. It is not shown nor is it claimed that the passage or defeat of the proposed amendments, so mentioned, or any of them, depended upon these different phrases that were variously used. It is not shown nor is it claimed that the meaning of the phrases so used in such proposed amendments were even debated or considered either in committees or on the floors of the respective legislative assemblies. The Gibbens Amendment was introduced in the senate, in 1911. It was reported out of the committee with only minor amendments. It passed the senate practically unchanged in the form that it was introduced. It passed the house unchanged. Not anywhere in the record of the house or the senate is there shown any action which indicates any attempt to change this phrase or to give to it any different meaning or interpretation than that already had by judicial and legislative construction. If any inference, at all, is to be indulged in, it is that this legislative assembly, having

five other matters concerning proposed constitutional amendments before it, all using various phrases and methods of determination for the approvals thereof by the people, and having thereby this specific matter at least brought to their attention from the contents of the respective proposals, were satisfied with the phrase as used in the Gibbens Amendment and with the meaning and construction that had been theretofore placed upon the same knowledge of which the relators concede the assembly presumably had. In fact, the various proposed amendments before such legislative assembly differed widely in their matters of substance and procedure as an inspection of the same will readily disclose. In 1915 such proposed amendments referred to that legislative assembly had to be adopted, if at all, unchanged. It is fair to presume that some of the wide differences in substance and procedure in these proposals had something to do with the defeat of some of such proposals. It also will be noted that the proposed amendments that were adopted were the senate proposals; also, that the records of the house and senate journals disclose a long consideration and spirited contention concerning whether the senate proposals or house proposals should be adopted. These matters may also have had something to do with the proposals so defeated. Furthermore, it should be taken into consideration that these various proposed amendments were each largely framed upon existing or proposed initiative and referendum measures or amendments in various other states.

The practical construction given by the legislative department upon the phrase in question both in the constitutional and statutory provisions is entitled to be considered by, and to have weight with, the judiciary. 8 Cyc. 736; Cooley, Const. Lim. 7th ed. 102; Sutherland, Stat. Constr. § 229; Story, Const. §§ 408, 409; State ex rel. McCue v. Blaisdell, 18 N. D. 39, 119 N. W. 360, and cases cited; State ex rel. Davis v. Fabrick, 18 N. D. 402, 121 N. W. 65; State ex rel. Linde v. Packard, 35 N. D. 298, 322, L.R.A.1917B, 710, 160 N. W. 150.

"In cases of doubt and uncertainty the solemn declaration of the legislative branch of the government, or practical construction by the executive department, gives a certain sanction, and will be influential with the courts. So the meaning of particular words in a recent statute will have weight, and their meaning may be inferred from earlier statutes in which the same words or language have been used, where the

intent was more obvious or had been judicially established. The words of a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary signification; but, if a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence of the sense intended." Sutherland, Stat. Constr. § 229.

The judicial construction upon the phrase involved has been in accord with this legislative construction and expression and has been well settled in this state. State ex rel. Larabee v. Barnes, 3 N. D. 319, 55 N. W. 883; State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958; State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360; State ex rel. Davis v. Fabrick, 18 N. D. 402, 121 N. W. 65; State ex rel. Miller v. Flaherty, 23 N. D. 321, 41 L.R.A. (N.S.) 132, 136 N. W. 76; State ex rel. Minehan v. Thompson, 24 N. D. 273, 314, 139 N. W. 960.

Other courts have recognized the propriety of the rule of construction applied and adopted by the courts of this state upon the particular phrase *"majority of votes cast."* Gillespie v. Palmer, 20 Wis. 544; Sanford v. Prentice, 28 Wis. 358; Marion County v. Winkley, 29 Kan. 36; State ex rel. Crocker v. Echols, 41 Kan. 1, 20 Pac. 523; Territory ex rel. McGuire v. McGuire, 13 Okla. 605, 76 Pac. 165; State ex rel. Durkheimer v. Grace, 20 Or. 154, 25 Pac. 382; Chamlee v. Davis, 115 Ga. 266, 41 S. E. 691.

Contra: Adkins v. Lien, 10 S. D. 437, 73 N. W. 909; but see Williamson v. Aldrick, 21 S. D. 13, 108 N. W. 1063; State ex rel. Pryor v. Axness, 31 S. D. 125, 139 N. W. 791; People ex rel. Reed v. Weber, 222 Ill. 180, 78 N. E. 56; People ex rel. Wheaton v. Wiant, 48 Ill. 264; Stebbins v. Judge of Superior Ct. 108 Mich. 693, 66 N. W. 595; State ex rel. Omaha & S. O. Street R. Co. v. Bechel, 22 Neb. 158, 34 N. W. 342.

The cases cited by the parties hereto upon the rule of construction applied to the phrase, "majority of electors," "majority of voters," and similar phrases are not specifically discussed or quoted for the reason that this court has definitely prescribed a rule of construction concerning the phrase, "majority of legal votes cast," the specific phrase herein involved thereby rendering it unnecessary to consider the rules of construction that other courts have placed, pro or con, upon different phrases than that under consideration.

The above considerations present a clear case for the application of the rule of *stare decisis,* a rule of construction adopted and followed by repeated decisions of this court, sustained by legislative expressions and enactments ever since statehood, upon which personal and property rights in this state for years have been determined and adjudicated.

The application should be denied and the proceedings herein ordered and dismissed.

ROBINSON, J. This case is brought to review the proceedings of the State Board of Canvassers on five constitutional amendments submitted to the voters by petition under § 202 of the Constitution. Under that section a petition for the submission of the amendments was signed by 50,000 voters, filed in the office of the secretary of state, and duly advertised. By that section when an amendment "receives a majority of all the votes cast at the general election," it must be referred to the next legislative assembly; and, if agreed upon by a majority of all the members elected to each house, it becomes a part of the Constitution; if not agreed upon, it does not become a part of the Constitution. The legislature is given absolute power to act upon and to disapprove an amendment; and the power to approve and disapprove go together—the one implies the other. The power to disapprove an amendment clearly implies the power to approve it. Section 202 was formulated by old-time members of the legislative assembly who were opposed to the submission or passage of any amendment by way of a petition and who desired to reserve to themselves full power to approve or disapprove of any amendment that might be referred to them. Hence it is that by § 202, the fundamental law, the legislative assembly is given full power to approve or disapprove any amendment and its decision is final and conclusive. Of course it may err. It is not infallible; but that fact in no manner lessens the finality of its decision.

At the general election the total number of voters were 94,055. The report of the canvassing board erroneously stated that the total number of votes cast were 94,055. The board erroneously assumed that every person cast but one vote. The error was grave and misleading and it was based on the assumption that each person does cast but one vote,

whereas, in truth, nearly every person voted four ballots and each ballot gave expression to several votes. Each amendment in question received a large majority of all the votes cast thereon, but did not receive a vote equal to all the votes cast at the election. That was an impossibility, because each person cast several votes and the total number of votes cast were at least three or four times the total number of voters. Surely it was over 300,000 and a majority of the votes cast was over 150,000; it was probably several times that number. And of course no amendment could receive 150,000 votes when the total number of voters was only 94,055.

To vote is to express a preference for any man or any measure in the manner prescribed by law. On every ballot voted by any person each X mark does express a preference for some man or some measure, and the total number of X marks expresses the total number of votes cast by the voter. At the last general election four ballots were voted: (1) A long ballot containing the names of the candidates for state and county offices; (2) a ballot with the names of supreme court candidates; (3) a ballot with the names of candidates for superintendent of public instruction; (4) a ballot containing a copy of ten proposed amendments. If each person casting a ballot had voted for or against the several amendments, that alone would have represented a vote equal to ten times the number of persons voting at the election, to wit, a vote of 940,550. Hence it is manifest there could be no such thing as any amendment receiving a majority of all the votes cast. Therefore, we must conclude that the phrase "a majority of all the votes cast at the general election" means a majority of all the votes cast for or against any measure or amendment, and as each of the five amendments received a large majority of all the votes cast for or against the same, it follows that each of said amendments was properly referred to the legislative assembly for approval or rejection and also that the Canvassing Board did properly certify the amendments in question showing that each amendment received a majority of all the votes cast thereon. It is strenuously contended that according to the true meaning of § 202 each amendment submitted for approval should have an affirmative vote equal to a majority of all persons voting at the election, but there is nothing to warrant such a contention, and it is fair to assume that § 202 was framed by lawmakers who knew how

to use the English language and to express a clear and definite meaning. Hence it is the judgment and determination of the court that the amendments were properly passed and certified to the legislative assembly and that by § 202 its determination is final and conclusive.

CHRISTIANSON, Ch. J. (dissenting). What number of votes is necessary to ratify a constitutional amendment proposed by initiative petition? That is the question which it is sought to have determined in this proceeding.

The methods of amending the Constitution are prescribed by § 202 of the state Constitution. The entire section reads as follows:

"First: Any amendment or amendments to this Constitution may be proposed in either house of the legislative assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on the journal of the house with the yeas and nays taken thereon, and referred to the legislative assembly to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice, and if in the legislative assembly so next chosen as aforesaid such proposed amendment or amendments shall be agreed to by a majority of all members elected to each house, then it shall be the duty of the legislative assembly to submit such proposed amendment or amendments to the people in such manner and at such times as the legislative assembly shall provide; and if the people shall approve and ratify such amendment or amendments *by a majority of the electors* qualified to vote for members of the legislative assembly *voting thereon,* such amendment or amendments shall become a part of the Constitution of this state. 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.

"Second: Any amendment or amendments to this Constitution may also be proposed by the people by the filing with the secretary of state, at least six months previous to a general election, of an initiative petition containing the signatures of at least twenty-five per cent of the legal voters in each of not less than one half of the counties of the state. When such petition has been properly filed the proposed amend-

ment or amendments shall be published as the legislature may provide, for three months previous to the general election, and shall be placed upon the ballot to be voted upon by the people at the next general election. Should any such amendment or amendments proposed by initiative petition and submitted to the people receive *a majority of all the legal votes cast at such general election,* such amendment or amendments shall be referred to the next legislative assembly and should such proposed amendment or amendments be agreed upon by a majority of all the members elected to each house, such amendment or amendments shall become a part of the Constitution of this state. Should any amendment or amendments proposed by initiative petition and receiving *a majority of all the votes cast at the general election as herein* provided, but failing to receive approval by the following legislative assembly to which it has been referred, such amendment or amendments shall again be submitted to the people at the next general election for their approval or rejection as at the previous general election. Should such amendment or amendments *receive a majority of all the legal votes cast at such succeeding general election* such amendment or amendments at once become a part of the Constitution of this state. Any amendment or amendments proposed by initiative petition and failing of adoption as herein provided shall not be again considered until the expiration of six years."

The first subdivision of the section was embodied in the Constitution adopted in 1889; the second subdivision was adopted as a constitutional amendment in 1914.

It will be noticed that it is provided that an amendment proposed by the legislative assembly (under the first subdivision), shall be approved "by a majority of the electors . . . voting thereon;" and that an amendment proposed by initiative petition (under the second subdivision), shall "receive a majority of all the legal votes cast at such general election,"—i. e., the general election at which the amendment is submitted. The question here is: Do these two phrases mean the same thing? And did those who framed and those who adopted the second subdivision intend to say in the latter phrase the same thing which had been said in the former phrase?

The object of construction, as applied to a written Constitution, is to ascertain and give effect to the intent of its framers, and of the people

in adopting it. But "the intention to which force is to be given is that which is embodied and expressed in the constitutional provisions themselves. Words or terms used in a Constitution, being dependent on ratification by the people, must be understood in the sense most obvious to the common understanding at the time of its adoption." 6 R. C. L. p. 52. "A Constitution is an instrument of government, made and adopted by the people for practical purposes, connected with the common business and wants of human life. For this reason pre-eminently, every word in it should be expounded in its plain, obvious, and common sense." People v. New York C. R. Co. 24 N. Y. 485, 486.

As the great jurist, Marshall, said: The framers of the Constitution, and the people who adopted it, "must be understood to have employed words in their natural sense, and to have intended what they have said." Gibbons v. Ogden, 9 Wheat. 1, 188, 6 L. ed. 23, 68. The noted Judge Cooley, said:

"Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government." Cooley, Const. Lim. 7th ed. 93. The people who adopt a constitutional provision doubtless judge "it by the meaning apparent on its face." Smith v. Thursby, 28 Md. 244, 269. Of course there are certain words which are employed in a technical sense, such for instance as the term "*ex post facto* laws." When such words or terms have acquired a well-understood meaning, it must be supposed that the people had such meaning in view in adopting them. "The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history, where they have been employed for the protection of popular rights." Cooley, Const. Lim. 7th ed. 94. But the words and terms of a Constitution "are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates, or the text suggests, that they have been used in a technical sense." And, "the presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them." 12 C. J. 705, 706.

It has been said that "in interpretation the first impression made by

a writing is an important factor, because the writing is then being tested in the same manner that the writer expected and in the same manner that the writer prepared the writing to be received."

It has also been said that "it is generally safe to reject an interpretation that does not naturally suggest itself to the mind of the casual reader, but is rather the result of a laborious effort to extract from a statute a meaning which it does not at first seem to convey." Ardmore Coal Co. v. Bevil, 10 C. C. A. 41, 27 U. S. App. 96, 61 Fed. 757; Schulthis v. MacDougal, 162 Fed. 340.

What is the first impression made by the words, *"a majority of all the legal votes cast at such general election?"* What is naturally suggested to the mind thereby? What did the people of this state understand these words to mean at the time they adopted the amendment containing the phrase? Is there any serious doubt as to how these questions should be answered? I think not. The words are not technical. They are words of common and ordinary use. Their utterance promptly conveyed, and conveys, a certain idea to the popular mind. And there is no room for argument as to the meaning generally attributed to them by the people of this state. It is undeniable that the phrase, "a majority of all the legal votes cast at such general election," was uniformly understood throughout the state to mean a majority of the votes cast by all the legal voters who participated in such general election. No one ever asserted that the phrase had any other meaning until after the election in 1918. During the campaign preceding the election those opposed to, as well as those in favor of, the amendments were of the same mind. For instance, the Republican state central committee (which had indorsed the amendments), issued a pamphlet entitled, "The Truth about the Constitutional Amendments." In this pamphlet (page 15), it is said: "In order to carry, the constitutional amendments *must have a majority of all votes cast,* so that the citizen who does not vote at all on these measures *is helping defeat them as much as the man who votes against them."* Statements to the same effect appeared in the newspapers of the state generally. No one contended that the phrase meant what the majority members now hold that it means. Of course, it is true, this is not evidence of the intention of the framers or proposers of the provision under consideration,

but it tends to show the meaning uniformly attributed thereto by the people of the state.

But let us consider the intention of those who framed and proposed the amendment embodied in the second subdivision of § 202. Let us bear in mind the object of the second subdivision, and the situation which confronted the men who framed it, and the legislators who proposed it. There was then in existence only one method of proposing constitutional amendments, to wit, the method proposed in subdivision 1 of § 202. The second subdivision provides a wholly different method of proposing constitutional amendments. The first subdivision provides for the proposal of constitutional amendments by the legislative assembly; the second subdivision provides for the proposal of such amendments by initiative petition. An amendment proposed under the first subdivision is proposed by the chosen representatives of the people. It must receive the approval of two successive legislative assemblies before being submitted to the people. It is published as a part of the proceedings of both legislative assemblies. It must also be published for three months previous to the election of the members of the second assembly, so that the people may know that the members they are about to choose will be required to vote for or against the submission of the *proposed* amendment. An amendment proposed by this method remains pending for a considerable length of time and much publicity and opportunity for discussion is afforded. But an amendment proposed by initiative petition does not emanate from any representatives chosen by the people, but from those who prepare, circulate, or sign such petition. No publicity is required before the petitions are circulated or filed. The proposed amendment is submitted at the next general election, if the petition is filed with the secretary of state at least six months prior thereto. The differences between the two methods of amending the Constitution are self-evident. These differences were recognized by the men who framed, proposed, and adopted the second subdivision. They established new standards and prescribed a different procedure for amendments proposed under the second subdivision from those established and prescribed in the first subdivision. The first subdivision expressly authorizes the legislature to prescribe the times at, and the manner in, which constitutional

amendments proposed by the legislative assembly shall be submitted. If the legislature desires, it may direct that such amendments shall be submitted at a special election. But the second subdivision expressly provides that amendments proposed thereunder shall be submitted at a general election. The legislature is given unrestricted power to prescribe the notice to be given previous to an election at which an amendment proposed under the first subdivision is submitted to the electors for ratification or rejection (as a matter of fact it prescribed ten days' notice); but it is expressly provided that an amendment proposed under the second subdivision shall be published for three months previous to the general election, at which it is submitted.

At the time the second subdivision of § 202 was framed, there were two prevailing rules in this country as to the number of votes required to ratify a constitutional amendment. That is, also, true to-day. Some of the states require only a majority of the votes cast upon the subject, while others require the votes of a majority of all the electors voting at the election at which the amendment is submitted. Our sister state Minnesota has the latter rule. So have many other states. See 12 C. J. 694. The former rule was embodied in the first subdivision of § 202 of the North Dakota Constitution. If the men who framed, and the legislators who proposed, the second subdivision intended to make the rule announced in the first subdivision applicable to amendments proposed under the second subdivision, there was no difficulty in finding suitable language to express such intent. There was no occasion to search for or invent a phrase. The phrase clearly expressing such intent was right before their eyes. Not only so, but the legislators who proposed subdivision 2, § 202, also proposed the constitutional amendment providing for the initiative and referendum of statutes. See Laws 1911, chap. 93; Laws 1913, chap. 101. And in this latter amendment it was provided in plain and unmistakable terms that statutes submitted to the people for ratification or rejection pursuant to initiative and referendum petitions shall require the approval of only a majority of the votes cast upon the particular subject. If the men who framed and proposed the second subdivision of § 202, meant to say that a constitutional amendment proposed thereunder should require only "a majority of all legal votes cast thereon,"

why did they not say so? They said so in the provision relative to the initiative and referendum of statutes. It had already been said in the first subdivision of § 202. That rule was satisfactory as to amendments proposed under that subdivision. No change was proposed therein. But as to amendments proposed under the second subdivision it was specifically stated that such amendments must "receive a majority of all the legal votes cast at such *general* election. This phrase was used three different times. The words were not used idly. There was a reason for their use. There was, also, a reason for the repeated use of the identical phraseology. A constitutional provision is the most deliberate and solemn of writings in our country. It affects every citizen. It "implies a degree of deliberation and a carefulness of expression proportioned to the importance of the transaction, and the words are presumed to have been used with the greatest possible discrimination." People v. New York C. R. Co. 24 N. Y. 485, 487. "It is not to be supposed that any words (in a constitutional provision) have been employed without occasion, or without intent that they should have effect as part of the law." Cooley, Const. Lim. 91.

But the majority members say that the question involved here has been settled by the former decisions of this court, and that we ought to adhere to such decisions. The cases relied upon are: State ex rel. Larabee v. Barnes, 3 N. D. 319, 55 N. W. 883; State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958; and State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360. Let us examine these decisions, and see what basis there is for the contention that they are controlling upon the meaning of the phrase involved in this controversy.

State ex rel. Larabee v. Barnes involved an election for the approval or rejection of the proposed Constitution of this state. The election was provided for in the "Enabling Act," under which the states of North Dakota, South Dakota, Montana, and Washington were admitted into the Union. Section 8 of the act provided that the Constitutions proposed by the different constitutional conventions should be submitted to the people of the proposed states for ratification or rejection at an election to be held in each of the proposed states on the first Tuesday in October, 1889. The section further provided: "At the

elections provided for in this section the qualified voters of said proposed states shall vote directly for or against the proposed Constitutions, and for or against any articles or propositions separately submitted. . . . And if a majority of the legal votes cast shall be for the Constitution the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon and upon separate articles or propositions, and a copy of the said Constitution, articles, propositions and ordinances." [25 Stat. at L. 679, chap. 180.] Section 24 of the Enabling Act provided: "That the constitutional conventions may, by ordinance, provide for the election of officers for full state governments, including members of the legislatures and representatives in the fifty-first Congress; but said state governments shall remain in abeyance until the states shall be admitted into the Union, respectively as provided in this act."

The constitutional convention provided for the election of state officers for the proposed state of North Dakota at the same time that the Constitution was submitted for ratification or rejection. It also provided that article 20 of the proposed Constitution (relating to the prohibition of intoxicating liquors), be submitted separately. And in the schedule or ordinance adopted by the convention, it provided: "There shall be submitted at the same election at which this Constitution is submitted for rejection or adoption, article 20, entitled 'Prohibition.' . . . If it shall appear according to the returns herein provided for that a majority of all the votes cast at said election *for and against prohibition* are for prohibition, then said article 20 shall be and form a part of this Constitution and be in full force and effect as such from the date of the admission of this state into the Union." The election returns showed that there were 35,548 votes cast for or against the adoption of the Constitution, and 35,945 votes cast for or against the adoption of said article 20, of which 18,552 were in the affirmative and 17,393 in the negative. It will be noticed that a majority of all the votes for or against said article 20 were in the affirmative, and also that the affirmative vote for said article 20 exceeded one half of all the votes cast for or against the adoption of the Constitution. But there were 38,098 votes cast for governor, and the affirmative vote upon the adoption of said article 20 was less than one

half of the total vote cast for governor. Upon these facts it was urged that article 20 had not received the number of votes required under § 8 of the Enabling Act.

It will be noticed that § 8 of the Enabling Act by its express terms was restricted to *"elections provided for in this section."* The provision relating to the election of state officers was contained in § 24 of the act. Hence, § 8 by its plain terms did not apply to such latter election. It should also be noted that there was no requirement in the Enabling Act that state officers be elected at the same election at which the Constitution was submitted for approval or rejection. The time and manner of holding such election was left entirely in the hands of the constitutional convention. The election provided in § 8 was held pursuant to the act of Congress requiring it to be held at a certain time for a certain specific purpose. The election for the selection of state officers was held pursuant to the ordinance of the constitutional convention.

State ex rel. Little v. Langlie involved the construction of a statute which provided for an election to relocate county seats. The statute provided that "if, upon canvassing the votes so given, it shall appear that any one place has two thirds of the votes polled, such place shall be the county seat." The court in its opinion called attention to the fact that the statute expressly provided that a petition for such election must be "signed by two thirds of the qualified voters of the county," but that in specifying "the vote necessary to relocate the county seat at another place, it studiously avoids the use of this explicit language." By way of further comment the court said: "To our minds this fact is very significant. It discloses a purpose to avoid making it necessary that there should be a two-thirds vote of the electors of the county in favor of one place to change the county seat to such place. The language which is employed makes it apparent that the two thirds vote required is a two-thirds vote on the particular question of the relocation of the county seat. The statute declares that, in the notice for the next general election, the voters are to be notified to designate upon their ballots the place of their choice. Then the statute continues, 'And if upon canvassing the votes so given it shall appear

that any one place has two thirds of the votes polled such place shall be the county seat.' The votes so given are the votes upon this particular question. If, upon the canvass of such votes, without any reference to any other vote at the same general election, it appears that any one place has two thirds of the vote polled, it shall be the county seat. The 'vote polled' is the vote polled upon that question. That is the only matter the statute is dealing with."

State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360, was a county division case. It involved the construction of § 168 of the Constitution, which reads: "All changes in the boundaries of organized counties before taking effect shall be submitted to the electors of the county or counties to be affected thereby at a general election and be adopted by a majority of all the legal votes cast in each county at such election." At the general election in 1908 the question was presented to the electors of Ward county to create the county of Mountrail from a portion thereof. There were 4,207 affirmative and 4,024 negative votes cast upon the proposition. At the same election there were 9,259 votes cast for the various candidates for governor. So the affirmative vote cast for the creation of the new county exceeded one half of all the votes cast upon the proposition, but was less than one half of the votes of all the electors who participated in the election. The court held that § 168 of the Constitution required that a proposition to change the boundaries of an organized county, in order to carry, need receive only a majority of the votes cast thereon, and that therefore Mountrail county had been created.

Two of the points adjudicated in that case, and upon which the construction placed upon § 168 of the Constitution was predicated, are announced in ¶¶ 4 and 5 of the syllabus as follows:

"(4) A majority of the votes cast upon a question submitted to a vote, if in the affirmative, carries it, unless the legislative will to the contrary is clearly expressed in the Constitution or the law.

"(5) In a strict legal sense, although the vote on a change in county boundaries is cast at a general election, it is the holding of a 'separate election,' but held in connection with the general election for convenience, to save expense, and because of the numerous subjects then voted upon, a more complete expression of the preferences of the electors is obtained."

In its opinion (after having announced its conclusion on the points covered by the two paragraphs of the syllabus quoted above), the court said: "It is contended that the words 'at such election' enlarge the application of the words 'votes cast,' and clearly indicate that the highest vote cast on any question at the general election is the criterion by which a majority must be arrived at. But, from the suggestions and reasons we have stated above, and particularly from a consideration of the meaning of the words 'votes cast,' it is clear to us that this contention is erroneous. It certainly *leaves the meaning ambiguous,* and in that event it is conceded that a majority of the votes cast on the question at issue controls." 18 N. D. p. 40.

How can it reasonably be asserted that these three decisions are determinative of the question involved in this case? The provisions involved in State ex rel. Larabee v. Barnes, 3 N. D. 319, 55 N. W. 883, and State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958, were so entirely different from the provision involved here, that the cases distinguish themselves from the instant case. Some of the reasoning in State ex rel. Little v. Langlie is against rather than in favor of the conclusion reached by the majority members in the instant case. In that case certain language was used in the first part of the section relating to the number of electors who must sign a petition for an election to relocate a county seat. In the latter part of the section other language was used as to the number of votes required at the election. In construing the meaning of the latter language the court called attention to the language contained in the first part of the section, and the failure to use this same language in the latter part thereof. The court said: "It [the statute] carefully excludes the idea that two thirds of the electors must vote for a place to make it the county seat. When speaking of the number of signatures to the petition required, it in terms declares that such petition shall be signed by two thirds of the qualified voters of the county. But when it specifies the vote necessary to relocate the county seat at another place, *it studiously avoids the use of this explicit language which is very appropriate to express the idea that appellant's counsel contends is to be found in the statute.*" This reasoning is directly applicable to the instant case. The first subdivision of § 202 in terms declared that a constitutional

amendment proposed thereunder be approved "by a majority of the electors voting thereon." But with this explicit language before them, the framers and proposers of the second subdivision "studiously avoided" its use, and in place thereof expressly provided that amendments proposed by initiative petitions must "receive a majority of all the legal votes cast at such general election."

While State ex rel. McCue v. Blaisdell involved a constitutional provision, and the language there construed is more similar to that involved in the instant case than that involved in the other two cases, the language is nevertheless different. In fact the basic reasoning in State ex rel. McCue v. Blaisdell is predicated upon the difference between the language contained in § 168 of the Constitution, and that contained in the second subdivision of § 202. It will be noted that the conclusion in State ex rel. McCue v. Blaisdell is predicated upon the premise that the election to create a new county, although held in connection with a general election, is nevertheless, a "separate election." Hence, the court said that when § 168 speaks of the "votes cast . . . at such election," it is ambiguous. That is, the words "such election" are capable of being understood in more senses than one,—they may refer to either the general election, or the "separate election" upon the question of county division held in connection with the general election, and that for this reason it will be presumed that they refer to the separate election.

This reasoning is manifestly not applicable to the case at bar. Here there is no ambiguity. The framers of the provision involved in this controversy eliminated the very ambiguity referred to in State ex rel. McCue v. Blaisdell. They left no room for doubt as to which election they had in mind. They specifically provided that a constitutional amendment proposed by initiative petition must "receive a majority of all the legal votes cast at such *general* election." They carefully repeated the term "all the legal votes cast at such *general* election," every time they had occasion to refer to the number of votes required to ratify such proposed amendment. I fail to find any room for application of the doctrine of *stare decisis*. Clearly the phrase involved in this case is different from that construed in the former decisions.

It should, also, be remembered that the provision involved in this

controversy relates to the amendment of the fundamental law of the state. This is manifestly the most important political function which the people can perform. In construing the meaning of words and phrases, we should not forget the subject-matter to which they are applied. Lewis's Sutherland, Stat. Constr. § 347. Nor should we forget that "Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." And "it does not follow, either logically or grammatically, that because a word is found in one connection in the Constitution with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs. This would be to suppose that the framers weighed only the force of single words, as philologists or critics, and not whole clauses and *objects,* as statesmen and practical reasoners." Story, Const. § 454.

In my opinion there is no room for doubt as to what was meant by the phrase, "a majority of all the legal votes cast at such general elections," contained in the second subdivision of § 202 of the Constitution. It meant exactly what the people of this state uniformly understood it to mean prior to the election held in November, 1918. It still means that. For, as Judge Cooley said, "A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written Constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. . . . A court or legislature which should allow a change in public sentiment to influence it in giving to a written Constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and

public duty; and if its course could become a precedent, these instruments would be of little avail. . . . What a court is to do, therefor, is *to dclare the law as written,* leaving it to the people themselves to make such changes as new circumstances may require." Cooley, Const. Lim. 7th ed. 89.

Certain procedural and jurisdictional questions are discussed in the majority opinions. Inasmuch as my associates have deemed it proper to decide the merits of the controversy I shall not consider or express any opinion upon the other questions considered by them. It is important, however, to note that the opinions of the majority members are all based upon the theory that the State Board of Canvassers was acting under statutory authority in certifying their findings as to the votes cast upon the constitutional amendments involved in this proceeding. For the reasons stated in the opinions which I prepared and filed in State ex rel. Linde v. Hall, 35 N. D. 34, 56, 159 N. W. 281, and in State ex rel. Twichell v. Hall, post, 459, 171 N. W. 213, I was, and still am, of the opinion that there was no law under which such constitutional amendments could be proposed or submitted for ratification or rejection. I am also of the opinion that there was and is no law under which the Board of Canvassers were authorized to make any determination whatever with respect to such amendments. The only provisions relating to the determination and certification of the result of votes cast at any election upon proposed constitutional amendments are §§ 1025 and 1026, Compiled Laws. It is under these sections that the State Board of Canvassers claim authority to act. These sections read: "For the purpose of canvassing and ascertaining the result of the votes taken at any election upon any proposed amendment to the Constitution, or proposition submitted to a vote of the people by the legislative assembly, the State Board of Canvassers shall proceed to examine such statements, and to ascertain and determine the result and shall certify under their hands a statement of the whole number of votes given for and the whole number of votes given against such amendment or proposition, and they shall thereupon determine whether such amendment or proposition has been approved and ratified by a majority of the electors voting thereon, and shall make and subscribe on such statement a certificate of such determination. § 1025.

"The secretary of state shall record in his office such certified statements and determination; and if it shall appear that such amendment or proposition has been approved, ratified, or adopted as aforesaid, he shall also make a record thereof, and cause such record to be found in the volume containing the original enrolled laws passed at the next succeeding session of the legislative assembly, and cause such record to be published with such laws." Comp. Laws 1913, § 1026.

These statutory provisions were enacted in 1892. They were enacted with reference to the then existing method of amending the Constitution—the method provided in subdivision 1 of § 202. They were enacted to provide the necessary machinery to ascertain, record, and proclaim the result of votes cast upon a constitutional amendment proposed by the legislative assembly. An amendment so proposed becomes part of the Constitution if it receives the approval of the electors. If it does not receive such approval it is no longer pending for any purpose. In either event there is nothing for the legislature to do with respect thereto. But an amendment proposed by initiative petition does not become a part of the Constitution by the mere fact that it receives the approval of the electors at the election. If it receives such approval it is referred to the next legislative assembly. It must receive the approval of a majority of all the members elected to each house; and if it fails to secure such approval it is again submitted to the people at the next general election.

Sections 1025, 1026, supra, are applicable to amendments proposed by the legislative assembly, and to such amendments alone. They are not, and never were intended to be, applicable to amendments proposed by initiative petition.

MARY E. DWIRE, Appellant, v. L. C. STEARNS, Respondent.

(172 N. W. 69.)

Seduction — chastity of daughter presumed.

1. In an action for the violation of the personal relation brought by the parent, for the debauching of her daughter, aged seventeen years, the chastity of the daughter is presumed.

NOTE.—On right of action for seduction independently of loss of services, see note in L.R.A.1917E, 758.

Seduction — civil liability.

2. In such action, whether the wrong be termed seduction or unlawful enticement, it is the act of securing or procuring the debauching of the daughter, and the civil liability therefor is not prescribed by the statutory definition of criminal seduction.

Seduction — loss of service — recovery of damages — exemplary damages.

3. In such action, when actual or constructive loss of the service has been established under the legal fiction pursuant to which such action is maintained, damages may be recovered for all that the parent has suffered through the ruin of the daughter, and the disgrace occasioned, including exemplary damages.

Opinion filed March 6, 1919. Rehearing denied April 15, 1919.

Action for damages for debauching the daughter of the plaintiff, District Court, Ward County, *Leighton*, J.

From the judgment entered upon an order dismissing the action when plaintiff rested, the plaintiff appeals.

Reversed and new trial granted.

Fisk & Murphy, for appellant.

Palda & Aaker and *Greenleaf, Wooledge & Lesk*, for respondent.

BRONSON, J. This is a civil action for damages for violation of a personal relation. The record shows evidence of the following facts: The plaintiff is a widow with four minor children. Prior to and at the time of the alleged offense she operated a rooming and apartment house in the city of Minot. The defendant is a married man, thirty-eight years old, connected with the Minot Auto Company, and possessed of considerable means. Helen, the daughter of the plaintiff, from January 1, 1917, to April 13, 1917, was living with the plaintiff, helping and assisting her in housework in the operation of such rooming and apartment house and also attending business college in Minot. On the evening of April 13, 1917, Helen, then aged seventeen years, met the defendant in front of the office of the Auto Company. With her in an automobile there was another man and woman. Theretofore, she and the other two had been drinking some beer and wine. The defendant joined the party, and with the car they all proceeded

to a disorderly house in Minot, where they procured one and a half dozen bottles of beer. Thence they drove to the town of Burlington. They went to a room there over a barber shop and pool room. The other couple got warm and left to attend a dance at Des Lacs. Helen and the defendant remained in this room alone for some two hours. During this time the defendant had sexual intercourse with the girl twice at his solicitation. Afterwards the other couple returned and the entire party returned to Minot and proceeded again to the same disorderly house. During this time they were drinking this beer, the defendant, however, not participating in the drinking. At this disorderly house some more drinks were had. It was about 4 o'clock in the morning. The girl mentioned that she was afraid to go home. The defendant and the girl talked about it. The girl stated that she thought she would leave town. The defendant then gave her $5 before she started to go. The girl did leave town, going first to Devils Lake and thence to St. Paul. These proceedings took place without the knowledge or consent of the mother, the plaintiff. The girl disappeared that evening and she thought that she must have gone with one of her girl friends. The mother proceeded thereafter to institute a search for the girl. She hired detectives to look for her; she had her other children do likewise. Some five weeks thereafter she was located and found in Minneapolis. In the meantime the girl, at Minneapolis, had seen the wife of the defendant and had given to her a written letter or statement of some kind concerning her relation with the defendant for which she received $10 and along about this time, also, she met in conference with the attorney for the defendant and received $500 in cash, paid by the defendant through his attorney upon the understanding that she would not come back to Minot.

Upon these acts of the defendant the complaint is based, and damages claimed in the sum of $10,000 predicated upon the loss of services, the society and comfort of her daughter, and the shame, humiliation, and disgrace occasioned to her, and also upon the expenses incurred by reason thereof.

When the plaintiff rested, the defendant moved for dismissal principally upon the following grounds: That the plaintiff had failed to prove any loss of services or that she had suffered any injury; that she

had failed to prove that the health of the girl was in any way impaired, or that she was incapacitated from rendering any services to plaintiff; that she had failed to prove that the girl was chaste and virtuous, or that the sexual intercourse was effected through force, violence, or any artifice or pretense practised, or that the act was without the connivance and consent of the girl. The trial court granted this motion. From the judgment entered upon its order so doing, the plaintiff has appealed.

With regard to this action of the trial court, the learned counsel for the plaintiff, a former chief justice of this court, stated in the brief and before this court as follows: "In the light of the undisputed evidence and the well-settled rules of law as established by all of the courts of the country, the ruling of the trial court granting such motion is, to say the least, most remarkable and we very much doubt if its parallel can be found in any reported case."

To show the pertinency of that remark and the application of such motion so made and granted, this court has stated more fully than usually necessary the substance of the evidence adduced at the trial.

With this observation so made by appellant's counsel, we are very much inclined to agree.

Upon this record, which at least for purposes of the motion involved and the order made thereupon must be taken to be true, we can find no justification in law or in good morals for the entertaining of such motion upon any such grounds. Law prescribes a rule of conduct. It should and does exemplify good morals.

There are just two propositions that require the consideration of this court upon the record: First, the civil liability of the defendant to the plaintiff for acts of this character; and, second, the rule of damages applicable thereto.

Section 4535, Comp. Laws 1913, so far as material provides: "The rights of personal relation forbid: The abduction or enticement of a child from a parent: The seduction of a daughter."

Our statutes have designated as crimes various acts of illicit sexual intercourse. Section 9579, Comp. Laws 1913, provides that adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. Section 9563, Comp.

Laws 1913, (as amended by chap. 193, Laws 1917) defines rape, and particularly provides, that it is, among other things, accomplished by the act of sexual intercourse with a female under eighteen years of age, not the wife of the prepetrator. Chap. 159, Laws 1915, also provides a criminal penalty for voluntary sexual intercourse between male and female, not married, terming the same fornication.

Under the statutes the act of the defendant, criminally, if true under the evidence, is rape.

The fact that the statute has variously denominated acts of illicit intercourse and termed the same otherwise than seduction, and limited seduction criminally to acts of illicit connection made under promise of marriage, does not change seduction, as a civil wrong, or tort. Hein v. Holdridge, 78 Minn. 471, 81 N. W. 522.

Seduction as a civil injury may be generally defined as the act of a man in inducing a virtuous woman to commit unlawful sexual intercourse with him. See note in 76 Am. St. Rep. 659; Patterson v. Hayden, 17 Or. 238, 3 L.R.A. 529, 11 Am. St. Rep. 822, 21 Pac. 129. It is true that a distinction is to be drawn between mere illicit intercourse and acts of seduction. Bradshaw v. Jones, 103 Tenn. 331, 76 Am. St. Rep. 655, 52 S. W. 1072.

In the case at bar, the evidence is amply sufficient to present a question of fact to the jury, either concerning the enticement of the daughter, or concerning her seduction. It is quite clear from the testimony that the intercourse in question, not only was unlawful and illicit, but also that the defendant in his position with relation to the girl could well be said to have induced or enticed her to commit the act. The contention of the respondent that there is no evidence of the previous chastity of the girl is wholly without merit. The idea that a presumption must be indulged in that a girl of that age is not virtuous and chaste shocks both the sense of justice and good morals. In such actions the presumption of chastity should and it does obtain. See note in Ann. Cas. 1916A, 200.

Concerning the rule of damages, the necessity of showing actual loss of services when the daughter is seduced is largely disappearing, and it is wholly proper, right, and just that it should disappear, except as a legal fiction. The thought that the wrong perpetrated by the

seduction of the daughter must be measured by the actual loss of services sustained by a parent, and must so be compensated, shocks the finer senses of humanity and morality. We do not hesitate to announce and adopt the rule of damages generally stated, namely, that when the technical basis of actual or constructive loss of service has once been established, damages may be recovered for all that the parent may suffer by the ruin of the daughter, and the disgrace to the family. See note in L.R.A.1917E, 758. This includes not only loss of services but also the dishonor and mental suffering brought upon the household; it includes the natural loss and expenses occasioned thereby, as well as exemplary damages for the wilful wrong done. Ingwaldson v. Skrivseth, 7 N. D. 388, 75 N. W. 772; Hein v. Holdridge, 78 Minn. 470, 81 N. W. 522; Russell v. Chambers, 31 Minn. 54, 16 N. W. 458; Fox v. Stevens, 13 Minn. 272, Gil. 252. See note in 52 L.R.A.(N.S.) 85. Not only constructive but also actual loss of services is established in the record of this action. It therefore follows that the trial court erred in dismissing the action; the order of the trial court is reversed, and a new trial granted, with costs to the appellant.

ROBINSON, BIRDZELL and GRACE, JJ., concur.

CHRISTIANSON Ch. J., concurs in the result only.

PER CURIAM: In the petition for rehearing, respondent's counsel objects to the statement contained in the opinion with reference to the payment of $500 to Helen Dwire. The statement is: "She met in conference with the attorney for the defendant and received $500 in cash, paid by the defendant through his attorney, upon the understanding that she would not come back to Minot."

This statement is merely a statement of a possible fact, of which there is some evidence. It is not a statement of an ultimate fact; and it is based upon the testimony of the girl in the shape of a deposition. The testimony is:

"Q. At that time what was said by Judge Palda to you with reference to not coming to Minot and appear at this trial? A. He said he did not think I should come back to Minot and I told him I could not

live in Minneapolis for nothing, the way things were, and Mr. Palda got me $500 from Mr. Stearns.

"Q. Did he give you $500 in cash? A. Yes.

"Q. Did he make any statement to you that if you came back you would get in trouble? A. He said I could come back to Minot if I wanted to.

"Q. Did he say if you did come you would get in trouble? A. No.

"Q. He gave you $500 with the understanding that you would not come back to Minot? A. Yes.

"Q. Was there any statement in substance that your mother's case would not amount to anything if you did not come back? A. Mr. Palda said at one time my mother offered to settle for $1,500.

"Q. That is all that was said? A. Yes."

Upon cross examination, witness testified:

"Q. You were told specifically by me (Judge Palda) that it did not make any difference whether you came back or not, that it was up to you, didn't I? A. You told me you can come back to Minot if you want to."

On re-direct examination:

"Q. At the time you talked with Judge Palda and he gave you this $500, he gave you to understand he was there representing the defendant, Mr. Stearns? A. Yes, sir."

Inasmuch as the statement in the opinion might be misconstrued as the statement of an ultimate fact which, if true, would reflect seriously upon a member of the bar, it is thought proper to state the exact condition of the evidence in connection therewith.

All concur in the above expression except BRONSON, J.

FIRST STATE BANK OF EASBY, a Corporation, Respondent, v. HANS BRATLIE and Karen Bratlie, Appellants.

(172 N. W. 821.)

Findings of fact — modification of judgment.

In this case the findings of fact, as made by the trial court, are sustained.

The conclusions of law and the judgment are modified and affirmed, without costs.

Opinion filed April 24, 1919.

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

Modified and affirmed.

G. Grimson and *Chester A. Marr,* for appellants.

"Where after breach of a contract, the performance of which was guaranteed the creditor and debtor enter into a new contract on terms different from first contract, by which they agree as to the damages to be paid later, the guarantors of the original contract are discharged." 107 Ind. 260.

McIntyre & Burlness, for respondent.

"Where the consideration of guaranty is sufficient when entered into, the guaranty does not fail by the subsequent loss of value of consideration." 20 Cyc. 1419, 1445.

ROBINSON, J. This is an appeal from a foreclosure judgment for $505.72 and $72.19 costs, and that a certain quarter section of land be sold to pay the same. As the findings and the evidence show, the action was commenced prematurely. The plaintiff had no cause of action without first delivering to the defendants a promissory note made by them to the plaintiff for $350 and interest, and a note for $245, made to them by Alfred Lunstad, but, in furtherance of justice, the court decided that no judgment should be entered until the delivery of said two notes to the clerk of the court by the plaintiff, and that within thirty days from the date of the findings the defendants might pay the amount found due without any costs. But, as the action was prematurely brought, without first delivering said two promissory notes, the defendants should not have been penalized with the costs unjustly incurred by reason of their failure to pay so large a sum within thirty days. The order should have been either that the action be dismissed, without prejudice, or that within ninety days the defendants pay the sum found due, without any costs whatever and, in case

of nonpayment, then that the land be advertised and sold to pay the same.

As the evidence shows, and as the court found, the $350 note was made to the plaintiffs by Alfred Lunstad, a son-in-law of the defendants, and by them it was indorsed and guaranteed without any consideration only a promise of the plaintiff to deliver up all the notes and indebtedness under certain conditions on the payment of said $350 note; that afterwards, in renewal and payment of said $350 note, the defendants made to the plaintiff the notes and the mortgage in suit, and then the plaintiff unjustly and unreasonably and without any consideration demanded and required Alfred Lunstad to make to it his promissory note for $245 against the protests of the defendants. There is some strong testimony that the mortgage and the notes thereby secured were never delivered, but that was not made a direct issue by the answer, and on these and the other issues the findings of fact appear to be just and fairly in accordance with the evidence. However, the judgment must be modified in accordance with this opinion by striking from it the item of costs and giving the defendants ninety days from the filing of the remittitur to pay the judgment, with interest, and if it be not paid within that time, then that the land may be advertised and sold to pay the same, with interest and the costs of sale.

Judgment modified and affirmed, without costs to either party.

GRACE, BIRDZELL, and BRONSON, JJ., concur.

CHRISTIANSON, Ch. J. (dissenting in part). In April, 1913, one Lunstad was indebted to the plaintiff bank in the sum of about $650. This indebtedness was secured by chattel mortgages. The plaintiff had instituted foreclosure proceedings and taken possession of the mortgaged chattels. The proceedings were adjusted under a written agreement, by the terms of which the plaintiff agreed to turn the chattels back to Lunstad, in consideration of Lunstad executing and delivering to the plaintiff a note for $350 executed by Lunstad as maker, and by the defendants Bratlie as guarantors. The agreement further provided that Lunstad was to cause certain flax raised by him in 1912 to be

threshed and deliver one-half thereof at an elevator at Easby; that the proceeds of such flax was to be turned over to the plaintiff, free of all charge except the threshing bill. The agreement provided that if the $350 note should be paid at its maturity, and the proceeds of the flax turned over as provided, that then the plaintiff bank would turn over all notes and evidences of indebtedness against Lunstad. It appears that the flax was destroyed by fire before it was threshed, and that the $350 note was not paid at maturity, or at all. Some arrangements were made for a renewal of the $350 note, and on October 31, 1913, the defendants executed the notes and mortgage involved in this action. It appears that on the same day the plaintiff obtained from Lunstad a note for $245, and a chattel mortgage to secure the same. The defendants Bratlie questioned the right of the plaintiff to demand such note and chattel mortgage from Lunstad, and did not turn the renewal notes and mortgage over to the plaintiff, but gave them to their attorneys. There is some dispute as to the demands of the defendants. The plaintiff contends that the defendants merely insisted upon a release of the chattel mortgage, and not upon a surrender of the $245 note. This is also Lunstad's version of the matter. Bratlie, however, claims that he also insisted upon a surrender of the $245 note. Later the bank released the chattel mortgage, and the notes and mortgage involved in this action were turned over to it. (The bank however retained the $245 note.) No payments were made, and in 1915 the bank instituted a proceeding by advertisement to foreclose the mortgage involved in this action. The defendants enjoined the foreclosure. In both the affidavit then presented and in the answer in this action no question was raised as to the delivery of the notes and mortgage involved in this action. The sole defense proposed by defendants in the affidavit on which the restraining order was based, and the sole defense set forth in their answer in this action, is that the consideration for the notes sued upon failed for the reason that the plaintiff demanded and obtained from Lunstad the $245 note.

I have already referred to the written agreement entered into at the time the $350 note was given. Under the express terms thereof Lunstad's notes were to be turned over by the bank upon two conditions: (1) The payment at maturity of the $350 note upon which the defend-

ants appeared as guarantors; and, (2) the delivery by Lunstad of the flax at some elevator at Easby. Conceding that Lunstad was released from the second condition by reason of the flax being destroyed by fire, the first condition still remained. This condition was never performed at all. Under the judgment in this case the trial judge adopted the view most favorable to the defendants. He required the plaintiff to surrender both the $245 and the $350 notes, and gave defendants thirty days in which to pay the amount of the two notes involved in this action, without costs. The majority members uphold the judgment in so far as it awards judgment against the defendants for the principal and interest of the notes, but reverses it in so far as it allowed defendants only thirty days in which to make payment, and required them to pay costs in event of their failure to make payment within such time. It seems to me that if the trial court had the power to award, and was right in awarding, judgment upon the notes at all, that the time in which payment should be made, and the allowance of costs, were matters within the discretion of the trial court. Manifestly the trial court had far better opportunity to determine these matters justly than have the members of this court. The trial judge had restrained the foreclosure by advertisement. He heard and saw the parties upon the trial of this action. He gave the defendants the benefit of all doubts upon the question of the controversy with respect to the $245 note. He afforded the defendants an opportunity to pay the amount of the notes without costs, provided payment was made within thirty days. There is not the slightest contention that the time allowed was inadequate. So far as the record in this case shows, the judgment now ordered by the majority members would have been just as objectionable to the defendants as that rendered by the trial court. Defendants have never suggested a modification of the judgment. They claim that they have been released from all liability to the plaintiff. That is the issue presented in their answer, and that is their contention on this appeal. I believe that the judgment appealed from should be affirmed without modification.

WILLIAM KLUVER, Appellant, v. MIDDLEWEST GRAIN COMPANY, a Corporation, and H. T. Hogy, Respondents.

(173 N. W. 468.)

Foreign corporations — service upon — doing business in state.

1. A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there, and has subjected itself to the jurisdiction and laws of such state.

Foreign corporations — process — statute — officers.

2. Where it is sought to make service upon a foreign corporation by delivering process to one of the officers or representatives enumerated in subdivision 5, of § 7426, Comp. Laws 1913, such service is ineffectual unless the person served at the time of such service was "within the state, doing business" for such corporation. And where it is sought to make service upon a foreign corporation under subdivision 6, of said section, the service is not binding upon the corporation unless the person served at the time of service was "found within this state acting as the agent of, or doing business for, such corporation."

Corporations — foreign corporations — process.

3. Service of process on a person who has ceased to represent a foreign corporation either as its agent or officer prior to the bringing of the suit is not service upon such corporation.

Summons — motion to set aside service of summons — reopening case — vacation of order.

4. Where a motion is made to set aside the service of a summons, the court has power to reopen the hearing after it has announced its intention to deny the motion. It also has power to vacate an order denying the motion and to entertain a second motion to set aside such service.

NOTE.—For authorities discussing the question of validity of service of process against foreign corporation on resident officer, see note in L.R.A.1916E, 244.

The question as to whether or not soliciting business within the state, by a foreign corporation through its agents, was doing business in the state, within the scope and meaning of statutes authorizing service of process against a foreign corporation doing business within the state, is discussed in notes in 9 L.R.A.(N.S.) 1214; 23 L.R.A.(N.S.) 834; and L.R.A.1916E, 236, on soliciting trade by foreign corporation as doing business within the state.

On jurisdiction over foreign corporation generally, see note in 85 Am. St. Rep. 905.

Failure of service — special appearance.

5. An appearance for the sole purpose of objecting to the jurisdiction of the court over a foreign corporation on the ground that the person upon whom service has been made was not authorized to receive such service is a special appearance only, and does not waive the want of service of process.

Opinion filed May 3, 1919.

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

Affirmed.

W. H. Sibbald, for appellant.

In passing upon a question of jurisdiction it is not within the province of the court to consider whether the allegations of the complaint are true. A plea in abatement will lie only where there are facts not appearing of record which defeat the jurisdiction of the court in the particular case, but where the facts giving jurisdiction appear of record no plea in abatement will lie. 1 C. J. 33 (18), 35 (26); 14 Cyc. 434; 40 Cyc. 110.

The truth of the allegation that a corporation is doing business within the state is a question for the jury. Oakland Sugar Mill Co. v. Wolf Co. 55 C. C. A. 93, 118 Fed. 239.

Where a foreigner buys property in a state it will be held to be doing business in such state on the ground that each state has control of property within its borders. L.R.A.1916E, 236, note; 23 L.R.A. (N.S.) 834, note; Pennsylvania Lumberman's Mut. F. Ins. Co. v. Meyer, 197 U. S. 405, 49 L. ed. 810; Atkinson v. United States Operating Co. (Minn.) 152 N. W. 410.

A party is not permitted to divide up his objections or claims for relief by several motions where complete relief can be granted upon one and all known objections or claims for relief against the same irregularities not urged by the first motion are waived. 19 R. C. L. 667; 1 C. J. 274 and cases cited therein; Bonesteel v. Orvis, 23 Wis. 506, 99 Am. Dec. 201; 32 Cyc. 528.

Service on any agent, or at least on the only one who is found in the state, is sufficient as against a foreign corporation which has failed

to comply with a statute requiring it to establish an office and appoint an agent on whom service may be made. Hagerman v. Empire Slate Co. 97 Pa. 534; Ehrman v. Teutonia Ins. Co. 1 McCrary, 123; Moch v. Virginia Ins. Co. 10 Fed. 696; Clews v. Rockford, R. I. & St. L. R. 49 How. Pr. 117; Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 47 L. ed. 987; Davis v. K. & T. Coal Co. 129 Fed. 149; Groel v. United Electric Co. 69 N. J. Eq. 397, 60 Atl. 822. And to like effect see extensive note in 30 L.R.A.(N.S.) 680; 19 Cyc. 1346.

Fisk & Murphy, for respondents.

The sheriff's return that service was made upon a party as president and managing agent of a corporation is merely prima facie evidence of the matters recited concerning relation of party to the corporation. Great Western Min. Co. v. Mining Co. 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771; Hays v. Alway, 166 N. W. 139.

CHRISTIANSON Ch. J. The complaint alleges that the defendant, Middlewest Grain Company, is a foreign corporation; that the defendant W. H. Hogy, was a licensed warehouseman, owning and operating an elevator at Burlington in this state, and engaged in buying or shipping grain for profit at said place of business; that between August 1, 1915, and July 1, 1916, the plaintiff stored in said elevator 333⅓ bushels of wheat, for which wheat the said Hogy issued storage receipts in form and substance as prescribed by law; that thereafter the defendant, Middlewest Grain Company, with the knowledge, consent and connivance of said Hogy, took and converted to its own use 333⅓ bushels of the same kind and quality of grain set forth in the storage receipts held by the plaintiff, not leaving sufficient grain in said elevator to cover the outstanding storage receipts which had been so issued to said plaintiff; that plaintiff's storage receipts are outstanding and unpaid; that plaintiff has tendered a return of said storage tickets to said Hogy and demanded of him a return of the grain stored, or a like quantity of the same kind and quality of grain, and that such demand was refused; that plaintiff has also demanded of the defendant, Middlewest Grain Company, the possession of the said grain, and that such demand was refused.

On February 2, 1918, the sheriff of Ward county served the sum-

mons and complaint upon one Jourgen Olson. The service was made in Ward county, in this state. In his return the sheriff certified that he had made service upon "the defendant, Middlewest Grain Company, a corporation, by handing to and leaving with Jourgen Olson, the president and managing agent of the above-named corporation, a true and correct copy" of said summons and complaint. The defendant objected to the jurisdiction of the court and so appearing moved that the attempted service of the summons be set aside. The basis of the motion is stated as follows in the affidavit of Jourgen Olson, which was submitted in support of said motion, viz.: "That the summons and complaint in the above-entitled action was served upon him (Jourgen Olson) at the city of Minot, North Dakota, on the 3d day of February, 1918; and affiant further states that he was not at said time within the state acting as agent for or doing business for and in behalf of the said Middlewest Grain Company, a corporation; that the Middlewest Grain Company is a corporation organized under the laws of the state of Minnesota, and that its office and place of business is at the city of Minneapolis and state of Minnesota, and that all of its business is conducted at said office; that this affiant lives in the city of Minot and has an office therein and is engaged in the land, loan, and real estate business, and, as above stated, was not acting as agent for nor doing business for the Middlewest Grain Company at the time of the said service."

In opposition to said affidavit of Jourgen Olson the plaintiff submitted the affidavit of plaintiff's attorney. Such affidavit set forth the sheriff's return, and averred that said Olson then was and at all times since the incorporation of the Middlewest Grain Company had been its president; that said Olson is a resident of Ward county, North Dakota, and at all the times mentioned in the complaint was and still is the managing agent, and in reality the manager, of said corporation, directing the major operations thereof from his office in Minot. The motion to set aside the service came on for hearing upon these two affidavits. Plaintiff states in his brief on this appeal: "At the time the motion came on for hearing plaintiff's counsel pointed out that even if the allegations denying the agency were true still Olson was admitted to be the president of the corporation, and as the cause of

action arose in this state the service was good. The trial court took the position that, in addition to showing that Olson was president, there must be a showing that Olson was doing business in the state for the corporation. The matter was accordingly postponed to enable plaintiff to make such showing."

Later the plaintiff filed the affidavit of his attorney, and the affidavit of one Fleckton. The affidavit of plaintiff's attorney is to the effect that on June 1, 1916, said Jourgen Olson procured from one H. T. Hogy, a chattel mortgage, running from said Hogy to said Middlewest Grain Company, to secure the sum of $13,608.24; that on April 4, 1916, said Olson secured from one W. J. Evans a chattel mortgage (running to said Middlewest Grain Company) on an elevator at Niobe, North Dakota, to secure the payment of $6,500. The affidavit of Fleckton is to the effect that he is the manager of the Niobe Elevator Company, and as such handles its correspondence; that among other letters received by said company since March, 1916, are certain letters apparently written by said Jourgen Olson, in behalf of the said Middlewest Grain Company, from Minot, North Dakota; "that during the year 1916, said Niobe Farmers' Elevator Company shipped grain to said Middlewest Grain Company, at Minneapolis, and that during the spring of 1917, affiant with other officers of the Niobe Farmers' Elevator Company, went to Minot, North Dakota . . . to the office of said Jourgen Olson, in Minot, and there arranged for the shipment of grain to said Middlewest Grain Company;" that said Jourgen Olson made the arrangements leading up to, and represented the Middlewest Grain Company at the time of, the giving of "such security." The letters referred to in Fleckton's affidavit are attached to and made a part of his affidavit. The first three letters are written upon the letterheads of Jourgen Olson & Company of Minot, North Dakota, and signed by Jourgen Olson. There is a printed statement at the top of the letterhead, relating to the Jourgen Olson & Company, to the effect that Jourgen Olson & Company has a capital of $500,000; that it offers "banks and the investing public choice first farm mortgages, also short-time paper maturing six months to one year;" and that it has *"money to loan to banks on their certificates of deposit at all times and to all classes of business men for six months to one year."*

The first letter bears date, March 22, 1917. It states that a certain note and mortgage are inclosed and gives directions for their execution. Inquiry is made as to whether the grain business of the Niobe Elevator Company may not be had. The letter further states: "We are able to finance you to your entire satisfaction on the same basis as any one else can, and no better. . . . We do not know if you have your supplies from the Middlewest Grain Company, but if not, there is plenty of time to send them." It is further suggested that a draft may be drawn on the Middlewest Grain Company for an amount sufficient to enable the Niobe Elevator Company to pay off the balance it may be owing to any commission company with which it was then doing business. The second letter bears date, September 25, 1917. The body of the letter reads:

"As I wrote you some time ago from Minneapolis in reference to the shipment of grain to the Middlewest Grain Company and as it was our understanding that in consideration of carrying your notes on your elevator that in that event you would ship your grain to the Middlewest Grain Company and if for any reason it was not handled satisfactorily then in that event you would pay us the notes.

"Up to the present time we do not seem to have received one car, and for that reason we cannot help but feel that you are doing business at other places, and if the case is that you were not satisfied with our business we prefer to have you pay up the $5,000 we carry on you."

The third letter bears date, September 29, 1917. It refers to the outstanding note of the Niobe Elevator Company, and the understanding with which it was taken. The fourth letter is written upon the letterhead of the Middlewest Grain Company. It is dated, Minneapolis, Minnesota, December 31, 1917. It makes reference to another letter, said to have been written from Minot. It further refers to some indebtedness of the Niobe Elevator Company to Wyman Company, and, also, to a certain carload of flax. The fifth letter bears date, February 2, 1918. It is written upon the letterhead of Jourgen Olson & Company, and signed by Jourgen Olson. The first two paragraphs in the letter read:

"We acknowledge receipt of your check for $225 which we have applied on your $5,000 note.

"Now in reference to oats, barley, and feed, I suggest that you write direct to the Middlewest Grain Company of Minneapolis and of course they can give you any and all information that you want as I do not know very much about that."

The remainder of the letter relates to some grain which apparently the Niobe Farmers' Elevator Company desires to purchase in Canada. Reference is also made to the $5,000 loan and the desire to have all the shipments from the Niobe Elevator Company during the coming year, if the latter company is given the financial aid it needs in operating its elevator.

Upon the filing of these two affidavits, the trial court apparently announced its intention to deny the motion, but the record contains no written order to that effect. Thereafter the defendant submitted to the court the affidavits of Jourgen Olson, Louis Enger, and N. J. Thorson. The court thereupon issued an order citing plaintiff to show cause why the former announcement should not be revoked, and the service of the summons set aside. The affidavit of Jourgen Olson is to the effect that on January 1, 1918, he sold and transferred all of his interest in the Western Grain Company to one N. J. Thorson; that since the date of said transfer said Olson has been and is wholly without authority to represent or act for the said Western Grain Company in any capacity whatsoever. The affidavit further states that the $5,000 note of the Niobe Elevator Company, which was originally given in 1916, is and always "has been owned by and in the possession of this affiant, Jourgen Olson, and was never the property of the Middlewest Grain Company, the defendant corporation, and that affiant personally advanced the $5,000 to the said Niobe Farmers' Elevator Company." The affidavit further states that the letter to the Niobe Elevator Company, dated February 2, 1918, "was written in behalf of Jourgen Olson & Company, and not in behalf of the Middlewest Grain Company." The affidavit of N. J. Thorson is to the effect that he is the president of the Middlewest Grain Company; that on January 1, 1918, he became the owner and holder of said stock and the president and director of said Middlewest Grain Company; that said Jourgen Olson on January 1, 1918, ceased to be an officer or director of said

company and ceased to have any interest whatever therein, and that since that time said Olson has been without authority to act for or in behalf of said Middlewest Grain Company. The affidavit of Louis Enger states that he is and for several months has been the manager and buyer of the Minot Farmers' Grain Association; that said association has transacted business with the Middlewest Grain Company; that "since the first day of January, 1918, business so transacted by the Minot Farmers' Grain Association with the defendant, Middlewest Grain Company, a corporation, has been transacted with one N. J. Thorson as the representative of the said Middlewest Grain Company, a corporation, and that at no time during said period has the said Middlewest Grain Company been represented in any transaction by said Jourgen Olson." In opposition to these affidavits was submitted an affidavit of plaintiff's attorney. The affidavit is to the effect that on February 23, 1918, he had a conversation with N. J. Thorson, and that said Thorson then stated that he knew nothing about the affairs of the Western Grain Company except as he was informed by Jourgen Olson, and that he took his orders from said Olson. The affidavit further states that on the previous hearing defendant's counsel admitted that Jourgen Olson was the president of said Western Grain Company, and the court was asked to take judicial notice of such statement. (Defendant's counsel denies that he made any such admission. He claims that he merely stated that even conceding that Olson was president of the defendant company still service upon him would not be sufficient unless he was within the state transacting business for the company. The trial court of course knew what the statement was, and it ruled against the plaintiff). Upon consideration of all of these affidavits, and after argument and consideration, the trial court found that said Jourgen Olson was not doing business for, and was not an officer of, the Western Grain Company at the time the summons in this action was served upon him. The court further found that the Western Grain Company was not doing business in this state within the legal contemplation of the term "doing business." An order was entered setting aside the service of the summons, and the plaintiff has appealed therefrom.

The statutes of this state relating to service of foreign corporations, relied upon by the plaintiff in this case read:

"The summons shall be served by delivering a copy thereof as follows:

. . . . . .

"'(5) If the defendant is a foreign corporation, . . . to the secretary of state, . . . or to the president, secretary, cashier, treasurer, a director or managing agent thereof, if within the state, doing business for the defendant.

"'(6) In all cases when a foreign corporation . . . shall not have appointed either the secretary of state or commissioner of insurance, as the case may be, as its lawful attorney upon whom service of process may be made, and such foreign corporation . . . cannot be personally served with such process according to the provisions of subdivision 5 of this section, it shall be lawful to serve such process on any person who shall be found within this state acting as the agent of, or doing business for, such corporation. . . . But the service provided for in this subdivision can be made upon a foreign corporation, joint stock company, or association only when it has property within the state or the cause of action arose therein.'" (Comp. Laws 1913, subds. 5 and 6, § 7426.)

It is well settled that (subject to constitutional limitations) a state may prescribe the terms upon which alone it will permit foreign corporations to do business within its borders. And where a state imposes as a condition, on which a foreign corporation may do business therein, that it accept as sufficient the service of process upon certain designated officers or agents within the state, a foreign corporation subsequently doing business in the state is deemed to assent to such condition, and to be bound by the service of process in the manner specified by the statute. 11 Enc. U. S. Sup. Ct. Rep. 308. Of course, the consent of the corporation to be bound by such service of process is not an actual consent, but an implied one. It has been said by the highest authority to be "a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defense." Pennsylvania F. Ins. Co. v. Gold Issue Min. & Mill. Co. 243 U. S. 93, 96, 61 L. ed. 610, 616, 37 Sup. Ct. Rep. 344. Hence, the power of the state to

prescribe the mode of service and to designate the officer, agent, or representative on whom process may be served is not unlimited. It is subordinate to the requirement of due process of law. It must be exercised so as not to encroach upon the elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction to render a personal judgment except by actual service of process within its jurisdiction, upon the defendant, or some one authorized to accept service in his behalf, or by his waiver of due service.

The Federal Supreme Court has held that three conditions are necessary to give a court jurisdiction to render a personal judgment against a foreign corporation: "First, it must appear that the corporation was carrying on its business in the state where process was served on its agent; second, that the business was transacted or managed by some agent or officer appointed by or representing the corporation in such state; third, the existence of some local law making such corporation amenable to suit there as a condition, express or implied, of doing business in the state." Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 618, 43 L. ed. 569, 574, 19 Sup. Ct. Rep. 308. The same court has also said that in order to be "doing business" so as to render a foreign corporation subject to service of process in a given jurisdiction, the transactions "must be of such character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and the laws" of that jurisdiction. St. Louis S. W. R. Co. v. Alexander, 227 U. S. 218, 57 L. ed. 486, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915B, 77. Or, as was stated in a more recent decision: "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there." And even if it is doing business within the state, the process will be valid only if served upon some authorized agent." Philadelphia & R. R. Co. v. McKibbin, 243 U. S. 264, 61 L. ed. 710, 37 Sup. Ct. Rep. 280.

The same great tribunal has also said that a state law prescribing the mode in which, and designating the agents or officers on whom, process may be served, "must be reasonable, and the service provided for should be only upon such agents as may be properly deemed repre-

sentatives of the foreign corporation" (St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354), and the character of their agency "such as to render it fair, reasonable, and just to imply an authority on the part of an agent to receive service" (Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 574, 19 Sup. Ct. Rep. 308).

The statutes of this state relative to the service of process upon agents or officers of foreign corporations were enacted in view of and recognized the fundamental principles which we have just considered. Subdivision 5, § 7426, supra, provides that a summons in a civil action may be served upon a foreign corporation by delivering a copy thereof "to the president, secretary, cashier, treasurer, a director or managing agent thereof, *if within the state, doing business for the defendant.*" Subdivision 6, of that section provides that in all cases where a foreign corporation has failed to appoint an agent on whom process may be served as required by the statute, and where service cannot be made under subdivision 5, "it shall be lawful to serve such process on *any person who shall be found within this state acting as the agent of, or doing business for, such corporation.* . . . But the service provided for in this subdivision can be made upon a foreign corporation . . . only when it has property within the state or the cause of action arose therein." These provisions speak for themselves. Under their express terms the person upon whom service is made (whether an officer or agent) must be within the state acting as agent of, or doing business for, the corporation at the time service is made. This is the construction which the trial court placed upon these provisions. And we are wholly unable to understand how they are susceptible of any other construction.

The question to be determined therefore is whether the trial court erred in holding that Jourgen Olson was not an officer or agent of the defendant corporation, and as such rating, or doing business, for it within this state, at the time the summons in this action was served upon him.

Of course, the presumption is that the order appealed from was properly entered, and the appellant has the burden of overcoming that presumption. For "it is a general rule of wide application that an appellate court will indulge all reasonable presumptions in favor of the

correctness of the judgment, order, or decree from which the appeal was taken. In other words it will be presumed on appeal, in the absence of a contrary showing, that the trial court acted correctly and did not err. Indeed, error is never presumed on appeal, but must be affirmatively shown by the record; and the burden of so showing it is on the party alleging it, or, as sometimes stated, the burden of showing error affirmatively is upon appellant or plaintiff in error." 4 C. J. 731–733, ¶ 2662.

Appellant assumes that the complaint in this case shows that the alleged cause of action arose in this state. While we do not deem the matter of any controlling importance, we fail to find any basis for the assumption. The complaint alleges that the Western Grain Company is a foreign corporation, but it nowhere alleges that it is or has been doing business in this state. Neither does it allege that the alleged conversion took place in this state. In this connection it may be noted that there is nothing in the affidavits submitted by the plaintiff tending to show that Jourgen Olson had any connection with the particular transaction upon which plaintiff seeks to recover in this case. It may also be noted that all the affidavits,—of plaintiff as well as of the defendant,—tend to show that the defendant is a commission firm, engaged in selling in the Minnesota terminal markets, grain consigned to it by shippers for that purpose. There is nothing in the record to indicate that the grain for which this suit is brought did not come into the possession of the defendant through shipment thereof to it to the place where it was so engaged in receiving and disposing of grain.

In the case at bar, the positive affidavits of Jourgen Olson and N. J. Thorson are to the effect that all of Olson's stock in the Middlewest Grain Company was sold and transferred to Thorson on January 1, 1918; that Thorson immediately succeeded Olson as a director and president of the company, and that Olson ceased to be an officer or agent of the defendant company on the day the stock was transferred and has not since had any authority to represent it. These statements are also to some extent corroborated by the affidavit of Enger. If the statements in Olson's and Thorson's affidavits are untrue, then these men are guilty of perjury. Leaving all question of morality on one side, is it at all reasonable to believe that these men would have com-

mitted perjury in this proceeding? No man commits perjury unless he has some motive for so doing. What did these men or the defendant grain company have to gain in this matter? Certainly nothing very substantial. They could not defeat plaintiff's right of action. If he had such right, that remained unaffected and might be enforced in some court whose jurisdiction over the defendant could not be questioned. It is undisputed that the defendant Middlewest Grain Company is a corporation organized under the laws of Minnesota, and engaged in the grain commission business in the Minnesota terminal markets. It also appears without dispute that its principal office is in Minneapolis, Minnesota. By the laws of Minnesota it is required to maintain an office in that state "in charge of some person upon whom legal process affecting it may be served." See Minn. Gen. Stat. 1913, § 6184; State ex rel. Childs v. Park & N. Lumber Co. 58 Minn. 350, 49 Am. St. Rep. 516, 59 N. W. 1048. Failure to maintain such office constitutes cause for the annulment of its charter. State ex rel. Childs v. Park & N. Lumber Co. supra. By the laws of Minnesota the Middlewest Grain Company is also required to keep its books so "as to show intelligently the original stockholders, their respective interests, the amount which has been paid in on their shares, *and all transfers thereof,* and *such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same.*" Minn. Gen. Stat. 1913, § 6177. Under all the circumstances it seems highly improbable that Olson and Thorson would make false affidavits. The trial court believed that the affidavits of Olson, Thorson, and Enger were true, and we see no reason for overturning the trial court's ruling on this question. And of course if Olson had ceased to be the agent of the corporation the service made upon him was a nullity. For in a case like the one at bar, where the authority to receive service is sought to be implied from the character of the acts of the agent in behalf of the corporation (as distinguished from a case where a foreign corporation has specifically appointed an agent on whom process may be served), the question of agency "must be determined by inquiring whether the agent was such at the time the process was served, and not by his relation to the corporation at any other period, anterior or subse-

quent." And "service of process on a person who has ceased to represent a foreign corporation as its agent prior to the bringing of suit is entirely nugatory." Not only is that the purport and effect of our statutes, but that would be true even in the absence of statute by virtue of the constitutional guaranty of due process of law. See 85 Am. St. Rep. 917, 935; 32 Cyc. 567; 21 R. C. L. 1357.

Appellant contends that the trial court erred in reopening the matter and permitting the defendant to introduce the affidavits of Olson, Thorson, and Enger. The contention is without merit. It will be remembered that upon the first hearing the plaintiff asked for and was granted permission to submit certain additional proof. Some time thereafter plaintiff submitted certain affidavits. Ordinary fair play would entitle defendant some opportunity to rebut the affidavits so submitted. No formal order had been entered denying the defendant's motion, although the court apparently had intimated that it deemed the affidavits submitted by the plaintiff sufficient to justify a denial of the motion. But even if a formal order had in fact been entered the court would have had undoubted power to vacate such order. 28 Cyc. 1518. It might even have entertained a second motion to set aside the service of the summons without first formally vacating its former order. Clopton v. Clopton, 10 N. D. 569, 573, 574, 88 Am. St. Rep. 749, 88 N. W. 562; Fisk v. Hicks, 29 S. D. 399, 137 N. W. 424, Ann. Cas. 1914D, 971, 19 R. C. L. 676.

It was suggested upon the oral argument that defendant's appearance was in effect a general one, and therefore conferred jurisdiction under the rule announced by the supreme court of Wisconsin in Grantier v. Rosescrance, 27 Wis. 466. In the case cited the defendant moved to set aside a default judgment on the grounds: (1) That the record did not show a legal service of the summons, and that in fact such service had not been made; and (2) that the complaint failed to state a cause of action. The court ruled that the defendant by challenging the sufficiency of the complaint made a general appearance, and thereby conferred jurisdiction. It will be noted that in the Wisconsin case the defendant did not limit his appearance to the question of want of jurisdiction over his person, but went further and specifically asked the court to determine the sufficiency of the complaint. Of

course, the latter question could not be considered or determined by a court which did not have jurisdiction over the person of the defendant, and hence the court held that the defendant, by asking the court to determine this question, submitted himself to the jurisdiction of the court. But that condition does not exist in the instant case. Here the defendant has not recognized the court's jurisdiction at all. It has consistently denied such jurisdiction. It has appeared for the sole purpose of objecting to the jurisdiction of the court over the defendant, because of want of legal service of process upon it. The authorities all seem agreed that such appearance is a special appearance only, and does not waive the want of service of process See 4 C. J. 1316, and 2 R. C. L. 327. See also 1 Bouvier's Law Dict. Rawle's 3d Rev. pp. 212 et seq. It has been so ruled by the Supreme Court of the United States. See Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; Commercial Mut. Acci. Co. v. Davis, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. Rep. 445; Cain v. Commercial Pub. Co. 232 U. S. 124, 58 L. ed. 534, 34 Sup. Ct. Rep. 284; Toledo R. & Light Co. v. Hill, 244 U. S. 49, 61 L. ed. 982, 37 Sup. Ct. Rep. 591; Meisukas v. Greenough Red Ash Coal Co. 244 U. S. 54, 61 L. ed. 987, 37 Sup. Ct. Rep. 593; Re Indiana Transp. Co. 244 U. S. 456, 61 L. ed. 1253, 37 Sup. Ct. Rep. 717; and also by the supreme court of Wisconsin. See Sanderson v. Ohio C. R. & Coal Co. 61 Wis. 609, 21 N. W. 818; Kingsley v. Great Northern R. Co. 91 Wis. 380, 64 N. W. 1036. As was well said by the United States Supreme Court in Goldey v. Morning News, supra: "Irregularity in a proceeding by which jurisdiction is to be obtained is in no case waived by a special appearance of the defendant for the purpose of calling the attention of the court to such irregularity."

It follows from what has been said that the order appealed from must be affirmed. It is so ordered.

BIRDZELL, J., concurs.

GRACE, J., concurs in the result.

BRONSON, J., did not participate.

ROBINSON, J. (concurring). This case presents no serious question. It relates only to the service of a summons on a foreign corporation. By statute such service may be made by delivering a copy of the summons to the president, secretary, treasurer, or managing agent, if within the state and doing business for the corporation. Section 7226, subd. 5. Now the sheriff of Ward county attempted to serve the summons and returned the same with a certificate that he had served it on the defendant by delivering to and leaving with Jourgen Olson, the president and managing agent of the defendant, a true copy. The certificate was insufficient and so were the affidavits in regard to such service, because it was not shown that Olson was doing business for the corporation, and it was clearly shown that at the time of such attempted service he had ceased to be an officer of the company. Hence the service was properly held void.

OTHAR K. JENSEN et al., Appellants, v. SAWYER STATE BANK, Respondent, and H. THORSON and T. D. Thorson, Interveners and Respondents.

(173 N. W. 162.)

Banks and banking — execution of notes for bank — responsibility.

1. Where, in order to raise moneys for banking operations, an arrangement is made, pursuant to an agreement of the officers and directors of a bank, to deed certain lands then held by the bank to its cashier, and for the cashier then to mortgage such lands to secure two notes for $4,500 each, to be signed by the directors thereof, and where, pursuant to such agreement, such deed, notes, and mortgages are executed and $9,000 secured thereby through a sale of such notes and mortgages, and where, thereupon, such proceeds are paid to the bank and credited to its real estate or loans and discounts account, representing real estate held, and the lands involved are thereafter treated, in making sales, in raising crops, in payment of taxes, and in rentals thereof, as the lands of the bank, and it was so understood between all the bank officials and directors, even though, on the books of the bank, the specific liability therefor is not shown in the usual form, and where such cashier, after ceasing to be such, deeded the lands involved to his successor, it is *held* that the bank is legally

liable to the parties who assumed and executed such notes, for the amount of moneys paid by them, upon such obligation so assumed, for the interest and purposes of the bank.

Banks and banking — execution of notes for bank — responsibility.

2. Where, subsequent to such agreement and its consummation, ninety-five shares of the stock of such bank are sold to persons not parties to such arrangement, at about 50 per cent of the par value of such stock, and where such parties, so purchasing, examined such bank and its condition prior to such purchase, and relied in part upon the judgment of its then cashier, who knew all about this transaction, and who theretofore had received and retained a deed to the lands involved from its former cashier, and where, in addition, one certain piece of real estate so deeded is directly carried in the real estate account of such bank as owned and possessed by such bank, all of which furnished a means and an opportunity of knowing and understanding the real nature of this transaction concerning the real estate, it is *held* that such persons are not innocent purchasers of such stock so as to create an estoppel against the persons who assumed such obligation, in an action thereupon against the bank, even though such obligation is not evidenced upon the books of the bank in the usual form.

Appeal and error — trial by court — review.

3. Where an action properly triable under the Newman Act is tried by the court as a law case, with the consent of the respondent, this court will consider and review the same as a law case, where in so doing it is without prejudice to the rights of the appellant.

Opinion filed May 2, 1919. Addendum filed May 22, 1919.

Action to recover upon notes executed and paid, for the benefit of the defendant bank. From a judgment rendered for the defendants and interveners dismissing the action, and, from an order denying a new trial, in the District Court of Ward County, *Leighton,* J., the plaintiffs appeal.

Judgment reversed, with directions to enter judgment for the plaintiffs.

W. S. Lauder, for appellants.

Engerud, Holt, & Frame, and *John E. Greene, Palda, Aaker, & Greene,* for defendant, interveners, and respondents.

Bronson, J. (upon reargument). This action was reargued before

the entire court on March 8, 1919. The prior hearing before this court occurred on September 24, 1917, and a decision affirming the judgment of the trial court was rendered by this court just prior to December 1, 1918. This action was brought to recover $9,807.45 against the defendant bank by reason of certain notes executed in a real estate transaction. The interveners, who are subsequent stockholders of the bank, interposed a complaint in intervention, alleging an estoppel and praying for a dismissal of plaintiffs' causes of action. The action was tried in the trial court as a law case without a jury, and judgment was rendered, pursuant to findings of the trial court, for the dismissal of plaintiffs' complaint.

From such judgment, and from an order of the trial court denying a new trial, the plaintiffs have appealed. The contentions of the parties have been ably presented before this court in briefs, supplemental briefs, and by elaborate arguments, orally made by the learned counsel upon the reargument. No attempt will be made to discuss in detail all the features of the evidence presented in the record. Some of the leading facts will be stated, sufficient to base an understanding upon the principles of law made applicable to the record facts by this opinion. These facts are stated as follows: The defendant is a state bank located at Sawyer, North Dakota. Its capital stock is and was $16,000. In the fall of 1912 the bank had become possessed of considerable real estate in the course of its banking operations, having procured the same through foreclosure sales or otherwise upon obligations due the bank. Accordingly, in the month of November, 1912, it had some 1,300 acres or more of lands situated in Ward county. On its books the moneys loaned or invested in such lands were represented in the real estate account, or in the loans and discounts account, in the form of bills receivable. The real estate account then showed something over $5,000 invested in real estate, and at this same time the loans and discounts account was carrying in the form of bills receivable considerable amounts of moneys invested by the bank in real estate, but not carried as such in the real estate account. At that time the plaintiff Jensen was cashier of such bank; the plaintiff Atkinson, assistant cashier; the plaintiffs Saastad, Hays, and Atkinson, and also one Rosholt, were directors thereof. Jensen, although cashier, had, in

fact, no stock. The other persons mentioned owned the great majority of the stock of such bank. During the month of November, 1912, meetings of the officers and directors, as well as of the stockholders, were held with reference to securing moneys to carry on the operations of the bank. Plans were discussed of levying an assessment or of using these lands as a means whereby some moneys might be raised, as well as to lessen the real estate holdings. There was no disagreement that either one of these two plans had to be adopted or the bank must borrow money as banks usually do. As a result of these meetings a plan was adopted whereby these lands were deeded by the bank to its cashier, Jensen, who thereupon, with his wife, executed two notes each for $4,500, dated December 1, 1912, and due in two years, payable to said Atkinson, a director, and, to secure the same, also executed separate mortgages for each of said notes on these lands. Then the directors, Atkinson, Hays, and Saastad, each as individuals, indorsed these notes so executed, and the same, together with the mortgages securing such notes, were sold to two other banks, and $9,000 in moneys secured. This money, so received, was paid to the bank; some $3,800 thereupon being placed to the credit of the real estate account which reduced such real estate account down to some $1,600, and the balance being placed in the loans and discounts account in reduction of certain bills receivable evidencing investments in such real estate. About January 15, 1913, Jensen ceased to be cashier, and one Bowman succeeded him. After this deal was so made the bank paid interest on these two notes so sold to other banks. For instance, it paid $319 interest on February 10, 1914; it paid $107.50 interest on June 8, 1914; it thereafter made payments on the first mortgages; it paid taxes; it paid for repairs on the premises; it leased or cropped the lands and received the returns thereupon. No control over the land or payments of any kind on the notes were made by the plaintiffs, excepting the final payments made, which are the subject of this action. Some of these payments for interest, repairs, and taxes were directly charged up in the real estate account of the bank. The bank sold one-quarter section of the land so deeded. It received two notes aggregating $894, which it credited on February 14, 1914, to the real estate account, charging such notes in the bills receivable account. It ob-

tained a deed from Jensen for such land. Another piece of such lands was traded by the bank for some other land, and the sum of $217 paid as excess or "boot" money. The bank received a deed for this land. No money was paid by or to Jensen on account of these transactions. Jensen also executed a deed on these lands to said Bowman, the cashier, and the title to the lands has ever since remained in Bowman of record. In the year 1914 negotiations were begun between one Rosholt who was principally interested in such bank, with one Thorson, to purchase the controlling interest in such bank, and thereafter, in the spring and summer of 1914, pursuant to such negotiations, said Thorson and his son became possessed of ninety-five shares of stock in such bank. For this stock he paid 50 per cent of its par value. The elder Thorson has eighty-five shares, his son ten shares procured through his father. The purchase of stock began in March, 1914, thus: Thorson bought five shares from Dr. Herbst in March, 1914; thirty shares from Rosholt in April, 1914; ten shares from Hays in April or May, 1914, and the balance during the spring and summer of that year. Mr. Ingwaldson had done work of auditing in banks for the elder Thorson; he was directed by Thorson to ascertain the condition of this bank. During the latter part of February, 1914, Ingwaldson visited the bank and made an examination. He testified that he looked over the daily statement, the certificate register, glanced over the other real estate account and noticed that it was nearly $8,000; that he asked what they had in that; that he examined the bills receivable and the notes and securities. That he made no examination as to what particular real estate the bank owned at that time; that he was advised that it was farm lands and a couple of lots in town. That he was informed of no notes or mortgages that had been taken for the sale of land to Jensen that he could remember. That he talked to Mr. Bowman, the cashier. The other real estate account at that time as shown in the evidence disclosed payments of interest on mortgages, and repairs or expenses charged concerning some of these lands that had been theretofore deeded to Jensen. Bowman, during these negotiations, was the cashier, and corresponded to some extent with the elder Thorson concerning the purchase, the payment, and delivery of bank stock to Thorson. The elder Thorson, as a witness, testified, in one place in his

evidence, that he knew Bowman before he purchased the stock, that he knew he had been in the bank a year or more as cashier, that he relied to some extent on Mr. Bowman's judgment as to whether the stock would be a good purchase. At another place he testified that in purchasing the stock from Mr. Hays, Mr. Bowman acted for him in the transaction; that he directed Bowman to buy it, and sent him the money to buy. That he had no communication at any time with Mr. Hays. Bowman, the cashier, bought his stock, thirty shares, in January, 1913, paying $3,000 for the same, par value, and at that time he knew all about this land transaction with Jensen. In May, 1914, an assessment of 50 per cent on the bank stock was levied and thereafter paid. After the purchase of such stock by said Thorson the bank continued to handle such real estate and to look after the same, paying the taxes, some interest on mortgages, and repairs upon the same; many of these items appeared in the real estate account until August, 1914, when the real estate account then amounting to over $11,000, a new account was instituted, termed the Rosholt et al. account. To the new account, thereafter items of disbursements and receipts concerning these lands were charged, and some items from the real estate account were transferred.

Subsequently each of these $4,500 notes became due and went to protest, the bank refusing to pay them. These plaintiffs paid them, and, upon the refusal of the bank to recompense them, thereupon instituted this action. It is the contention and claim of the plaintiffs, in substance, that this plan, so carried out, was done for and by the bank, and for its benefit; that it was understood and agreed that the real estate so deeded to Jensen, all of the time, should be considered and regarded as the real estate of the bank, and that out of the proceeds to be realized from these lands that might be sold the notes should be paid, and if they could not so be paid when the notes fell due, then the bank should make payment of the same. The bank and the interveners herein, on the other hand, contend this transaction was a sale of the lands to Jensen; that the records of the bank so show; that nothing on the books of the bank show to the contrary; that furthermore these interveners purchased the stock in the bank, without knowledge of this secret agreement or plan, and that the plaintiffs herein are

estopped to assert any claim against them or the bank by reason thereof. From the record in this case it plainly appears that this transaction was had for the purpose of securing money for the bank, and for the purpose of relieving the bank of the situation then presented. That it was put through in the name of the cashier, Mr. Jensen, and the directors, as a means of accomplishing this purpose, with the thought in mind that the bank could work out, through this plan, by disposition of the lands before the notes came due. The immediate parties to this arrangement do not at all disagree in this record concerning this intent and purpose. It is true that the reports made to the bank examiner and the books of the bank thereafter do not contain any statement or record of any such agreement. It is to be noted, however, that subsequent statements made to the bank examiner, however, listed 80 acres of these very lands deeded to Jensen in its real estate account of lands owned by the bank. As between original parties to this plan or agreement, we are satisfied upon the record that the deed of these lands was made to Jensen, not for the purpose of a bona fide sale to him of such lands, or with any intent or thought on his part of purchasing the land, but that the deal was made bona fide between the original parties in the bank for the purpose of assessing and aiding the bank in repleting its capital, lessening its real estate, and putting it in shape as a bank to continue its operations, without levying an assessment upon the capital stock. The subsequent action of the bank in treating this real estate as its own simply confirms this conclusion.

Every item of money realized from the sale of any of these lands involved, or from rentals or crops produced thereupon, was received by the bank. Every item of disbursement concerning these lands has been made by the bank. Every action therefor of the bank and every action of the plaintiffs herein simply corroborates the intent and purpose for which this deed was given and the manner in which these lands belonging to the bank were, in fact, used as a basis of securing money. The principal contentions raised on this appeal between the parties, pursuant to the specifications and the issues presented thereby, are as follows:

(1) Whether this action was properly tried as a law case or was properly triable under the Newman Act.

(2) Whether the bank was liable to the plaintiffs for the obligations assumed and paid by them.

(3) Whether the plaintiffs are estopped as against the bank and the interveners, subsequent purchasers of the stock of such bank.

The trial court, in its findings and conclusions, finds in substance that this obligation assumed and paid by the plaintiffs was secretly made; that it is not shown upon the books or records of the bank; that it was fraudulently and secretly withheld, and not disclosed to the interveners, subsequent purchasers of the stock of the bank; that by reason of such fraudulent concealment the plaintiffs are estopped to assert a claim against the bank.

The action in the trial court was tried as a law case to the court, a jury being waived by the defendant and interveners. The complaint in the action seeks an accounting and asks for equitable relief. The answer of the defendant bank sets up grounds of estoppel, as does likewise the complaint in intervention. Properly the action might have been tried as an equitable action under the Newman Act; but in view of the conclusion to which this court has arrived in the decision of this case, and in view of the fact that the respondents consented to, and do not complain against, the trial and determination of this action as a law case, this contention of the appellants becomes immaterial, because not prejudicial.

Our next consideration is addressed to the liability of the bank upon this obligation of the plaintiffs so assumed and paid, in view of the record facts herein, that no formal action of the board of directors, or of the stockholders of the bank, anywhere appears recognizing the same as an obligation of the bank, and that, furthermore, in the books and records of the bank there does not appear any direct recognition of such obligation.

It is clear, from the record, that Jensen, as well as the other officers of the bank, in the fall of 1912, possessed authority to borrow money for purposes of the bank. There is nothing in the record which inhibited borrowing $9,000 for bank purposes, and to pledge security therefor. Consequently, if Jensen or the other officers of the bank had borrowed $9,000, and given these very notes signed by the bank, and had put up these lands as collateral security to secure such notes,

the bank unquestionably would have been liable therefor, and, likewise, unquestionably the records of the bank would have shown in its bills payable the amount so borrowed. By means of the arrangement and plan pursued the $9,000 in question was secured by these same officers for the very purposes that a loan for that amount would have subserved. The money secured went directly to the bank. The $9,000 so secured was not credited as bills payable; it did show as a credit in the loans and discounts account, and, as a credit to the real estate account, with a corresponding and apparent diminution in the real estate holdings offsetting such amount. As a matter of debit and credit, the bank would be in exactly the same position no matter whether it borrowed the $9,000 direct, or whether it borrowed it through the plaintiffs. However, as a matter of conforming to bank examinations and reports to be made, and with reference to amount of real estate shown to be carried, it did make a considerable difference concerning the apparent liquid assets of such bank and its ability to do banking business. If the equity of the bank in the land so deeded was, in fact, actually worth $9,000, the actual value of the stock, as a matter of debit and credit, did not improve or increase by making this deal, no matter whether it be considered a loan or a sale. If, then, there was the necessity for an assessment upon the stock to replete impaired capital, it was just as necessary in fact after these notes were given as it was before. Accordingly we are clearly of the opinion that, as far as the bank and the original stockholders are concerned, this obligation which its cashier and others assumed for the bank was a bank obligation enforceable against the bank. First Nat. Bank v. State Bank, 15 N. D. 594, 109 N. W. 61; Rankin v. City Nat. Bank, 208 U. S. 541, 52 L. ed. 610, 28 Sup. Ct. Rep. 346; 7 C. J. 559, § 166; Flower v. Commercial Trust Co. 138 C. C. A. 580, 223 Fed. 318.

The respondents, however, strenuously contend that, upon principles of estoppel, even though no bona fide sale of the land was made, the plaintiffs cannot maintain this action. They assert, among other things, that the interveners, who subsequently purchased ninety-five shares of the stock, had no notice of this secret arrangement or obligation when they bought the stock, and that the interveners purchased

such stock only with notice of liabilities of the bank to the extent that its books then showed. It is quite apparent that this contention cannot be maintained to its full extent under all circumstances; for instance, if at the time this stock was transferred to the interveners the bank then owned a drayage bill of $50, or a bill for attorneys' fees for $100, or an obligation for rent for $200, or some similar item not then shown on the books of the bank for which the bill had not been rendered, surely the bank in such instance would be liable for such indebtedness. The principle issues presented, and the one demanding our serious consideration, is whether, under the circumstances, there was such a concealment of the real transaction and such a lack of knowledge of the part of the interveners concerning this transaction when they purchased the stock, so as to raise an estoppel against the plaintiffs to maintain this action. This is a serious question in this case, and it is not free from difficulties. Ordinarily the commercial activities of a bank and its formal actions should be and are required to be noted either in its records or in its books. Secret and clandestine agreements which serve to create an apparent financial banking condition of a bank, and which serve to mislead the public, either depositors or prospective stockholders, should and ought to create an estoppel as against parties who seek afterwards to enforce such secret arrangements. The main question, therefore, is whether, within this record, there appear facts and circumstances which gave or may have given to the interveners at the time this stock was purchased notice of this arrangement and necessarily of this obligation.

The interveners are father and son. The elder Thorson has had a banking experience extending over forty years. At the time he was interested in twenty-two banks. He had an auditor who examined banks for him and who did examine the condition of this bank. This bank, at the time of the purchase of the stock, was in financial trouble. The elder Thorson knew this. He bought this stock, nearly all of it, at 50 per cent of the par value thereof. The books and records of the bank at the time Thorson caused it to be investigated disclosed at least that the bank was looking after this real estate involved, was renting the same, and had negotiated concerning a sale of some of these very lands. Thorson testified that he relied to some extent on Bow-

man's judgment concerning this purchase of stock, as to whether it would be a good purchase. Bowman was then the cashier of the bank.

There is in the evidence, exhibit 2, a carbon copy of the letter dated March 6, 1914, from Bowman to the elder Thorson, which states that there is inclosed a statement of the real estate held by the bank. This statement tells a big tale in itself. It contains the very lands that were deeded to Jensen. It contains a purported statement of the value of such lands, and a list of the amounts that were credited to each of such pieces of land so deeded out of the $9,000 received on the notes. It also contains a list of the first mortgages against such lands, and arrives at a tentative balance of the value of the lands as against the amount of encumbrances or investments therein. If Thorson received this statement there would be absolutely no question about his notice of this transaction in connection with these lands. The record is in dispute concerning whether Thornson did get this statement. Thorson denies having received the same, and Bowman does not testify that the original letter, with the statement inclosed, was sent to Thorson; but he testifies that he does not remember, but, regardless of this question, Bowman knew about this deal. He must have prepared this statement for Thorson; and, if Thorson relied on Bowman's judgment concerning the purchase of the stock, he knew about this transaction if Bowman acted bona fide. There is nothing in the records to justify the inference that the plaintiffs were guilty of any fraudulent concealment as far as the directors or stockholders of the corporation were concerned. The earmarks of this transaction were apparent upon the face of the records of the bank, although the transaction was not carried in the usual manner as a bills payable account, for reasons that are apparent owing to the condition of the bank. Nevertheless, the bank, by its conduct, by its records, by its control over these lands, disclosed, and its records showed, the real motive of this transaction. There, therefore, is no legal reason why the ordinary rule applicable to purchasers of stock in a corporation should not apply, in other words, Thorson bought this stock subject to equities existing against the bank that might affect the value of such stock as far as this transaction was concerned. Comp. Laws 1913, § 5160. Under the circumstances the fact that the reports made to the bank

examiner did not disclose this arrangement, or that the interveners may have relied in part thereupon in the purchase of the stock, does not create any estoppel against the plaintiffs in this action, in view of the accommodation service rendered by the plaintiffs to the bank and the knowledge thereof ascertainable from the books and records of the bank. Leonard v. State Exch. Bank, 149 C. C. A. 448, 236 Fed. 316, this is an action on the obligation assumed against the bank. It is not an action involving the rights of the interveners, if any, to recover for false representations and deceit in the sale of the stock to them, similar to that in Gerner v. Mosher, 58 Neb. 135, 46 L.R.A. 244, 78 N. W. 384.

Concerning this matter, in the former opinion, it is stated that "notice that a bank has assets in the shape of land is certainly not, in itself, notice that there are secret claims against the bank on account of the land, there being nothing to that effect on the books of the bank or in the public records." A careful investigation of the record discloses, in answer to that statement, that the books and records of the bank showed, both prior and subsequent to this transaction involved, that the bank not only considered this real estate as its own, but also paid the interest on this very obligation which is the subject of the suit involved herein, as well as interest on other prior liens on said lands so involved. If the bank claimed these lands as its own; or its records disclosed a course of conduct treating the same as its own, surely any purchaser of the stock, if he relied on what the books showed concerning these lands as being real estate, would be bound by the liens then existing against the same as well as the liens that then appeared of record against the same.

The record does not justify the inference that a banker of some forty years' experience owning some twenty-two banks, employing an expert auditor to examine the bank, and who did examine this bank, was not put upon inquiry, and did not have notice of this transaction, the earmarks of which are plain and apparent upon the books of the bank themselves, both before and after he purchased his stock. It therefore follows that the trial court erred in its findings and conclusions of law. The judgment of the trial court is reversed, with direc-

tions to enter judgment for the plaintiffs for the sum of $9,807.45, with interest and costs, including costs of this appeal.

ROBINSON and GRACE, JJ., concur.

BRONSON, J. (addendum). As this case has been pending before this court a great length of time, and as it has been argued and reargued before this court, and the majority opinion now reverses the former opinion rendered by this court, it is well to note a consideration or two that should be applied to the dissenting opinion now filed.

The dissenting opinion overlooks entirely that this action was tried as a law action, with the respondent consenting and not objecting thereto, and with the appellant making specific objection; accordingly this case should be governed by legal principles applicable.

The dissenting opinion apparently has discovered a new method of re-establishing impaired capital; it might be termed the "boot strap" method. In other words, impaired capital may be restored by taking $9,000 of the assets of the bank and hypothecating or disposing of the same and receiving therefor $9,000 in cash, and, presto-change, the capital is restored. The illustration cited sufficiently answers such a contention that the procedure contemplated between the parties was a re-establishment of the impaired capital. It matters not whether the transaction be termed an attempt to restore impaired capital or to make loan, in either event the status of the bank, as a matter of debit and credit, was just the same after the transaction was consummated as it was before. Simple principles of arithmetic demonstrate this. In the dissenting opinion, there is expressed alarm that the security is not disposed of by this court, when as a matter of fact the bank or its banking officials have had this property, or the control over it, for years. The bank can easily take care of this real estate and handle it without any order from this court so to do.

GRACE and ROBINSON, JJ., concur.

BIRDZELL, J. (dissenting). The opinion of the majority in this case, in my judgment, ignores both sound principles of public policy

which have long been incorporated in legislative acts, and well-established, controlling legal doctrines. After a strained interpretation of some of the facts, a conclusion is drawn therefrom that seems to me to be wholly unwarranted when the case is carefully examined even in the light of the facts stated,—much less is it warranted if the whole record is considered. The opinion seems to ignore altogether the fact that the capital of the bank was impaired prior to the negotiation of the loan that is the basis for this action, and that the whole transaction was nothing more or less than an arrangement to make good the impaired capital. The following statement from the majority opinion reflects the erroneous viewpoint. It is said: "It is clear, from the record, that Jensen, as well as the other officers of the bank, in the fall of 1912, possessed authority to borrow money for purposes of the bank. There is nothing in the record which inhibited borrowing $9,000 for bank purposes, and to pledge security therefor. Consequently, if Jensen or the other officers of the bank had borrowed $9,000, and given these very notes signed by the bank, and had put these lands as collateral security to secure such notes, the bank unquestionably would have been liable therefor, and likewise unquestionably the records of the bank would have shown in its bills payable the amount so borrowed." To this it might well be added, *likewise, unquestionably, a bank examiner performing his sworn duty would have soon closed the doors of the bank.* The fact ignored is that the bank was so heavily overloaded with real estate and bad paper that it had no right to continue to transact the business for which it was organized, without making good the impairment of its capital, *and this was recognized by its own officers.* The record shows clearly that the whole transaction, whereby the bank was to be relieved of its surplus prohibited investment of bank capital, was designed as a substitute for an assessment to make good the impairment. By ignoring these facts, the majority reach a conclusion that would be absurd if rendered in the light of all the facts. Though not appearing to do so, it holds the corporation liable for obligations of stockholders to contribute to the capital fund. On the record in this court, when all the facts are considered, this is the real conclusion, and it cannot be escaped by ignoring a portion of the facts.

There are some stubborn facts in this record, which are not men-

tioned by the majority, that should absolutely preclude recovery by the plaintiffs in this action. The statement of condition rendered on September 4, 1912, before the $9,000 was put in, showed an investment in other real estate of $5,538.81, with a further item of expense over profits of $1,325.45. The statement for November 26, 1912, shows only $1,604.23 in the other real estate account. Subsequent statements show that this account kept increasing, and the testimony of the cashier, given upon the trial from the general ledger account, shows that on March 6, 1914, the account had crept up to $8,503.43. And it further shows that this represented an accumulation of land that the bank had taken on during the period following November, 1912. Other testimony of one of the plaintiffs herein shows that in 1912, before the loan in question was made, the bank actually had more of its capital tied up in real estate than was shown on the books; for it appears that the true condition was concealed from the examiner by carrying some of the real estate as bills receivable.

The testimony of the plaintiffs themselves shows that they did not treat this transaction as an ordinary negotiation of a loan by the bank. Plaintiff Atkinson testified: "We had to use the land as a means for raising *capital;*" and, further, that there were three alternatives open to the bank: (1) To levy an assessment; (2) to borrow money as banks usually do; or (3) use the real estate as security for capital borrowed by the stockholders. It further appears that the bank, at that time, was already indebted to the First National Bank of St. Paul for borrowed money to the extent of $10,000, which indebtedness was carried in the bills payable account. The record leaves no room to doubt that the third alternative was the one chosen as to the $9,000 loan.

There can be no question, on the record as a whole, that the purpose of these very plaintiffs in conducting the transaction as they did was to utilize their personal credit, supported by collateral drawn from the excessive real estate holdings, as a means of raising money to meet their own continuing obligations to keep the capital of the bank unimpaired. It is alleged by the plaintiffs that the lands pledged as security for the $9,000 were alone worth between $15,000 and $20,000, and that "the loan was negotiated to raise money necessary to enable

said bank to continue in business as a banking institution, and to pay its depositors and other creditors and save them from loss."

The proceeds of the loan, as shown by the undisputed testimony of the cashier of the bank, were used as follows:

Bills Receivable Credits.

Note, Emily Seibold	$1,390.00
Note, Fred Seibold	1,390.00
Note, Fred Seibold	315.00
Note, A. J. Vik and wife	958.86
Note, Jacob Kennewischer	1,076.00
Total proceeds of loan expended to replace capital lost through bad loans	$5,129.86
Credited to real estate account (to reduce investment of capital therein)	3,810.14
Total	$9,000.00

Yet the majority of the court persists in treating this transaction as an ordinary loan by the bank to secure needed capital to transact its business. They seem to ignore the legal requirements that make it necessary for stockholders in banking corporations to keep the capital unimpaired as a condition of being allowed to transact a banking business. In the face of this showing of the manner in which the proceeds of the loan were absorbed in replacing the questionable assets of the bank, I am utterly unable to understand how the transaction can be treated as though it were one ordinarily pursued to acquire additional funds for use in ordinary banking.

The extent to which the majority opinion seems to be based upon a misapprehension of the facts relative to the $9,000 loan is further illustrated by the following statement in the opinion. Referring to a statement of real estate items which, it is claimed, was sent by Bowman to Thorson at the time Thorson was negotiating for the stock, it is stated: "This statement tells a big tale in itself. It contains the very lands that were deeded to Jensen. It contains a purported state-

ment of the value of such lands, and a list of the amounts that were credited to each of such pieces of land so deeded out of the $9,000 received on the notes." The statement or exhibit referred to does not indicate the source of the $9,000, and is not a clear statement of the condition of the real estate account. It shows, however, a loss of over $3,000 on the supposition that $9,000 of the total investment in the real estate had been previously charged off. In other words, on the supposition that the bank had previously expended capital in real estate to the extent of $25,383.31, which was at the time valued at $22,200, the purchaser of the stock, if he received this statement, would be charged with notice of the impairment of the capital to the extent of $3,183.31, provided that the real estate were worth the appraised value. And he would also be notified that in connection with whatever stock he would buy in the banking enterprise, capitalized at $16,000, he was acquiring an interest in real estate valued as a bank asset at better than 135 per cent of the capital. It is little wonder that the stock was priced at 50 cents on the dollar, and that immediately after Thorson acquired it he levied an assessment, the necessity of which was even recognized by Rosholt when he sold out. Then, if the $9,000 represented as a previous investment of bank capital in the real estate, be considered, as against a purchaser of stock, a debt still owing by the bank and chargeable to stockholders, as found by the majority, the exhibit is made to work a barefaced fraud upon the purchaser. He is required to advance his proportionate share of $9,000, which is represented to have been already paid out. In short, this statement says to him: "We are overloaded with real estate, and our capital is impaired on account of the loss sustained thereby. We have more real estate than it is permissible for us to carry, and more than is consistent with good banking. It stands us at more than $25,000 and is worth perhaps a little better than $22,000. If you will take the stock with our real estate account in this condition, you may have it at 50 cents on the dollar. Perhaps you can levy an assessment and raise sufficient added capital to meet the requirements of the state banking department." The majority opinion allows the individuals who have made this kind of a representa-

tion to work a fraud upon the purchaser by compelling him to contribute a proportionate share of the $9,000 which they represent as having been already expended on account of the real estate. Indeed, "This statement tells a big tale in itself," or, if it does not, it is made to do so. Suppose the bank had owned an automobile for which the vendors of the stock represented that the bank had paid $3,000, and it should be discovered later that the note of these same stockholders given in payment was outstanding. According to the majority opinion, notice that the automobile had cost $3,000 would be notice to the purchaser of the stock that the corporation was under obligation to reimburse the stockholders who had given the note and made the representation that the automobile was paid for. It may well be that the corporation would be liable to the seller for the price of the car, but, if the law still recognizes estoppels, stockholders who made such representations, upon paying their note, would surely be estopped, as against the purchaser of the stock, to seek reimbursement.

Following the negotiation of the loan in 1912, the bank continued business, with the result that it was compelled to take in more real estate in liquidation of bad loans. The real estate account was again overloaded, notwithstanding the previous reduction in 1912. Such was the condition when Thorson purchased his stock, and in this real estate there was tied up what was supposed to be live banking capital not charged off, to the amount of $16,383.31,—that is, according to the telltale exhibit.

There is every reason to believe that after the transaction in 1912, as a result of which the asset value of the real estate was reduced by the contribution of new capital, the accounts were made to conform to the reduction, and it is admitted that the books contained no entry showing the liability of the bank on account of the money borrowed by the stockholders to effect the reduction. If the views of the majority are correct, the officers of the bank have doubtless been guilty during the years following 1912 of falsifying the condition of the bank in the reports to the bank examiner. Yet, though they stand so convicted by the majority opinion, they are also rewarded in the same opinion by being allowed a recovery predicated upon facts which they themselves have apparently secreted from the public examiner.

I confess I cannot comprehend the elements of justice in a situation where the plaintiffs succeed by first convicting themselves of forgery (Comp. Laws 1913, § 5174), and where they must necessarily do so to support their claim. A judgment in favor of the plaintiffs under these circumstances might possibly be justified in order to prevent some greater injustice, but in the instant case the plaintiffs allege that the lands held by Bowman as security are worth more than the amount they seek from the bank. So, certainly no injustice would result to them by adopting their own allegations as to value, and leaving the real transaction to conform to the ostensible transaction as they themselves wrote it in the books.

The statute is very definite as to the contents of the reports of condition the banks are required to make the public examiner. It says: "Every banking association, savings bank, and trust company organized under this chapter, shall make at least five reports each year to the state examiner, in such form as the state banking board shall prescribe; such forms to be as nearly as possible like those prescribed by the comptroller of the currency for similar reports for national banks. Such report shall exhibit in detail, under appropriate heads, the resources and liabilities of the association at the close of the business on a past day by him specified, which shall, if practicable, be the same day for which similar reports are required from national banking associations within the state by the comptroller of the currency of the United States. Each report must be verified by the oath of the president or the cashier and attested as correct by at least two of the directors, and must be transmitted to the examiner within seven days after receipt of the request for the same, and an abstract of the same in a form prescribed by the board shall be published, at the expense of the association, in some newspapers in the city, town, or village where such bank is located, and in case there is no such newspaper, then in any other newspaper in the county in which such association is located." (Comp. Laws 1913, § 5167.)

Though the officers must have made a number of these reports, based on the condition as shown by the books, they are now permitted to recover on the theory that all of such reports were false. The testimony, in fact, of one of the plaintiffs in this action, shows ex-

pressly not only that the $9,000 obligation was not disclosed to the bank examiner, but that the condition of the real estate account was likewise concealed.

I not only regard the conclusion of the majority as being erroneous for the reasons above stated, but it seems to me that, even conceding that there might be a bank liability to reimburse the stockholders on account of the payment of their personal obligations under the circumstances stated by the majority, they should be able to enforce the obligation as against a new stockholder, acquiring a controlling interest in the bank, only by advancing clear proof that it was an element of the bargain. Yet, not a single plaintiff in this action claims that he communicated any facts to the purchasing stockholder concerning the alleged $9,000 obligation; and they come into court acknowledging that it was concealed and not entered on the books. It was so successfully concealed in fact as to deceive the bank examiner. They are nevertheless permitted by the majority of the court to overcome the estoppel that arises on the face of their own books by a mere conjecture of knowledge on the part of the purchaser,—a knowledge he could not have obtained without delving into the transactions which the plaintiffs themselves attempted to conceal. In short, their attitude is this: "We concealed this transaction, but your auditor, being an expert, either did or should have detected our concealment. Therefore, we are not estopped to assert this liability against you." Common honesty, it would seem, would require that the plaintiffs, if they intended the purchasers of the bank to reimburse them for the payment of the notes in question, should have stated frankly that the notes were outstanding, and that they represented an obligation which should be met by the bank. Yet there is no suggestion of the slightest attempt to conform to this elementary requirement of fair dealing.

Another remarkable feature of the judgment in this case is that it goes against the bank, and leaves the security in the hands of the individual. No reason is assigned for any departure from the ordinary rule, according to which equity, when it obtains jurisdiction, proceeds to administer complete justice, and does not do things by halves. The query arises as to what disposition the majority will make of the land, and what further proceedings, if any, are contemplated

as being necessary. The judgment in this case should be for the defendant and for the interveners, and the holder of the legal title to the land should be declared a trustee for the plaintiffs, who would thus be given the benefit of the profit which, according to their own pleadings, they are attempting to thrust upon an unwilling defendant.

CHRISTIANSON, Ch. J. (dissenting). I concur in the dissenting opinion prepared by Mr. Justice Birdzell. His statement of the facts is so clear, and his reasoning so cogent, that little or nothing can be added. It is undisputed that the $9,000 note involved in this litigation in no manner appeared upon the books of the bank. It is also undisputed that, in the statements which the officers rendered to the state examiner, no reference was made to such note. The $9,000 note was made, and the lands transferred to Jensen, on December 1, 1912. The sale was made to Thorson in March, 1914. During the interim the officers of the bank were required "to make at least five reports each year to the state examiner." (Comp. Laws 1913, § 5167.) And the state examiner was required, "either personally or through deputy examiners," to visit the bank "at least twice each year," and inspect and verify its assets and liabilities, and investigate the character and value of its assets and its method of operation and conduct. (Comp. Laws 1913, § 5146.) It is undisputed that, upon his examinations of the bank, the state examiner did not discover that the $9,000 note was outstanding, or that the so-called equities in land remained part of the assets of the bank. The plaintiff Atkinson admits that the directors intended to conceal these facts from the examiner, and it is undisputed that they succeeded in accomplishing their purpose. The books and records which Thorson was afforded an opportunity to examine before he purchased the stock from the plaintiffs were the same books and records which the state examiner had examined. They gave no information to Thorson which they had not given to the examiner. With full knowledge of the facts, not a single one of the plaintiffs said anything to Thorson in regard to the $9,000 note, or the matters incident thereto. The fact that the bank had paid interest on the note, and received moneys for rent, furnished no information whatever unless those items of income and expense were checked back to their

original sources, and inquiries made with respect thereto. Can it be possible that a purchaser of bank stock is required to check every item of income and disbursement appearing upon the books of the bank for months and years prior to the time of such purchase, in order to ascertain everything connected with such items? Can persons who, with the avowed object of deceiving the public and public officers, make false entries and false reports, later assert such falsity to their own advantage? Can they say to one who has dealt with them with knowledge of such entries and reports, it is true the entries and reports were false, but you had no right to accept them as true; you should have assumed that they were false and acted accordingly? There should be no room for dispute as to how these questions should be answered, as long as the doctrine of estoppel is recognized and enforced by the courts.

OTTO BENNESS, Appellant, v. MIDDLEWEST GRAIN COMPANY, a Corporation, and H. T. Hogy, Respondents.

(173 N. W. 476.)

This case is governed by the decision in Kluver v. Middlewest Grain Co. ante, 210.

Opinion filed June 21, 1919.

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

Affirmed.

W. H. Sibbald, for appellant.

Fiske & Murphy, for respondents.

Per Curiam. This case was submitted together with Kluver v. Middlewest Grain Co. ante, 210, 173 N. W. 468. The facts in the instant case are identical with those in the Kluver Case, and on the authority of the decision rendered in that case, the order appealed from is affirmed.

Grace, J., concurs in the result.

H. J. NELSON, Appellant, v. MIDDLEWEST GRAIN COMPANY, a Corporation, and H. T. Hogy, Respondents.

(173 N. W. 475.)

This case is governed by the decision in Kluver v. Middlewest Grain Co. ante, 210.

Opinion filed June 21, 1919.

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

Affirmed.

W. H. Sibbald, for appellant.

Fiske & Murphy, for respondents.

PER CURIAM. This case was submitted together with Kluver v. Middlewest Grain Co. ante, 210, 173 N. W. 468. The facts in the instant case are identical with those in the Kluver Case, and on the authority of the decision rendered in that case, the order appealed from is affirmed.

GRACE, J., concurs in the result.

SARAH E. LAMMADEE, Appellant, v. MIDDLEWEST GRAIN COMPANY, a Corporation, and H. T. Hogy, Respondents.

(173 N. W. 475.)

This case is governed by the decision in Kluver v. Middlewest Grain Co. ante, 210.

Opinion filed June 21, 1919.

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

Affirmed.

W. H. Sibbald, for appellant.

Fiske & Murphy, for respondents.

PER CURIAM. This case was submitted together with Kluver v. Middlewest Grain Co. ante, 210, 173 N. W. 468. The facts in the instant case are identical with those in the Kluver Case, and on the authority of the decision rendered in that case, the order appealed from is affirmed.

GRACE, J., concurs in the result.

CHARLES CRAWSON, Appellant, v. MIDDLEWEST GRAIN COMPANY, a Corporation, and H. T. Hogy, Respondents.

(173 N. W. 475.)

This case is governed by the decision in Kluver v. Middlewest Grain Co. ante, 210.

Opinion filed June 21, 1919.

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

Affirmed.

W. H. Sibbald, for appellant.

Fiske & Murphy, for respondents.

PER CURIAM. This case was submitted together with Kluver v. Middlewest Grain Co. ante, 210, 173 N. W. 468. The facts in the

instant case are identical with those in the Kluver Case, and on the authority of the decision rendered in that case, the order appealed from is affirmed.

GRACE, J., concurs in the result.

EDWIN K. LIVINGSTON, Appellant, v. MIDDLEWEST GRAIN COMPANY, a Corporation, and H. T. Hogy, Respondents.

(173 N. W. 474.)

This case is governed by the decision in Kluver v. Middlewest Grain Co. ante, 210.

Opinion filed June 21, 1919.

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

Affirmed.

W. H. Sibbald, for appellant.

Fiske & Murphy, for respondents.

PER CURIAM. This case was submitted together with Kluver v. Middlewest Grain Co. ante, 210, 173 N. W. 468. The facts in the instant case are identical with those in the Kluver Case, and on the authority of the decision rendered in that case, the order appealed from is affirmed.

GRACE, J., concurs in the result.

N. M. NELSON, Appellant, v. MIDDLEWEST GRAIN COMPANY, a Corporation, and H. T. Hogy, Respondents.

(173 N. W. 475.)

This case is governed by the decision in Kluver v. Middlewest Grain Co. ante, 210.

Opinion filed June 21, 1919.

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

Affirmed.

W. H. Sibbald, for appellant.

Fiske & Murphy, for respondents.

PER CURIAM. This case was submitted together with Kluver v. Middlewest Grain Co. ante, 210, 173 N. W. 468. The facts in the instant case are identical with those in the Kluver Case, and on the authority of the decision rendered in that case, the order appealed from is affirmed.

GRACE, J., concurs in the result.

HENRY OLSON, Appellant, v. MIDDLEWEST GRAIN COMPANY, a Corporation, and H. T. Hogy, Respondents.

(173 N. W. 474.)

This case is governed by the decision in Kluver v. Middlewest Grain Co. ante, 210.

Opinion filed June 21, 1919.

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

Affirmed.

W. H. Sibbald, for appellant.

Fiske & Murphy, for respondents.

PER CURIAM. This case was submitted together with Kluver v. Middlewest Grain Co. ante, 210, 173 N. W. 468. The facts in the instant case are identical with those in the Kluver Case, and on the authority of the decision rendered in that case, the order appealed from is affirmed.

GRACE, J., concurs in the result.

PATTERSON LAND COMPANY, Appellant, v. GEO. W. LYNN, Respondent.

(175 N. W. 211.)

Appeal and error — courts — jurisdiction of supreme court on trial de novo; subject-matter of suit.

Defendant moves the supreme court to vacate its decision entered in this cause on March 6, 1914. For reasons stated in the opinion the motion is denied.

Opinion filed June 21, 1919.

Motion to vacate decision and reinstate and reopen cause.

Motion denied.

George W. Newton, R. N. Stevens, H. C. Lynn, Geo. W. Lynn, and *H. A. Bronson,* for motion.

Watson & Young and *E. T. Conmy,* contra.

PER CURIAM. The original opinion in this case was filed March 6, 1914. A rehearing was denied April 11, 1914 (see 27 N. D. 391, 147 N. W. 256). A motion to recall the remittitur and reinstate the appeal was filed March 14, 1917, and, after hearing had, was denied by an opinion filed April 28, 1917 (36 N. D. 341, 162 N. W. 702). In that opinion this court said: "Among other questions urged is that this court rendered judgment upon an amended pleading, without permitting a trial upon the issue formed by such amendment. It is contended that the proper practice would have been to have directed the amendment to be allowed and remanded the case for trial upon

the pleading as amended. We have examined the original briefs, and find that considerable space was devoted to a discussion of whether the trial court should have allowed an amendment of the complaint. We have also examined the petition for rehearing, which consists of eighty-seven pages of typewritten matter. This petition is a complete reargument of the entire cause, and assails practically every portion of the opinion. The last eight pages of the petition are devoted almost exclusively to an attack on that portion of the opinion which deals with and allows the proposed amendment to the complaint and orders judgment upon the complaint as amended. The matter is argued at length and with great particularity, and it was claimed then, as now, that where an amendment of the pleading has been allowed, evidence formerly taken is not admissible to support substantive matter in the pleading as amended. No claim, however, was made in the petition for rehearing, that any actual prejudice had resulted or that the defendant had any evidence which he desired to offer upon the issues arising under the amended pleading. It will be noted that the original opinion was handed down and a rehearing denied more than three years ago. It also appears that judgment was entered in the district court, in accordance with the findings and conclusions of this court, in July, 1914, and that notice of entry of judgment was served upon the defendant at that time. It further appears that proceedings have been had in the district court in accordance with the directions contained in the former opinion herein, to ascertain the amounts to be paid by the Patterson Land Company to the defendant for the amounts expended and incurred by him in obtaining titles, taxes paid by him, and the cost of any improvements which he may have placed on the premises. There is no claim that defendant has questioned the binding effect of the former decision during all of this time." Patterson Land Co. v. Lynn, 36 N. D. 341–343, 162 N. W. 702.

The defendant has now filed a motion "to vacate the determination, order, judgment, and decree of this court, made in the above-entitled cause on the 6th day of March, 1914, and to direct the district court of Emmons county to vacate any and all judgments, decrees, and acts done under the direction of this said judgment of this court, on the ground that this court had no jurisdiction to grant the relief pretended

by said judgment and decree to be granted, and said judgment and decree is absolutely void and of no effect." The specific ground for the present motion is that this court erred in its original decision in allowing certain amendments to the complaint which were offered during the course of the trial and rejected by the trial court. See 27 N. D. 416, 147 N. W. 256. Defendant contends that the amendments changed the "subject-matter" and introduced the proposition of an involuntary trust, as a "new subject-matter."

This court doubtless has power to review rulings on proposed amendments. Under our statute pleadings may be amended even after judgment. Comp. Laws 1913, § 7482.

This case was appealed to this court for a trial de novo. The statute provides that in such cases "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." Comp. Laws 1913, § 7846.

The statute contemplates that when a retrial of the entire case is demanded, the supreme court shall review the entire record and "render final judgment, and thus, by its mandate, forever terminate the particular litigation." Christianson v. Farmers' Warehouse Asso. 5 N. D. 438, 445, 32 L.R.A. 730, 67 N. W. 300. It is only in unusual cases, and where the court "deems such cause necessary to be accomplishment of justice," that a new trial may be ordered. § 7846, supra.

It was doubtless the intention of the legislature, by the enactment of this statute, to create "a means of terminating litigation in a manner that should at once possess the strongest probability of absolute justice with the least expenditure of time and money;" and to avoid "the delay and expense of the second trial, and the risk of further errors that might necessitate a second appeal." Christianson v. Farmers' Warehouse Asso. supra.

It is for this court to construe the pleadings and determine the issues involved in each case that comes before it. This is peculiarly so in a case which comes here for trial de novo. Where the correctness of a ruling on a proposed amendment is assailed in cases triable

here de novo, the question thereby presented must be determined as any other question in the case. And an error of judgment in its determination does not constitute an excess, or devest the court, of jurisdiction. In cases triable here de novo there is no want of jurisdiction to allow amendments which were proposed in and denied by the trial court. See Raley v. Raymond Bros. Clarke Co. 73 Neb. 496, 103 N. W. 60. This court is not necessarily required to remand a case because it finds that the trial court erred in ruling on an application to amend a pleading. Under the plain words of the statute, this court is required to finally dispose of the case whenever justice can be done without a new trial. And the case should not be remanded to the trial court unless this court "deems such course necessary to the accomplishment of justice." Comp. Laws 1913, § 7846.

Defendant is in error when he assumes that in all cases wherein a trial de novo is asked this court becomes in effect vested with and exercises original jurisdiction. The effect of the statute providing for trials anew in this court, of issues of fact in equitable actions, was construed by this court in Christianson v. Farmers' Warehouse Asso. 5 N. D. 438, 32 L.R.A. 730, 67 N. W. 300. And it was there held that such statute does not require the supreme court to perform any functions that do not pertain to its appellate jurisdiction. In fact it was alone by such construction that the constitutionality of the statute could be sustained; for under § 86 of the state Constitution the supreme court, except as otherwise provided in the Constitution, has appellate jurisdiction only.

In the case at bar this court fully determined the different questions presented on the appeal. No reservation of jurisdiction was made for any purpose. Manifestly this court intended to and did made a final decision of the cause brought before it. It fully and finally terminated the cause presented to it for determination. It denied a rehearing and intentionally ordered the remittitur sent down to the court below. The judgment ordered by this court was entered and carried into effect by the district court long ago.

Defendant is also in error when he assumes that the subject-matter of an action is limited to the reasons or theories on which an action or a determination is based. The "subject-matter of a suit," when re-

ference is made to questions of jurisdiction, means the nature of the cause of action and the relief sought. When applied to the matter in dispute it is understood as having reference to the cause, the object, the thing in dispute, and when applied to an action where conflicting claims to realty are in issue, it is synonymous with the real property itself. See 4 Words and Phrases, 2d ed. pp. 732–735.

The subject-matter of this action was certain land. The question presented to the trial, and the appellate, courts related to the ownership of, and the rights and interest of the respective parties in, such land. The parties were in court. The subject-matter was before the court. The fact that the appellate court disagreed with the reasons and conclusions of the trial court certainly did not constitute a change in the subject-matter of the action or render the decision of the appellate court void.

It is very questionable if any amendments were necessary. We rather believe that they were unnecessary. In any event the amendments related to matters foreshadowed by allegations in the original complaint. And while defendant filed a petition for rehearing and assailed the decision, he at no time even suggested that he desired to offer any further testimony with respect to the matters referred to in the amendments.

The present motion is in effect ruled by our decision on the motion to recall the remittitur, and what we said there is applicable here.

Motion denied.

GRACE, J., concurs in the result.

ROBINSON, J. I dissent from this decision and all decisions in this case.

BRONSON, J., did not participate.

CHRISTIAN DEIDE, JR., and Jacob Kitzen, and All Other Persons Similarly Situated, Appellants, v. ANTELOPE SCHOOL DISTRICT NO. 7 OF STARK COUNTY, a Municipal Corporation, and Frank Lautz, Respondents.

(173 N. W. 942.)

Schools and school districts — when notice of election for removal of schoolhouse insufficient.

The school board called an election for the specific purpose of voting upon the removal of a schoolhouse from its present site to another definite location which was named in the resolution. The notice of election did not state the purpose of the election in accordance with the resolution of the school board and the provision in § 1185, Compiled Laws 1913. *Held*, that the notice of election was insufficient, and was in fact no notice, and that the election held in pursuance of such invalid notice was invalid.

Opinion filed July 16, 1919.

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

Reversed and remanded.

S. P. Halpern, for appellants.

It requires an affirmative vote of two thirds of all of the voters present and voting to order the removal of the school to any particular site or location. N. D. Comp. Laws 1913, § 1185; Re Davis (Kan.) 61 Pac. 809; (Kan.) 60 Pac. 1057; People ex rel. Davenport v. Brown, 11 Ill. 478; State ex rel. Dobbins v. Sutherland, 54 Mo. 391.

L. A. Simpson, for respondents.

GRACE, J. An appeal from the judgment of the district court of Stark county, W. C. Crawford, Judge.

This is an action to restrain and enjoin the defendant from moving what is known as Schoolhouse No. 1, located within the school district in question, from its present location to Antelope, which is about half a mile distant from the present location. It appears that on the 9th day of January, 1917, the board of school directors of the school district of Antelope held a meeting for the purpose of calling an elec-

tion. The election was to be called for the purpose of submitting to the qualified electors of the district the following propositions: (1) The moving of Schoolhouse No. 1, 1½ miles north of its present location; (2) the building of a new schoolhouse 1 mile south and ½ mile east of the location of Schoolhouse No. 1. At the meeting of the board on January 9th, above referred to, the school board passed the following resolution, as appears from the minutes of the clerk's record of such meeting: "Election to be held for the purpose of moving Schoolhouse No. 1, 1½ miles north of old location, and to build a new schoolhouse 1 mile south and ½ mile east of the old location. Election to be held the second Tuesday in February. Notices to be gotten out by the clerk, and election to be held in School No. 1." The clerk prepared the following alleged notice of election:

Notice of Election
(School District—Special Election)

Notice is hereby given that on Tuesday, February 13th, A. D. 1917, an election will be held at School No. 1, in Antelope school district No. 7, county of Stark, state of North Dakota, for the purpose of determining the following questions:

Removal of School No. 1,
Erection of New Schoolhouse.

The polls will be opened at 2 o'clock P. M., and closed at 5 o'clock P. M., of that day.

Dated at Antelope, this 23d day of January, A. D. 1917.

By order of the School Board,
Henry Weiland, Clerk.

There is testimony to the effect that notice was posted in three places in the district. At the election fifty-two votes were cast. Thirty-three were cast and counted for moving the schoolhouse into Antelope. Four votes were cast and counted against moving it into Antelope. Eleven votes were cast and counted for moving the schoolhouse 1½ miles north, the location designated in the resolution. Four votes were cast and counted against moving the schoolhouse 1½ miles north. The question of the new schoolhouse is not involved in this

action and needs no further comment, and no further reference to it need be made.

It will be observed that the specific purpose of calling the election was to submit to the qualified electors the proposition of removing Schoolhouse No. 1 1½ miles north of its present site. The election was for no other purpose. It was limited to the proposition stated in the resolution. The proposition to be voted upon was *not* moving the schoolhouse 1½ miles north, or to some other location within the district. It was confined to the single proposition of moving the schoolhouse 1½ miles north, and the election was ordered to be held for that specified purpose. This leads us to a consideration of the alleged notice of election. The notice of election, as we view it, was insufficient. It was no notice of the election called and authorized to be held by the school board. It needs no argument to demonstrate that the notice of election must set forth the purpose for which the election is to be held. The notice entirely fails to disclose the purpose of the election. The purpose of the election was set forth and determined by the resolution above set forth. And, as we have seen, that stated the purpose to be: To move the schoolhouse 1½ miles north. That was the sole purpose of the election so far as the removal of the schoolhouse was concerned. That purpose is wholly absent from the notice of election. In other words, the very purpose for which the election was to be held was not stated in the notice of election, but is wholly and entirely absent therefrom. From the notice of election no qualified voter within the district could possibly know that the purpose of the election was to move the schoolhouse 1½ miles north. There are no words in the notice from which a voter could gain any such impression. Section 1185 of the Compiled Laws of 1913 provides for the manner of calling elections such as this. It contains the following with reference to the notices of election: "Three notices of the time, place, and purpose of such election shall be posted in three of the most public places in the district at least fourteen days prior to such meeting." The notice of election in question in no way complies with this requirement of the statute. Neither does it comply with the purpose stated in the resolution. Hence, the notice of election wholly and entirely failing to state the purpose of the election, it is

entirely invalid. The notice of election, being wholly invalid and of no force or effect, was a nullity.

There is no need of discussing any other question which is raised in the assignments of error. They become immaterial in view of the fact that the election was wholly void. The directors of the school district in question acted legally and properly in refusing to move the schoolhouse, on the ground that the election was not conducted according to law. The judgment is reversed. The temporary injunction should be reinstated and made permanent, so far as the removal of the schoolhouse in question is concerned, in so far as such removal depends upon the election in question. It is so ordered. The case is remanded to the trial court for further proceedings not inconsistent with this opinion. The appellants are entitled to statutory costs on appeal.

EMERSON-BRANTINGHAM IMPLEMENT COMPANY, a Corporation, Respondent, v. JOHN BUSCH, Appellant.

(175 N. W. 201.)

Sales — rescission of part of contract.

In an action to foreclose a chattel mortgage on a tractor and other machinery, where it appeared that the tractor was sold under parol representations and warranties which were not embraced within the written order, and where the written order expressly negatived warranties, the purchaser being induced to sign it by misrepresentations of agents, who stated that it contained the warranties agreed upon, and where the duplicate order intended for the purchaser was delivered to him but immediately retaken by the agent under the pretext that it was needed for convenience in checking the goods on arrival, and where the purchaser made a claim for damages for loss of time and expenses incurred by reason of the failure of the tractor to perform as warranted, which claim was settled in full for $200 and upon the additional understanding that the tractor would be put in working order, and where the evidence shows that the tractor did not comply with the warranties,—that it was never put in working order, and that by reason thereof the consideration for the defendant's notes as represented by the price of the tractor had failed, except to the extent that he had been benefited by its use, it is *held:*

1. That the contract of purchase, in so far as it relates to the tractor, should be rescinded and the defendant's obligations to that extent reduced, and that defendant should have judgment for the payments made and for his damages as agreed on.

Sales — settlement of claims — release.

2. Upon the settlement of a claim for damages incident to the failure of a tractor to work as warranted, where the written portion of a receipt signed by the purchaser expressly states that it is "for damages and lost time in full," and the printed portion, not read by the purchaser, embraces also a release of all claims and all warranties, the testimony showing that the latter was no portion of the agreement of the parties, the receipt or release does not bar the defendant from reliance upon the warranties.

Opinion filed July 16, 1919.

Appeal from the District Court of Logan County, *W. L. Nuessle,* J.

Reversed and remanded.

A. B. Atkins and *W. S. Lauder,* for appellant.

The law will not permit a corporation or an individual to reap the fruits of the fraudulent acts of its or his employees. That is exactly what plaintiff is attempting to do in this action. Altman v. Olson, (Minn.) 26 N. W. 451, and cases cited. Maxfield v. Schwartz, 47 N. W. 448; Ward v. Speltz, 58 N. W. 426; Woodbridge v. DeWitt, 70 N. W. 506; Strand v. Griffith, 97 Fed. 854; Chamberlain v. Fuller, 59 Vt. 256; Wardner v. Whitish, 46 N. W. 540; Davis v. Parker, 103 Mass. 501; Holland v. Anderson, 38 Mo. 55; Albany v. Burdick, 87 N. Y. 40; Bennett v. Judson, 21 N. Y. 238; Mundorff v. Wickersham, 63 Pa. 87; Keough v. Leslie, 92 Pa. 424.

Plaintiff, having elected to retain the fruits of the fraud, is responsible for it. Granger v. Mangam, 93 N. Y. 642; Bennett v. Judson, 21 N. Y. 238; Sanford v. Hanley, 23 Wend. 268; Krumm v. Beach, 96 N. Y. 298; United States v. Davis, 2 Hill, 452; Mecham, Agency, § 739; Insurance Co. v. Minch, 53 N. Y. 149.

The rule that parol evidence is incompetent to change or vary the terms of a written contract, or the other rule, that "all prior or contemporaneous oral negotiations are presumed to have been incorporated in the writing," has no application where the question involved is, "Was the contract itself procured by fraud?" Gilbert Co. v.

Bryan, 39 N. D. 113, 166 N. W. 805; DeRue v. McIntosh, — N. D. —, 127 N. W. 34; Erickson v. Wiper, 33 N. D. 193, and cases cited; Gustafson v. Rustemeyer, 39 L.R.A. 644; State v. Cass, 19 Atl. 972; Eaton v. Eaton, 35 N. J. L. 290; Sanford v. Hanley, 23 Wend. 265; Mallory v. Leach, 35 Vt. 154; Dane v. Sessions, 26 Atl. 585; Warner v. Landis, 20 Atl. 950; Pierce v. Woodward, 23 Mass. 206; Bussick v. Van Ness, 44 N. J. Eq. 82, 12 Atl. 609; Collins v. Tillon, 68 Am. Dec. 398; Dale v. Gear, 9 Am. Rep. 353; Belden v. Seymour, 21 Am. Dec. 661; Baldwin v. Sastle, 42 Am. Dec. 735; Cummings v. Cass, 52 N. J. L. 77.

It is immaterial whether the agents, Brost & Lee, knew when the warranty was given that it was false. If they warranted the machinery without knowing that the warranty was true, the warranty was a fraudulent one. 2 Rev. Codes, § 3848; Krause v. Bussacker, 81 S. W. 406; Gotzhauser v. Simon (Wis.) 1 N. W. 473; Saudners v. Michaels, 50 N. W. 507; Beetle v. Anderson, 73 N. W. 560; Gunther v. Ulrich, 52 N. W. 88; Davis v. Nozum, 40 N. W. 497; Middleton v. Jardee, 40 N. W. 629; Kinnon v. Volmar, 43 N. W. 800; Bird v. Kliner, 41 Wis. 134.

It is no defense to an action for deceit, to allege that if the party complaining had been less credulous or more keen in the given transaction, the fraudulent statements or representations would not have deceived him. Strand v. Griffith, 97 Fed. 854, with cases cited; Chamberlain v. Fuller, 59 Vt. 256, 9 Atl. 832; Wardner Co. v. Wittish, 77 Wis. 430, 46 N. W. 540; Gamill v. Johnson, 1 S. W. 610; Davis v. Parker, 103 Mass. 501; Holland v. Anderson, 38 Mo. 55; Kiffer v. Rodgers, 19 Miss. 32; Ward v. Speltz, 58 N. W. 426; Woodbridge v. DeWitt, 79 N. W. 506; Cole Bros. & Hart v. Williams, 11 N. W. 875.

Lawrence & Murphy and Honorable *Charles A. Pollock,* for respondent.

BIRDZELL, J. This is an action in equity to foreclose a chattel mortgage, and the appeal is from a judgment awarding foreclosure. The action is here for trial de novo, and, under the contentions of counsel, the case turns upon questions of fact. The following state-

ment will serve to present the decisive issues of fact as they appear in the pleadings and in the record. In the winter of 1915–1916 the defendant became interested in the purchase of a tractor. Two agents of the plaintiff, named Lee & Brost, solicited him at his farm for the purpose of making the sale. On or about February 11, 1916, the defendant gave an order for one Big Four "30" model C gas tractor, one set of extension wheels, one No. 50 8-bottom Emerson plow, 6 sod bottoms, and 1 500-gal. Big Four gas tank. The price agreed upon was $3,024, plus freight, an old engine, tank, pump, and hose which were taken in trade; the money consideration to be made payable in three notes as follows: One due October 1, 1916, for $1,200; one due October 1, 1917, for $1,100; one due October 1, 1918, for $724.

The order contains an express stipulation as follows: "It is a condition hereof, that the above-described machinery is purchased and sold without any warranty whatever. The purchaser acknowledges having received a copy of this order, and that no promises, representations, or agreements have been made except as herein containd."

This stipulation appearing on the back side of the order is contained in a separate paragraph near the end, there being considerable solid printing matter above it. At the time the order was signed, it was made in duplicate, and a copy was handed the defendant. He retained it for a few minutes, and upon the suggestion of one of the agents it was returned to him, to be left in town to facilitate checking the goods upon arrival. The goods were later shipped, and arrived at Napoleon in March. Upon their arrival the defendant went to the bank and executed the notes in accordance with the agreement, and also a chattel mortgage covering the same to secure the deferred payments. At the same time he signed a receipt for the goods, in which it was recited that the goods were received under and pursuant to the terms and conditions of the written order, and that the written order contained all agreements between the parties on account of the purchase. The defendant hired an engineer to operate the engine, but it gave more or less trouble during the season, and he claims that it would not develop the amount of power it was represented to be capable of developing, one of the principal defects being that the radiator did not work properly so that the engine heated when running. There

were also other defects of a serious character which were testified to by the plaintiff and an engineer who operated the engine for some time. In the fall of 1916 the defendant paid $500 on the first note, making payment to Brost. He testified that he had at first refused to make payment until the engine was put in running order as guaranteed, in reply to which, according to his testimony, Brost agreed to fix the engine and give him another style of radiator; that experts had ascertained that the radiator with which the engine was originally equipped did not have enough cooling capacity. He had used the tractor considerably that summer, plowing several hundred acres, and he testified that he paid the $500 because he had had some benefit from the engine, but that he declared at the time that he would hold back for extra expense due to the consumption of more gasolene than should have been necessary had the machine been as warranted, and for extra hired help. Sometime after this payment was made, in December, an action was begun by the plaintiff against the defendant for the recovery of the balance of the purchase price due according to the terms of the acceleration clause of the mortgage, and for the foreclosure of the mortgage. The summons and complaint in this action were served on January 19, 1917. Following the service of these papers, one Sayler, a collecting agent of the plaintiff, accompanied by Laney, the sheriff, called at the defendant's place apparently for the purpose of effecting a settlement. After some negotiations the defendant agreed to accept a reduction of $200 from the purchase-price obligations in settlement of what he contends was a claim for damages accrued to date on account of extra expenses incident to breaches of warranty in the past, and which the plaintiff claims was a settlement in full of all claims arising out of the transaction. At this settlement the defendant signed a written release as follows, the italicized part having been written by Sayler, the remainder being printed:

Napoleon, N. D. Jan. 20, 1917

In consideration of *settlement and a discount of $200 for damage and lost time in full* and for one dollar to me in hand paid by Emerson-Brantingham Implement Company (Incorporated), of Rockford, Illinois, receipt whereof is hereby confessed, I or we, do hereby for-

ever release and discharge said company, its officers and agents, from any claim, demand and cause of action whatsoever from any cause arising, prior to the date hereof, and to release said company from all warranty and responsibility, express or implied, growing out of any transactions heretofore had.

Witness my hand and seal,

John Busch (Seal)

———— (Seal)

In presence of
Geo Laney
J. B. Sayler

It further appears that upon at least two occasions the defendant's expert made written reports concerning the condition of the engine, both of which were signed by the defendant. One of these reports is dated April 30, 1916, and states that the machine was working satisfactorily. The other is dated October 12, 1916, and recites that the machine had plowed some 400 acres; that the radiator was full of mud and slime; that the expert had cleaned the radiator and set the magneto; that the machine would work satisfactorily if it continued to cool; that Busch had agreed to report if the radiator did not continue to cool properly, and that he desired the privilege of exchanging the engine before spring of the next year.

The controverted questions of fact relate to the existence of a warranty at the time the machine was sold, which, in view of the stipulations in the written order, would not be available to the defendant unless the order were fraudulently obtained; and to the settlement made in January, 1917, whereby the defendant released all claims. The trial court found that the engine was sold to the defendant on representations and warranties, made by Brost & Lee, as to its construction, material, and efficiency; that the defendant had no knowledge of the printed stipulations contained in the order providing that there was no warranty; that the defendant did not read the order, and was unable to read it because of the fact that the agent Lee took it from him for the purpose of preventing him from reading it; and that the engine did not comply with the representations and warranties so made. The respondent does not seriously argue upon this

appeal that the foregoing findings are erroneous, and a careful examination of the testimony convinces us that these findings are amply supported by the evidence. It would serve no useful purpose to recite the evidence upon which our conclusions are based, for the record leaves little doubt that the plaintiff's sales agents represented that the tractor was in every way efficient and capable of operating at least eight plows; that a person need not be an expert to operate it; that the fuel cost would not exceed 40 cents per acre; and that it would furnish power enough to run a good sized separator for threshing. The evidence also establishes that the defendant was presented from ascertaining that he had signed an order which negatived all such warranties by being thrown off his guard, being told that the order did contain the warranties, and being prevented from reading it by having his copy taken from him on the pretext that it would be necessary to have it in town to check the goods upon arrival. Considering the simplicity of the description of the few items embraced in the order, and the ease with which a memorandum could have been made and left wherever it was needed, the act of the plaintiff's agents in taking from the defendant the copy of the order, manifestly intended for him, is a badge of fraud of a most significant character. This circumstance also tends strongly to discredit the testimony of the agent Brost in so far as it conflicts with that of the defendant, Busch, concerning the warranties. Lee did not testify. We therefore have no hesitancy in adopting the findings of the trial court relative to the existence of warranties and to the fraud in obtaining the order from the defendant so worded as to negative them.

Neither can there be any doubt that the engine failed to comply with the warranties, and that the defendant was put to considerable extra expense in operating it, for the testimony shows that the engine was at no time able to pull the number of plows it was warranted to pull and that the fuel consumption was considerably greater; that the radiator, without which the engine could not work successfully, was defective,—a fact which was recognized by the plaintiff itself, as it agreed to furnish a radiator of a different type.

The remaining controverted fact relating to the settlement obtained in January, 1917, remains for consideration. As we view the case,

the facts surrounding this settlement cannot be considered independently of the facts concerning the warranties. The evidence shows that the defendant was at all times objecting to the payment of the purchase price until the engine was made to comply with the warranties, and at the same time he was making a claim for the damages he had sustained by reason of the failure of the engine to perform as warranted during the period that he had actually used it. The defendant was apparently dealing with plaintiff's agents all of the time upon the supposition that the warranties claimed by him existed, and so far as the record shows nothing was done to change this impression. On the contrary, in response to his request for experts, experts were not sent until near the culmination of the transaction; and even at that time an expert was promised but not sent. By what we consider to be the weight of the testimony, it appears that the defendant, in entering into negotiations for the settlement, was under the impression that he was settling his claim for damages, and that he was still relying upon the plaintiff company to fulfil the warranties made by its agents. Sayler, the collector, had been to the defendant's place a number of times, and each time he was interested in obtaining payment of the defendant's note that was then due. The defendant had paid part and withheld the balance as compensation for damages, and on subsequent occasions Sayler had endeavored to obtain payment of the balance by offering inducements to the defendant, none of which were agreed to until after papers were served in the former action. Upon the occasion of the settlement in question, Laney, the sheriff, and Sayler, came to the defendant's place the morning after the papers had been served, and after an agreement was made, whereby the defendant was to have a $200 discount and the plaintiff was to furnish a new radiator to put the engine in working order, Sayler wrote out the release hereinbefore quoted, and gave it to the defendant to sign, stating that it was just a receipt for the money that he would send into the company. The defendant did not read it, and did not understand that he was signing a release of all liability arising out of the transaction. The defendant's statement that he thought he was settling his damages is somewhat corroborated by Sayler's testimony, wherein the latter gives as a reason why the defendant did not take care of his notes, that it

was "because he thought he had a damage suit against the company." And again he said, referring to the occasion when the settlement was made: "I sat on one side of the table and he sat on the other side in the dining room, and we were there probably three fourths of an hour before we arrived at a basic settlement. The matter of the radiator did not stand in the way at that time. It was the money consideration. I had offered him a radiator the same as before, but he wanted more money than I was willing to pay *for the damage he claimed he was put to.*"

So, according to the testimony both of the defendant and of the agent of the plaintiff, the settlement involved the defendant's claim for money damages. Furthermore, there is no dispute concerning the fact that the plaintiffs agreed to replace the radiator and to put the machine in working order, and this is not mentioned in the release. The defendant testifies concerning the radiator, that he was to get the new radiator free, and that he inquired as to who was going to put the radiator on, and was told that anybody could put it on, and that if he had trouble to make it work he could send for an expert. Also that defendant's agent warranted that the machine would have all kinds of power, and would give no further trouble after the radiator was exchanged. The radiator was furnished; the defendant put it on, but he had no success with the machine. He sent for an expert and was told by Brost that he would have an expert sent inside of three days, but the expert was never sent.

It is significant, too, that the written portion of the release which the defendant states he did read states expressly that the settlement was "for damage and lost time in full." This statement in the written portion coincides with the testimony, and would naturally lead one reading it to suppose that nothing else was embraced in the settlement. In fact, under the testimony of both the defendant and the plaintiff's agent, Sayler, if the release stood in the way of defendant's claim for breach of warranty, it could well be made to conform to the mutual intention, for it does not state the other portion of the agreement with reference to the radiator, and it includes matters which, under the testimony of both witnesses, were not agreed upon at all. In these circumstances, the printed portion of the release is not so far controlling as to cut off the defendant's rights upon the warranties.

There is no testimony relating to the other articles purchased at the same time, and it appears that during the time defendant had the engine he obtained some benefit from its use and sustained some damages. He consented to settle his damages for $200, and we know of no reason why this settlement, in so far as it pertains to his damages, should not be sustained. The price of the engine was $2,800. The defendant traded in materials valued at about $600 and paid in cash $1,068.60. In the pleadings no relief is asked as to the machinery traded in. The evidence shows that the engine was not placed in working order as required to fulfil the warranties. It also shows that the defendant was to have an opportunity to exchange it if it did not work satisfactorily. He was induced to keep it, and did keep it, relying upon the promises of the plaintiff's agents from time to time that they would put it in good condition. They have not only failed to this, but they have also failed to fulfil their own promise to send an expert. In these circumstances it is difficult to adjust the equities between the parties. Justice requires, however, that the contract, in so far as it relates to the tractor, be rescinded, and that the obligations of the defendant as represented by the purchase price of the tractor be reduced or canceled. The evidence on the subject of the benefits received by the defendant from the use of the tractor is in such condition that an intelligent finding cannot be made thereon. We therefore find it necessary to remand the case to the district court, with directions to allow the taking of additional testimony upon this one subject upon the plaintiff's application therefor.

The judgment of this court is: (1) That the sale of the tractor be rescinded; (2) that the notes and securities of the plaintiff be reduced to the extent of $2,800 and the accrued interest thereon; (3) that the defendant recover of the plaintiff $200 in settlement of his claim for damages and loss of time incident to breaches of warranty prior to the settlement; (4) that the defendant have judgment for the recovery of $1,068.60 paid, with the legal rate of interest from the time of such payment; (5) that the plaintiff have judgment against the defendant for the reasonable value of the benefits derived by the use of the tractor during the time it was in his possession, and that, there be a new trial to determine the amount thereof; (6) that the transaction, except

as hereinbefore altered, shall stand, the plaintiff having the right to avail itself of the securities in its hands to enforce payment of any amount due it under the terms of this judgment; and (7) that the items entering into the judgment may be offset one against the other.

The appellant will recover costs upon this appeal.

CHRISTIANSON, Ch. J., and BRONSON, J., concur.

GRACE, J. (concurring in part and dissenting in part). I concur in the opinion as written by Justice Birdzell, that the sale of the tractor be adjudged rescinded; that the notes and securities be reduced $2,800 and interest; that the defendant should recover $200 damages and $1,068.60 paid, with legal interest thereon.

I do not agree that the plaintiff should have judgment against defendant for the reasonable value of the benefits derived from the use of the tractor during the time of the defendant's possession thereof, and no new trial should be had on that issue, nor at all.

There being fraud in the procuring of the order in the manner as found by the trial court, and as clearly appears from the opinion of Justice Birdzell, the entire order and contract was void and should be adjudged rescinded. The plaintiff, under the facts in this case, is entitled to no benefits and should not be permitted to recover for any, and is entitled to no relief nor to any recovery whatever.

ROBINSON, J., concurs.

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

(174 N. W. 81.)

Statutes — presumption in favor of enrolled bill not conclusive.

1. While every reasonable presumption is in favor of an enrolled bill, such presumption is not conclusive; and where the legislative journals clearly show that a statute was in fact never passed the court will adjudge it to be void.

Statutes — not voted upon in senate not constitutionally enacted.

2. For reasons stated in the opinion it is *held* that chapter 136, Laws 1917, was not constitutionally enacted.

Opinion filed July 29, 1919.

Appeal from the District Court of Ramsey County, *Buttz*, J.

Defendant appeals from the judgment of conviction, and from an order denying a new trial.

Reversed.

Cuthbert & Smythe, for appellant.

The title of the act must properly define the subject. Garrigan v. Kennedy, 19 S. D. 11, 101 N. W. 1081; State v. Becker, 51 N. W. 1018; State v. Morgan, 2 S. D. 32, 48 N. W. 314; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; State v. Bryan, 39 So. 929; State v. Davis, 2 Iowa, 280; People v. McHaney, 13 Mich. 481; Louisiana v. Pillsbury, 105 U. S. 278; Norfolk Beet Sugar Co. v. State, 73 N. W. 69; Oxnard Beet Sugar Co. v. State, 102 N. D. 80; Pioneer Irrig. Dist. v. Bradley, 68 Pac. 295; Shrevport v. Tidwell, 36 So. 312.

The court erred in not requiring the state to elect upon which charge it would try the defendant. State v. Dean, 126 N. W. 692; State v. Lofthus, 104 N. W. 906; State v. Norris, 97 N. W. 999; State v. Higgins, 95 N. W. 244; State v. King, 91 N. W. 768; State v. Brown, 12 N. W. 318; People v. Simon, 131 Pac. 102; People v. Bartnett, 113 Pac. 879; People v. Hatch, 109 Pac. 1097; Goodhue v. People, 94 Ill. 37; State v. Lancaster, 78 Pac. 1081.

It is a fundamental that every material allegation in a criminal information must be proved by competent evidence beyond a reasonable doubt. 8 R. C. L. 218, from which we quote as follows: "That courts universally disapprove of misleading arguments, and it is reversible error to allow same." Fox v. People, 95 Ill. 71; State v. Hogan, 88 N. W. 774; Brown v. State, 60 Ga. 210; State v. Thompson, 106 La. 362; Com. v. Baldwin, 129 Mass. 481; People v. Aikin, 33 N. W. 321; Long v. State, 81 Miss. 448; Roberson v. State, 26 So. 645; People v. Smith, 59 Pac. 295; People v. Mitchell, 62 Cal. 411.

Wm. Langer, Attorney General, *George K. Foster,* Assistant Attorney General, and *Rollo F. Hunt,* State's Attorney, for respondent.

Where the act is enrolled in the manner provided by law, and is duly certified by the proper official of the legislature, approved by the governor, and deposited with the secretary of state, and certified by him as one of the laws of this state, these facts are conclusive as to the regularity of its passage in accordance with the constitutional requirements. Case note in 40 L.R.A.(N.S.) p. 1; 20 Ann. Cas. p. 350; 44 L.R.A.(N.S.) 468; L.R.A.1915A, 1210; L.R.A.1915D, 119; L.R.A.1916E, 1251.

"Unless the Constitution declares that the journals shall show the concurrence of one branch of the legislature in an amendment to a bill made by the other branch, the silence of the journals as to such concurrence in an amendment that appears in an enrolled bill is not sufficient to defeat it." Burks v. Jefferson County, 40 Ark. 200.

The act is not in violation of § 217 of the Constitution of North Dakota, prohibiting the manufacture, sale, or gift of intoxicating liquors. Re Crane, 27 Idaho, 671, 151 Pac. 1006; Crane v. Campbell, 245 U. S. 304.

The title of the act properly defines the subject of the act. State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924; Great Northern R. Co. v. Turner, — N. D. —, — N. W. —, decided June 3, 1919, but not yet reported.

Only one offense is charged in the information. Comp. Laws 1913, § 10,688; Moffit v. People, 59 Colo. 406, 149 Pac. 104; Anderson v. Van Buren Circuit Judge, 130 Mich. 697, 90 N. W. 692; Sturgeon v. State, 17 Ariz. 513, 154 Pac. 1050; The People v. McDonald, 193 Ill. App. 553; Estes v. United States, 141 C. C. A. 102, 225 Fed. 980.

CHRISTIANSON, Ch. J. The defendant was convicted in the district court of Ramsey county of violating the so-called "Bone-dry" Law of this state. Laws 1917, chap. 136. And he has appealed from the judgment of conviction and the order denying a new trial.

The information charges that the defendant on July 5, 1918, within Ramsey county, committed the crime of aiding, abetting, and secur-

ing the delivery of intoxicating liquors to himself in violation of the provisions of chapter 136, Laws 1917. The defendant demurred to the information on the ground, among others, that it did not state facts sufficient to constitute a public offense. He also moved in arrest of judgment upon the same grounds as those stated in the demurrer. Defendant contends that chapter 136, Laws 1917, as a matter of fact, was never passed by the legislature, and is therefore not a law at all.

The statute under consideration was introduced on January 12, 1917, as House Bill No. 39. It was passed by the House of Representatives on January 31, 1917, as originally introduced. The first part of the act as introduced and passed by the House read as follows: "It shall be unlawful for any person, firm, or corporation to deliver, or receive or have in possession for delivery within this state any intoxicating liquor unless the package or container of such liquor shall be labeled on the outside in large clear letters showing the consignor, consignee, kind and quantity, percentage of alcohol, and place of delivery."

Upon reaching the Senate the bill was referred to the committee on temperance. This committee made a report recommending several amendments. The Senate adopted the amendments, and on March 1, 1917, passed the bill as amended. Senate Journal, pp. 1018, 1019. As passed by the Senate the above-quoted portion read as follows: "It shall be unlawful for any person, firm, or corporation to deliver, or receive or have in possession for delivery to any person, firm, or corporation within this state, more *than 4 quarts of spirituous liquors, or 5 gallons of wine, or 72 quarts of beer, malt or other intoxicating liquors within any consecutive thirty days, except that delivery of intoxicating liquors may be made to registered pharmacists for disposition as provided by law, for medicinal, mechanical, scientific, and wine for sacramental purposes or* any intoxicating liquor *for any purpose,* unless the package or container of such liquor shall be labeled on the outside in large clear letters showing the consignor, consignee, kind and quantity, percentage of alcohol, and place of delivery."

The other amendments made in the bill harmonized its provisions with the change made in the portion quoted. On March 2, 1917 (the last day of the legislative session), the bill was reported back to the House, with the statement that the Senate had amended the bill so that

the portion above quoted read as follows: "It shall be unlawful for any person, firm, or corporation to deliver, or receive or have in possession for delivery within this state any intoxicating liquor *for any purpose whatsoever, except that such liquors may be delivered, or received or possessed, for delivery by common carriers to registered pharmacists to be disposed of by them as provided by law; and* unless the package or container of such liquor shall be labeled on the outside in large clear letters showing the consignor, consignee, kind and quantity, percentage of alcohol, and place of delivery." (The matter inserted by way of the different amendments has been italicized.) The House of Representatives concurred in the alleged amendments reported and passed the bill as so amended. The Senate Journal shows that the amendments reported to the House had been proposed in the Senate, but that the Senate at the time it passed the bill expressly rejected them, and amended the bill as heretofore mentioned. Not only is this fact affirmatively shown by the Senate Journal (Senate Journal, pp. 1018–1019); but when the legislature was convened in extra session in January, 1918, the Senate unanimously adopted the following resolution:

"Whereas, there was passed at the fifteenth session of the legislature House Bill No. 39 appearing in the Session Laws for 1917 under chap. 136, and

"Whereas, the Journal of the House of Representatives, at page 1461, erroneously contains what is purported to be an amendment to said bill and as having been passed by the Senate as so amended, and

"Whereas, the House of Representatives passed said bill with such purported amendment assuming that this Senate had so amended and passed such bill (the record of the passage of such bill as amended will be found at page 1479 of said House Journal), and

"Whereas, it is within the knowledge of the members of the Senate and each individual Senator, and it is so recorded correctly at page 1018–19 of the Senate Journal for the fifteenth legislative assembly, that House Bill No. 39 as so amended by the Senate was not voted upon or adopted by the House of Representatives, the amendment as adopted by the Senate having been reported incorrectly or changed in the House after same had been reported to said House, and

"Whereas, through such gross carelessness or fraud such bill was passed by the House different in form and meaning than same was passed in the Senate.

"Now, therefore, be it resolved, that this Senate do now severely condemn the practice by which this fraud was perpetrated upon the Senate and the people of the State of North Dakota in order that this practice may cease in the future, and in order that the people may know that the laws of the state are made by the regular constituted legislative assembly, and not by clerks or employees of such assembly."

Now, under that state of facts, is it the duty of this court to hold that chapter 136, Laws 1917, was not enacted, and that in fact it is no law at all? That is the question here.

The Constitution declares: "Each House shall keep a journal of its proceedings, and the yeas and nays on any question shall be taken and entered on the journal at the request of one sixth of those present." Const. § 49. "No law shall be passed, except by a bill adopted by both Houses." Const. § 58. "No bill shall become a law except by a vote of a majority of all the members-elect in each House, nor unless, on its final passage, the vote be taken by yeas and nays, and the names of those voting be entered on the journal." Const. § 65. By the express terms of the Constitution, all of its provisions "are mandatory and prohibitory unless, by express words, they are declared to be otherwise." Const. § 21. Provision has been made in our laws for the publication of the legislative journals (Comp. Laws 1913, § 40), and it is made the duty of the courts to take judicial notice of such journals and the history of every statute in its progress through the legislature. Comp. Laws 1913, § 7938, subds. 58, 59, 61. It has been made the duty of the secretary of the Senate and the chief clerk of the House to retain custody of all papers committed to them, "and at the close of each session of the legislative assembly to deposit for safekeeping in the office of the secretary of state all books, bills, documents, resolutions, and papers in possession of the legislative assembly, correctly labeled, folded, and classified." Comp. Laws 1913, § 39. A personal inspection of the records in the secretary of state's office discloses that no report or statement from the secretary of the Senate or the chief clerk of the House regarding House Bill No. 39 has ever been turned over to the secretary of the state.

It is frankly conceded by the respondent that the conflict between the enrolled bill and the journal entries of the Senate is irreconcilable, but it is contended that the enrolled bill is conclusive, and that the court is powerless to look beyond it. This presents a question upon which there is a direct conflict in the authorities. One line of authorities holds that the enrolled bill is conclusive, and that the courts cannot go behind it. Another line holds that the enrolled bills are presumed, to have been regularly adopted, but that the presumption is not conclusive, and that the court may look to the records of the legislative bodies to ascertain whether a statute has been enacted. The rule established by the first line of authorities was adopted from England. It is well to remember that England has no written constitution. Parliament is the tribunal which determines whether a law is in accord with the principles of the unwritten constitution, and of course it also determines the propriety of the procedure of enactment. England has a King. It is a canon of the law of England that the King can do no wrong. In view of these facts there seems to be a very good reason for the rule adopted in England, that when a bill has passed both Houses and received the royal assent, a court cannot look beyond it, but that the Parliament roll is conclusive. But our government is founded upon a written constitution. The courts, and not the legislative bodies, eventually determine whether statutes violate the Constitution. All our officials are sworn to support the Constitution. It is assumed that they will perform that duty. And when any official act is assailed, the law presumes that the act was regularly performed, but the presumption is not conclusive. Comp. Laws 1913, § 7936, subd. 14. We have no king. Our officials are public servants, enjoined to perform certain duties in accordance with the mandates of the Constitution. The sovereign will of the people as expressed in the Constitution alone is supreme. No one is above it; all are subject to and bound thereby. The Constitution is the means employed by the sovereign people to limit the powers of their agents, especially those of the legislative department. State ex rel. Miller v. Taylor, 22 N. D. 362, 368, 133 N. W. 1046.

No good purpose would be subserved by entering into an extended discussion of the various authorities dealing with the question whether

an enrolled bill is conclusive evidence of the passage of a law. These authorities will be found collated in notes in 23 L.R.A. 340; 40 L.R.A. (N.S.) 1; 44 L.R.A.(N.S.) 468; L.R.A.1915A, 1210; L.R.A.1915D, 119; L.R.A.1916E, 1251. An examination of the authorities will disclose not only the two conflicting rules mentioned, but different reasons advanced for, and different applications of, the rules. In an editorial note in 23 L.R.A. 348, it is said: "It will be noticed that in many instances decisions from the same state appear on both sides of the question, and it is a fact that many of the states have changed their rule once, and sometimes two or more times. . . . In fact the court seems to be exceptional which has adopted at the outset a rule which has proved perfectly satisfactory." The question was dismissed by this court in Power v. Kitching, 10 N. D. 254, 262, 88 Am. St. Rep. 691, 86 N. W. 737, although the court stated that it was not necessary to a determination of the case. It was again considered in Woolfolk v. Albrecht, 22 N. D. 36, 40–43, 133 N. W. 310, wherein the court treated the question as an open one, and refrained from adopting either rule. Both in Power v. Kitching, and Woolfolk v. Albrecht, the court consulted the journal entries, and the inferences drawn therefrom are set forth in the opinions.

Either the enrolled bill is conclusive, or it is not. If it is conclusive then, of course, the court may not look beyond it for any purpose. If this view is correct then an enrolled bill is the law of the state, and must be enforced as such even though it affirmatively appears from the legislative records that the bill never received the approval of either House. We have already noted some of the restrictions which the people, in their Constitution, have placed upon the legislative department. They have said that each House shall keep a journal of its proceedings; that "no law shall be passed, except by a bill adopted by both Houses," and that "no bill shall become a law except by a vote of a majority of all the members-elect in each House, nor unless, on its final passage, the vote be taken by yeas and nays, and the names of those voting be entered on the journal." Const. §§ 49, 58, 65. They have also said that these provisions are mandatory and prohibitory. Const. § 21. Yet if the enrolled bill is conclusive, these provisions are rendered nugatory. An enrolled bill would be law, even though the

legislative records prescribed by the Constitution demonstrated that the bill had never been passed. That which the people had said should not be law would nevertheless be the law. Clearly such a result was never contemplated by the men who framed, and the people who adopted, the Constitution. When they prescribed the conditions under which legislative power should be exercised, they intended that it should be exercised only in the manner prescribed. Cooley, Const. Lim. 7th ed. pp. 114, 115. When they required legislative records to be kept and certain matters to be recorded therein, they had a reason for so doing. The purpose and effect of such provisions were well known at the time our Constitution was adopted. Among the framers of the Constitution were men learned in constitutional law. The constitutional convention was addressed by the celebrated Judge Cooley, and doubtless many of its members were familiar with his great treatise on Constitutional Limitations. In that treatise, Judge Cooley, said: "It is also provided in the Constitution of some of the states that, on the final passage of every bill, the yeas and nays shall be entered on the journal. Such a provision is designed to serve an important purpose in compelling each member present to assume, as well as to feel, his due share of responsibility in legislation; and also in furnishing definite and conclusive evidence whether the bill has been passed by the requisite majority or not. 'The Constitution prescribes this as the test by which to determine whether the requisite number of members vote in the affirmative. The office of the journal is to record the proceedings of the house, and authenticate and preserve the same. It must appear on the face of the journal that the bill passed by a constitutional majority. These directions are all clearly imperative. They are expressly enjoined by the fundamental law as matters of substance, and cannot be dispensed with by the legislature.'" Cooley, Const. Lim. 7th ed. p. 201. "Each House keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the Constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence, and adjudge the statute void." Id. pp. 193–195.

We cannot adopt the rule that the enrolled bill is conclusive evidence of the enactment of a law. We believe that such rule runs counter to the spirit and letter of our Constitution. It is the duty of the court to ascertain and give effect to the intention of the lawmakers. But even more so is it our duty to enforce and give effect to the provisions of the Constitution, which is the supreme law of the state. In determining what the law is, it is the duty of the courts to look to those sources which the people in their Constitution have made available for that purpose. It is no disrespect to the legislative department (as has been suggested in some of the cases) to go to the records which they have made to ascertain the truth. Manifestly it would be a far greater disrespect to the lawmakers to say that is a law which their records clearly and unequivocally show that they refused to enact.

In this case there is no question about the facts. Chapter 136, Laws 1917, was never enacted. It was never passed by the Senate at all. Not only is this fact shown by the legislative journals of the 1917 session, but was so proclaimed by the Senate by unanimous vote when convened in extra session in 1918.

It follows from what has been said that the information in this case does not state the facts sufficient to constitute a public offense. The judgment of conviction is therefore reversed, and the action is ordered dismissed.

ROBINSON, J., concurs.

BIRDZELL, J. (concurring specially). I concur in the opinion of Mr. Chief Justice Christianson, holding that the enrolled bill is not so far conclusive evidence of the facts in connection with the passage of a bill as to preclude reference to the journals for the purpose of ascertaining therefrom the facts required to be recorded. And I concur in the reasoning of the opinion upon which the conclusion is based. However, some statements are made or quoted which might lead to the conclusion that the enrolled bill would not be conclusive where, through omission, the journals failed to contain facts which are essential to the due passage of the bill. In the case before us the facts recorded in the journal negative the passage of the bill. It is not a

case, therefore, of mere omission to record acts which might or might not have taken place. What is said, therefore, with reference to the effect of a mere omission is dictum, and I express no opinion upon such question. I concur in the syllabus and in the opinion, but do not wish to be understood as expressing any opinion concerning the conclusiveness of an enrolled bill as against facts which are required to be entered in the journals, and which may not be so entered, or as to the effect of mere omissions in a legislative journal.

BRONSON, J. (specially concurring). I concur in the determination made that the judgment must be reversed and the action ordered dismissed upon the ground that chapter 136, Laws 1917, was not ever adopted as the law of this state, and that therefore the information does not state a public offense. Under § 58 of the Constitution no law shall be passed except by a bill adopted by both Houses, and under § 65 of the Constitution no bill shall become a law unless, on its final passage, the vote be taken by "yeas" and "nays" and the names of those voting be entered on the journal. As set forth in the opinion of Justice Christianson, and as disclosed by the Journals of the House and Senate of the legislative session of 1917, chapter 136, Laws of 1917, was, in fact, never up before the Senate for a third reading and final passage in the form that it was adopted, and it never was, in fact, voted upon by the members of the Senate in 1917. Although the President of the Senate and the Speaker of the House signed the engrossed bill in the form that it now appears as an apparent law, and the bill became by signature of the governor and filing as ordinarily required an apparent law, nevertheless in fact, it was never adopted as such by the Senate of 1917. Although high presumptions should obtain as to the conclusiveness of the engrossed bill, yet the provisions of the Constitution are mandatory, and a bill that was in fact not passed cannot be made a law by the mere certification of the state officers, when it has, in fact, not been passed by the legislative body having the power so to do.

GRACE, J. I concur in a large part of the reasoning and in the result reached in the specially concurring opinion of Justice BRONSON.

LAUREAS J. WEHE, Plaintiff and Appellant, v. ARTHUR C. WEHE, Defendant and Respondent, and ELIADA P. WEHE, Laureas J. Wehe, Herbert C. Wehe, Charles L. Wehe, Jr., Delia L. Wehe, Blanche H. Ray, Formerly Blanche H. Wehe, Maude L. Stansberry, Formerly Maude L. Wehe, Alice G. Wehe, et al., Defendants-Appellants.

(175 N. W. 366.)

Homesteads — validity of husband's conveyance of statutory homestead to wife.

1. A deed from husband to wife of a statutory homestead in 1891 is valid although the wife did not concur and join in the execution thereof, pursuant to the law then existing.

Trusts — conveyance by husband to wife.

2. In an action to determine adverse claims, where it appears that in April, 1891, the father deeded the land involved to his wife in order to protect his home and save the land from demands of creditors, although it was unnecessary for him so to do by reason of the land being a statutory homestead and therefore exempt from the claims of the creditors, and where the father thereafter acquiesced in such conveyance and made no attempt to secure reconveyance until 1916, after his wife had died, it is *held* that in equity no trust of any kind arose and the father is not in a position to claim reconveyance.

Husband and wife — acts insufficient to show adverse possession.

3. In such action, where the father, after such conveyance to his wife in 1891, farmed and occupied the premises until 1896, and thereafter removed from the same, but managed and controlled the land through tenants and generally paid the taxes thereon until the year 1913, and in other ways treated the farm as his own, it is *held* that such acts were not hostile to the title of the wife and do not constitute acts of adverse possession.

Trusts — will as memorandum creating constructive trust.

4. In such action, where the wife, who had received such deed, made a will in October, 1913, devising a legacy of $1,000 to each of their three children, with a division of the residue of her estate among her remaining children, share and share alike, and, where, on the day following, she executed a deed,

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NOTE.—On effect of conveyance of homestead by husband to wife, see note in 69 L.R.A. 379. On constructive trust in deed of homestead by husband to wife, with proviso attempting to derogate from her right to survivorship, see note in 1 L.R.A.(N.S.) 312.

absolute in form, conveying the land involved, being the entire property possessed by her, to the three children named as legatees in the will, and thereafter in February, 1914, again made a will containing the same terms, and where it appears that the reason for the execution of such deed was that the mother feared that an attempt might be made to break the will, and where, further, it was the understanding that the property should belong to the mother until her death, and that the persons designated as grantees in the deed should carry out the intention of the mother as expressed in the will in the devises therein made, it is *held* that such deed imposed a constructive trust upon the grantees named to carry out the intention of the grantor as expressed by her in the will, and that the will is a memorandum in writing of the terms of such trust.

Opinion filed July 1, 1919.

Action to determine adverse claims.

From a judgment of the District Court of Nelson County, *Cooley,* J., in favor of the defendant Arthur C. Wehe, the plaintiff and the other children of the deceased mother appeal, and demand a trial de novo.

Reversed and remanded for further proceedings.

L. J. Wehe, for plaintiff and appellants Eliada P. Wehe, Herbert C. Wehe, and Laureas J. Wehe.

D. V. Brennan, for defendants and appellants Charles L. Wehe, Jr., Delia L. Wehe, Blanche H. Ray, Maude L. Stansberry, and Alice G. Wehe.

"In all species of resulting trusts, intention is an essential element, although that intention is never expressed by any words of direction." 3 Pom. Eq. Jur. 3d ed. § 1031; 2 Washb. Real Prop. 520; Williams v. Williams (Iowa) 78 N. W. 792; 39 Cyc. 104.

The law is quite well established that a resulting trust in real property may be established by parol evidence. 3 Pom. Eq. Jur. 3d ed. § 1041; Sanford v. Sanford, 31 N. D. 190; Gates v. Kelly, 15 N. D. 639; Smith v. Strahan, 16 Tex. 314, 67 Am. Dec. 622; Amidon v. Snouffer (Iowa) 117 N. W. 44; 39 Iowa, 159; 31 Ind. 56; 29 Cyc. 108; N. D. Comp. Laws 1913, § 7871, subd. 2.

In such cases as this, courts of equity do not enforce the trust in violation of the Statute of Frauds, but relief is granted as based on

the fraud arising out of the confidential relation, or because of the facility for practising it. Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088; Hanson v. Svarverud, 18 N. D. 550, 120 N. W. 550; Hayne v. Herman, 97 Cal. 259, 32 Pac. 171; Allen v. Jackson, 122 Ill. 567, 13 N. E. 840; 39 Cyc. 27.

Frich & Kelly, for respondent.

It is universally held that a mere unexpressed understanding is wholly insufficient to establish a trust, in the absence of actual fraud. Adams v. Adams, 79 Ill. 517; Pierson v. Pierson (Ind.) 25 N. E. 342; McGinnis v. Barton (Iowa) 33 N. W. 152; Collar v. Collar (Mich.) 13 L.R.A. 621; Loomis v. Loomis, 1 L.R.A.(N.S.) 312.

Bronson, J. This is an action to determine adverse claims to 152 acres of land in Nelson county. The parties to the action are the children of Charles L. Wehe and Pauline E. Wehe, both deceased. The action was originally instituted in February, 1916, by Charles L. Wehe, the father; it came to trial in November, 1916. Before its determination in the trial court, but after his testimony had been taken, the father, on December 20, 1916, died. His son, the executor of his will and one of the defendants herein, was substituted by order of court as party plaintiff on March 13, 1917.

On April 7, 1917, the trial court made findings adjudging the defendants Arthur C. Wehe, Eliada P. Wehe, and Herbert C. Wehe to be the owners in fee of the land, and quieting title in them, and ordering, further, a judgment against the defendant Laureas J. Wehe in favor of Arthur C. Wehe, for $136.01 on account of rents and profits of such land, for the year 1915. Pursuant thereto, on May 21, 1917, judgment was entered. The plaintiff and the defendants, excepting Arthur C. Wehe, have appealed and demand a trial de novo.

The facts substantially are as follows:

The father squatted on this land in 1883. In February, 1891, a United States patent thereof was issued to him. On April 13, 1891, the premises then being a statutory homestead, he gave a warranty deed of the same to his wife. The reason, as stated in his testimony, why he placed title in his wife, was that creditors might not get at it; that he might protect his family. At the time there was apparently a

judgment for a large amount against him, and thereafter, under execution, this land, as well as other land, was subjected to the levy thereof, but this land was exempted not only by reason of the deed given, but also on acount of its being a homestead. The parents lived on the land until 1896, when they moved to Grand Forks, and there they subsequently resided up to the time of their death. The father continued to operate the farm, pay the taxes, and in a general way to receive the profits therefrom up until 1913, when on account of, or to avoid, some family troubles, the mother then began to look after and operate the farm. Sometime in 1900 the mother made a will, which was filed in the county court. This will was later taken out by Arthur C. Wehe about the time he visited his mother, on or about October 30, 1913, at Grand Forks, when, in accordance with his testimony, a new will was drawn up and signed by the mother, which devised $1,000 each to her children the defendants Arthur C. Wehe, Eliada P. Wehe, and Herbert C. Wehe, and the rest and residue of her estate to her other children, share and share alike. Likewise, in accordance with Arthur C. Wehe's testimony, on the morning of October 31, 1913, the mother executed a warranty deed conveying the land to said Arthur C. Wehe, Eliada P. Wehe, and Herbert C. Wehe, mentioned as legatees in the will made the night before. Arthur C. Wehe further testified that this will so made the night of October 30th was subsequently destroyed by his mother, and a new will executed by her sometime in the month of February, 1914, at Grand Forks, at her home, containing the same terms, and dated the same day as the will so destroyed. This will was offered in evidence. It designates the defendant Arthur C. Wehe as the executor. It is witnessed only by Arthur C. Wehe and Eliada P. Wehe, two of the children named as legatees therein. As a reason why such deed was executed, Arthur C. Wehe further testified, that his mother was afraid the will might be attacked, and it was therefore proposed that the deed be given to the three of them; that there was an implied understanding that the will should be used as a memorandum in connection with the deed; that it was the mother's wish that the land so be disposed upon her death as provided in the will; that, out of this land, the three grantees in the deed should each get $1,000, and that the surplus remaining, if any, after the sale of such

land, should be divided among the remaining children. That there was further an implied understanding that the mother should receive the income and receipts off the land so long as she lived. In another place, he directly testified that the deed was not an absolute deed, but it had connection with the will, and that it was his wish and desire to carry out the instructions of his mother concerning the disposition of the land.

In the year 1914, Arthur C. Wehe looked after the land. On October 13, 1914, the mother died. Shortly prior to that time, on October 5, 1914, the deed of the mother to the children was recorded. On October 28, 1914, the will dated October 31, 1913, was filed in the county court. On November 3, 1914, a statement was rendered, covering the crop on the land for the year 1914, made by Arthur C. Wehe, showing a balance of $37.45 due the mother. After the death of the mother this will and deed became known to the other children not mentioned therein, and apparently difficulties and troubles concerning this land rapidly arose between the father and all of the children.

In January, 1915, Herbert Wehe appointed the defendant L. J. Wehe as his attorney and agent to look after his interests in the land. Likewise, on February 13, 1915, Eliada P. Wehe did the same. Subsequently on February 4, 1916, both Herbert Wehe and Eliada P. Wehe executed a full power of attorney to said L. J. Wehe, authorizing him to manage, farm, rent, sell, or transfer their right and interest in the land. In 1915, said L. J. Wehe took charge of the farm.

In this record, therefore, two of the grantees named in the deed, Eliada P. Wehe and Herbert Wehe, seek to repudiate such deed as an absolute deed, and join with the remaining appellants in the contentions made to set aside the judgment of the trial court, so determining in their favor.

There are various and conflicting contentions made by the appellants upon this appeal, dependent upon the construction that the court may give to the two deeds and the will involved. Upon the record herein there are presented the following major legal questions:

1. The effect of the deed from father to mother in 1891.

2. The question of the adverse possession of the father, after the delivery of such deed.

3. The construction to be given the deed from the mother to the three children dated October 31, 1913.

1. *The deed of father to mother in 1891.* The deed from husband to wife covering the homestead was not void for the reason that both did not concur in and sign the same joint instrument. Dak. Comp. Laws 1887, § 2451. The homestead statute was enacted for the purpose of the protecting and preserving the home for the benefit of the family as a whole. Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684. The disabilities of coverture under common-law principles was removed by § 2590, Dak. Comp. Laws 1887, now § 4411, Comp. Laws 1913, which provides that either husband or wife may make any agreement with the other concerning the property which the other might make, if unmarried. Under this statute this homestead protection of the law cannot be devested without the consent of both spouses. In a conveyance from husband to wife there is no intention to devest the wife of her right, or the family, of this homestead protection. The deed is therefore valid as against such objection. Furrown v. Athey, 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208; Harsh v. Griffin, 72 Iowa, 608, 34 N. W. 441. See also Olson v. O'Connor, 9 N. D. 504, 81 Am. St. Rep. 595, 84 N. W. 359.

The appellants, however, contend that there was no real intention of the father to part with his title. That there was no consideration for such deed. That the father, not knowing that the homestead was exempt from seizure to satisfy claims or judgments of creditors, through mistake conveyed to his wife in order to protect the family and save his home. That therefore a trust was created. Clearly, this contention cannot be sustained. The intention of the father to place the title of the land absolutely in the mother is clearly disclosed in the record, by his own testimony. The relation of the parties furnished a sufficient consideration if any was needed. The fact that he was ignorant concerning his legal exemptions, or that the conveyance, legally, was not in fraud of creditors, does not serve to alter his real intention and purpose at the time, or thereby to create in his favor a trust of any kind, no fraud or misrepresentation being practised by

the mother, and no agreement to recovery being shown. Further, for many years after the parties removed from the premises and the property lost its homestead character, the father acquiesced in this title residing in the mother, and made no claim therefor until after the death of the mother. There might have been possible judgments or claims that might have attached to this property, if the title had been in him.

Upon plain principles of estoppel as well as upon equitable principles that apply when a reconveyance is sought of a deed made to defraud creditors, the father was in no position to assert a trust or claim a reconveyance. 20 Cyc. 617; 21 Cyc. 1302; 16 Cyc. 791, 804.

The trial court, therefore, did not err in finding that such deed from father to mother was an absolute deed.

2. *The adverse possession of the father:* The appellants further contend that the continuous occupation and management of the farm as well as the payment of the taxes after the execution of such deed constituted adverse possession. This contention is wholly without merit. There was no such actual open, notorious, exclusive, continuous and hostile possession under a claim of right adverse or in hostility to the claim of the mother which, upon elemental principles, is required to establish adverse possession. Comp. Laws 1913, § 7365; 2 C. J. 50, 122, 135, 156; Ward v. Cochran, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230.

3. *The effect of the deed from mother to the three children dated October 31, 1913:* The appellants contend that either the deed is in the nature of a testamentary disposition of the property, or it created a constructive trust for the benefit of the persons entitled by law to her estate. Upon this phase of the case the question presented is not without difficulties. It is clear that, upon the testimony of Arthur C. Wehe concerning the intention of his mother, the deed given was not intended as, and is not, an absolute deed. In fact, he so directly testified. He further testified, as hereinbefore stated, that the will was to be used as a memorandum in connection with the title conveyed by this deed; that it was his mother's wish that the land be so disposed upon her death, as provided in the will.

It is the opinion of the writer, after full consideration, that this

deed, under all the circumstances in the record, must be construed to be a testamentary disposition, in order to give any force and effect to the real intention and purpose of the mother.

In arriving at this conclusion the evidence is considered as follows:

The mother, practically at the same time that the deed was executed, made a will which gave to the three children the same interest as Arthur C. Wehe testified that they were supposed to receive by the deed. The deed, after being so made, was not recorded until very shortly before the death of the mother. The grantees therein did not attempt to consider the land as theirs, but treated it as belonging to the mother, and so the land was so considered by all the children until the mother died. Furthermore, in the month of February, 1914, the mother made another will exactly the same in terms as the will made in October previous. Certainly, if she had intended to dispose presently of her property by the deed there was no occasion for her making another will. It is not disputed that this land is the entire property that she possessed. The only reason that is given why she made this deed was because she feared that the will might be broken. In other words, the only inference to be drawn, after full consideration concerning her intentions, is that she might be better assured that after her death the property involved would go to the persons in the manner that she had designated it to go in her will. Furthermore, the testimony of Arthur C. Wehe, that the will was to be used as a memorandum in connection with this deed, to aid in arriving at the conclusion that the real intention of the parties was to make, by the instrumentalities of the will and the deed, a testamentary disposition of the property of the mother effective upon her death. The acts of the parties who knew about this will and about this deed confirm in every respect this intention as so construed.

In this connection, it is to be noted that the will, as yet not probated, was made subsequent in point of time to the deed; this is an element to be considered in determining the intention of the testator to make a testamentary disposition of the property covered in the deed, which all of the parties concede did not convey and was not intended to convey the land as prescribed in the deed. The deed therefore, so construed, would operate to pass no title to the grantees therein. Dev-

lin, Deeds 3d ed. §§ 855c, 309a, 854; see notes in 1 L.R.A.(N.S.) 315, and 89 Am. St. Rep. 494.

The majority of this court, however, are of the opinion that effect should be given to the deed as a deed; that the intention of the testatrix fairly construed was to pass a title in *præsenti* to the three grantees named therein upon a trust to carry out and perform the terms of disposition contained in the will; that this interpretation gives full effect to the intention of the testatrix, upholds the deed, and can be sustained upon principles of equity to prevent fraud. The evidence fully warrants the imposition of a constructive trust upon the grantees as opposed to the contention of the respondent and the holding of the trial court that the deed was absolute. The will properly serves all of the purposes of a memorandum in writing, expressing in specific terms the trust imposed. Hanson v. Svarverud, 18 N. D. 550, 120 N. W. 550; Arntson v. First Nat. Bank, 39 N. D. 408, L.R.A.1918F, 1038, 167 N. W. 760. In terms of the final result, the intention of the testatrix will be substantially fulfilled under either construction. It is therefore held by the majority of this court that the deed in question imposed a constructive trust upon Arthur C. Wehe, Eliada P. Wehe, and Herbert C. Wehe, the grantees in the deed, pursuant to the terms of the will, and that the will shall be used as a memorandum of the duties and obligations of such grantees, as trustees.

It is therefore ordered that the judgment of the trial court be reversed and the case be remanded for further proceedings in order to carry out and execute the duties of such grantees as trustees of the title consonant with this opinion. The appellants will recover the costs of this appeal.

CHRISTIANSON, Ch. J., BIRDZELL and GRACE, JJ., concur.

ROBINSON, J. (concurring specially). In this case the plaintiff and the defendants, except Arthur Wehe, appeal from the decision of the trial court. This is a Wehe case,—a case in which one of the ten young Wehes has been trying to impose on his poor old dad, and to bring down his gray hairs with sorrow to the grave.

This is an action to quiet title to a quarter section of land in Nel-

son county. Arthur Wehe is the only defendant who claims title, and all the others appeal from a judgment in his favor. He claims title under a deed made by Charles Wehe, now deceased, to his wife, and a deed by her to him. In 1883 Charles Wehe settled on the land as a pre-emption. Then he turned it into a homestead and made final proof in 1890 and received patent in 1891. In April, 1891, to protect himself and his family from claims of creditors, he foolishly made a paper deed purporting to convey the land to his wife. The land was then the homestead of Charles Wehe and was occupied as such by himself and family. The deed was made without any consideration and without any purpose to part with the title and possession of the land. It was not executed and acknowledged by the husband and wife; they did not both concur in and sign the same joint instrument. Comp. Laws, § 5608. In November, 1916, the action was brought to trial. The testimony of Charles Wehe shows that the deed was made without any consideration and without any purpose to pass the title or possession of the land; that until the time of the trial he was continuously in possession of the land, as owner in fee, and paid all taxes levied against it. He leased, farmed, and used the land as his own; he put in evidence twenty-two tax receipts, showing that in every year he paid the taxes in his own name, as the owner of the land; and it appears that he never accounted to any person for rents or profits. He cultivated and improved the land and built on it a residence, barn, granary, blacksmith shop, and such like. The property all belonged to Charles Wehe, and no person claimed any adverse title.

Now it seems that on October 31, 1913, Pauline Wehe made a will, which was drafted and witnessed by Arthur C. Wehe. The will gave to Arthur and two other children, to each of them, $1,000, to be paid out of the real and personal property. It made Arthur executor. Then, on the same day, she made a deed of the land,—a very questionable deed,—in which, as it now appears, the grantees are Arthur C. Wehe, Eliada Wehe, and Herbert Wehe. The last two persons knew nothing of the deed until over a year after it was executed and until after the mother's death. By answer they disclaim any title under the deed, and aver that it was made as a part of the will; that it did

not contain the name of Arthur Wehe, and that he inserted his own name as a grantee after the execution of the deed.

The mother had no claim or title to any other land or any other property. The express consideration is $1. The deed and the will were drawn by Arthur, and he held possession of the same, and the whole matter was kept secret until the day after the funeral.

There are three fatal objections to the title claimed by Arthur Wehe:

(1) The facts speak louder than words, and show conclusively that the deed was obtained by fraud and undue influence. The grantee was the mother of ten children. Her son, Arthur, drafted the will which she signed and in which she remembered all her children. Then in a few hours he induced her to make a warranty deed of her property, as he says, to himself and two other children. The other children disclaim title under the deed, and aver that it was made as a part of the will and that it did not contain the name of Arthur Wehe.

(2) The mother never had title to the land, because, when the deed was made to her in 1891, the land was occupied by Charles Wehe and his wife as a homestead, and they did not concur in and sign the same joint deed.

(3) The deed to Mother Wehe was made without any consideration, and not for the purpose of conveying any title to her. And for more than twenty-two years after the date of the deed, and until his decease, Charles Wehe remained in open, exclusive, and undisputed possession of the land as owner in fee. He cultivated and improved it, rented the land and made valuable improvements on it, and paid all taxes against it, as shown by the tax receipts. His title was absolute and perfect.

The judgment should be reversed and judgment entered to the effect that during his life and at the time of his decease Charles L. Wehe was the owner in fee of the land described in the complaint, and that his title be quieted and confirmed; and that the defendants, and each of them, and all persons claiming under them, be forever barred from any title or interest in said land, except as the legal heirs of Charles L. Wehe; that the plaintiff and the appellants do have and recover from Arthur C. Wehe, defendant and respondent, the costs and disbursement of the action and the appeal, the judgment to be without

prejudice to the rights of the executor to have and recover from Arthur C. Wehe for the use of said land and for any rents and profits that he may have received from it, and to charge the same and the costs of this action against any interest he may have as heir of Charles L. Wehe, deceased.

STATE EX REL. GEO. E. WALLACE, Plaintiff, v. CARL E. KOSITZKY, as State Auditor of North Dakota, Defendant.

(175 N. W. 207.)

States — auditor not authorized to transfer moneys from general fund to separate fund.

1. Where the legislature has appropriated $25,000, or so much thereof as may be necessary to indemnify the owners of animals afflicted with the disease known as glanders and dourine, for a period from June 30, 1919, to July 1, 1921, the state auditor is not authorized to set aside and transfer from the general fund of the state, into a separate and distinct fund, cash moneys amounting to $15,000 as a part of such appropriation, so as to thereby deprive the state of cash moneys necessary to meet current obligations.

Mandamus — state auditor compelled to issue salary warrant of tax commissioner.

2. In an original application for a writ of mandamus to compel the state auditor to issue the salary warrant of the tax commissioner, where it appears that the state auditor, without warrant of law, has transferred from the general fund into a specific fund, known as the Glander and Dourine Horse Fund, cash moneys in the sum of $15,000, of which amount there remains therein over $13,000 unexpended, and where it further appears that such amount so unexpended, together with the balance remaining in the general fund, is sufficient for the payment of the salary warrant of such tax commissioner, it is *held* that a peremptory writ of mandamus will be awarded.

Mandamus — issuance of salary warrant of tax commissioner by state auditor against general fund.

3. Where it appears from the return of the state auditor that there are claims filed in the state auditor's office, payable out of the general fund, prior in point of time to the claim of the tax commissioner for his salary warrant, but where no contention is made that any of such prior claims should first be paid, and no attempt is made to prove or establish the priority of any of

such claims for purposes of refusing the writ, no issue is presented to this court for consideration upon the priority of such claims, and the writ of mandamus will issue if there are moneys in the general fund with which to make payment of the salary warrant demanded.

Opinion filed September 29, 1919.

Original application for a peremptory writ of mandamus to compel the State Auditor to issue the monthly salary warrant of the Tax Commissioner.

Writ awarded.

Geo. E. Wallace, pro se for petitioner.

Theo Koffel, for respondent.

BRONSON, J. This is an original application in this court for a peremptory writ of mandamus to compel the state auditor to issue his warrant for the salary of the tax commissioner for the month of August, 1919. On the issues framed, upon the petition and the return, there is no dispute that the tax commissioner is entitled to a warrant for his salary for the month of August, for which he made demand therefor, if there are sufficient moneys in the general fund of the state with which to pay the same, and if, further, prior claims filed and audited against the state should not first be paid by the state auditor. In the return the state auditor denies that he has refused to draw such salary warrant, and specifically alleges that on September 5, 1919, he informed the tax commissioner that there was not sufficient money in the treasury to pay his salary, but he thought he would be able to pay him the following day, and that said commissioner thereupon said, "all right" and departed. However, such salary warrant has not been issued. He further returns that on September 1, 1919, there was a balance in the general fund of the state of about $14.27, and that on the close of business on September 5, 1919, there was $22.61 in such general fund. That at such time there were claims amounting in the aggregate to over $251,000, filed and unpaid against such general fund prior to the claim of the tax commissioner. The return, however, does not affirmatively allege either the duty or the intention of the state auditor to pay such claims or any part of them

out of the moneys that are or may become available in the general fund prior to the payment of the claim of the tax commissioner for his salary. On the other hand, in the oral argument before the court, the state auditor admitted and stated that many of the salaries due the various departments of the state government on September 1, 1919, had been paid, even though such alleged prior claims, as to a large portion thereof, had been filed and audited by the state auditing board prior to that time. The contention of the state auditor, therefore, is that on September 5, 1919, there were not moneys in the general fund sufficient to authorize him, under the law, to draw such salary warrant for the tax commissioner. In the evidence submitted before this court upon the hearing, it appears that on July 30, 1919, $15,000 was transferred by the state auditor from the so-termed general fund to the Glanders and Dourine Horse Fund, and that on the date of this hearing there remained a balance in such Glanders and Dourine Horse Fund of $13,023.93. The deputy state treasurer, by affidavit, states that on September 5, 1919, and at the date of the hearing, there was $36,547.11 in the general fund according to the records of the state treasurer's office. That this fund, as well as other funds, in the office are balanced and reconciled monthly with the records in the office of the state auditor. That furthermore, if the tax commissioner had presented such salary warrant on September 5, 1919, the same would have been paid by the state treasurer. To what extent the state auditor may have issued warrants which were not presented for payment to the state treasurer, or concerning which the state treasurer did not have notice, this court is not advised. It is apparent, however, that, if the transfer made by the state auditor to the Glanders and Dourine Horse Fund from the general fund was not legally authorized, there was at the time of the demand and at date of the hearing, sufficient moneys in the general fund with which to pay such salary warrant. In view of our determination of this question, the matter of ascertaining the real balance in the general fund does not require our consideration.

The state auditor maintains that it is his right and duty to maintain a separate fund designated as the Glanders and Dourine Horse Fund apart from the general fund, into which he may transfer the

amount, or a portion of the amount, appropriated for the purpose of such fund by the legislature.

Under Comp. Laws 1913, § 2736, it was provided that a levy of an annual tax of 1/10 of 1 mill on the dollar should be assessed, and, when collected, should be paid into a fund known as the Glandered Horse Fund, which should be preserved inviolate for the payment of claims allowed for the destruction of glandered horses. In 1915, said § 2736 was repealed. Laws 1915, chap. 216. Likewise in 1915, an act was passed providing for the appraisement of animals and indemnification to owners for animals destroyed by dourine, and further providing that all moneys now in, and hereafter deposited in the Glandered Horse Fund, shall be placed in the Glanders and Dourine Horse Fund, and that the same shall be preserved inviolate for the payment of claims for indemnity allowed for animals destroyed for either glanders or dourine. Laws 1915, chap. 164. At the same legislative assembly there was appropriated $10,000 for such fund. Laws 1915, chap. 29. Again, in 1917 there was appropriated $30,000, or so much thereof as may be necessary, to indemnify the owners of animals afflicted with the disease known as glanders and dourine. Laws 1917, chap. 25. Again, in 1919, there was appropriated by the legislature $25,000, or so much thereof as may be necessary to indemnify the owners of animals afflicted with the disease known as glanders and dourine for the period from June 30, 1919, to July 1, 1921. Senate Bill No. 105, Laws 1919. Pursuant to this appropriation the state auditor makes his return that he has so transferred $15,000, and that there still remains $10,000 to transfer to such fund. Although, as heretofore stated, there is a fund known as the Glanders and Dourine Horse Fund which pursuant to Laws 1915, chap. 164, shall be preserved inviolate as to moneys then in or thereafter deposited therein for the payment of claims of indemnity allowed for animals destroyed, nevertheless it is apparent that the appropriation in 1919 by the legislative assembly gave no direction to the state auditor or any other official to transfer the total amount, or any amount of such appropriation to a special fund; furthermore, under the act of the legislature of 1919, the amount to be used is for a period of time from June 30, 1919, to July 1, 1921. This specifically negatives any legislative in-

tent to have such appropriation transferred to a fund where it would be compelled to remain, whether or not there were any demands for indemnification thereupon. Under the old law, when a specific levy was made upon the assessed valuation for purposes of this fund, there existed a specific reason and a specific requirement for placing the moneys received from time to time as collected from taxation into a specific fund. However, when subsequently the legislature saw fit to make an appropriation biennially for purposes of indemnification, instead of a specific levy as theretofore, there then existed no more reason for transferring such appropriation into a separate and specific fund then there exists for so transferring any other appropriation made by the legislature for any department or purpose of the state government; this is further particularly so where the legislature has not directed such appropriation to be specifically covered into such separate fund. It is true that under the law the state auditor is the general superintendent of the fiscal affairs of the state. Comp. Laws 1913, § 132. It is true, also, that he is required to keep a separate account of the several appropriations made by the legislative assembly. Comp. Laws 1913, § 644. This, however, does not mean that the state auditor is authorized to segregate moneys of the general fund into various subfunds which could only serve to operate to the embarrassment of the state in its financial administration. It is a simple matter of arithmetic to understand where, under the budget system the expenses and disbursements of the state government are made by appropriation of the legislature for a biennial fiscal period in contemplation of taxes and other revenues to accrue or be collected during such period, necessarily, in the operation of the financial administration of the state on the cash basis, sufficient moneys never are immediately available to meet all of such appropriations made by the legislature unless and until such taxes and revenues are in fact collected. It therefore requires a financial discretion to be exercised by the state officials who administer the fiscal affairs of the state, so that the appropriations and expenses of the government may be disbursed during such fiscal period in accordance with the cash revenues received, so that the functions of government be accomplished and the legislative intent through appropriation be attained. This is readily understood

when a simple consideration of the financial legislation of this state clearly demonstrated that the state, in the operation of its financial system, has provided no means or method for building up or creating a cash reserve for purposes of meeting its general financial obligations in anticipation of taxes and other revenues to be collected.

We are clearly of the opinion, therefore, that the unexpended balance in the Glanders and Dourine Horse Fund is still a part and portion of the general funds of the state. The question whether the compulsory issuance of the salary warrant should be enforced as against outstanding prior claims, filed and unpaid by the state auditor, is not at issue before this court.

The state auditor has filed no brief. Upon the oral argument of this cause, upon a question propounded directly by the court, the state auditor stated that he did not refuse to issue this salary warrant upon the ground of prior outstanding claims, and that the warrant would have been issued if there were sufficient moneys in the general fund to cover the same. There is accordingly no contention made or proof submitted that any one of the so-termed prior claims should first be paid, or that the state auditor has made payment of various claims which in fact are subordinate to the claim for salary of the tax commissioner as a departmental officer. The controversy, accordingly, before this court is therefore upon the question whether, upon the date of the demand for the salary warrant, there were moneys in the general fund with which to make payment of the same. Clearly, therefore, it was the duty of the state auditor to issue such salary warrant to the tax commissioner unless he otherwise showed to this court the legal necessity of appropriating such moneys then in the general fund to the payment of other outstanding claims. He cannot thus evasively raise a collateral issue of law and fact unless he shows his intention to issue warrants for claims prior to the salary warrant herein to the extent of moneys in the general fund, and we do not understand that the state auditor so intends to do. Pierce, B. & P. Mfg. Co. v. Bleckwenn, 42 N. Y. S. R. 568, 16 N. Y. Supp. 768. See Spelling, Extr. Relief, § 1489. Upon the presentation of this case it is the apparent desire of both parties to determine the status of the general fund with reference to the sufficiency of moneys therein with which to pay such

salary warrant. Accordingly, upon the record presented, we are satisfied that there is no issue presented concerning the priority of other outstanding claims. It therefore follows that the writ as demanded by the tax commissioner should issue. It is so ordered.

GRACE and BIRDZELL, JJ., concur.

CHRISTIANSON, Ch. J. (concurring in part and dissenting in part). While certain language in Laws 1915, chap. 164, furnishes some foundation for a contrary view, I am of the opinion that, under the existing laws, moneys appropriated for the payment of glanders and dourine claims do not in fact go into and become a separate fund; but properly belong in the general fund, and that glanders and dourine claims are properly chargeable against such fund. I therefore agree with the opinion prepared by Mr. Justice Bronson that, under the showing made in this case, there was available on September 5, 1919, in the general fund the sum of $13,023.93, which had been erroneously transferred to the so-called Glanders and Dourine Horse Fund. I do not, however, agree that this fact alone warrants the issuance of a writ of mandamus to compel the defendant to issue a warrant to the relator.

The statute provides: "It is the duty of the state auditor: . . . 17. To draw warrants on the state treasurer for the payment of money directed by law to be paid out of the treasury; which warrants shall be numbered consecutively in the order in which they are drawn; but no warrants shall be drawn unless authorized by law, nor unless there are funds in the treasury applicable to the payment thereof to meet the same." Comp. Laws 1913, § 132, subd. 17.

The return or answer of the defendant, state auditor, is accompanied by a detailed itemized list of unpaid claims chargeable against the general fund. The correctness of such list is not denied. It appears therefrom that there are outstanding unpaid claims chargeable against the general fund, aggregating $7,624.31, which were presented for payment prior to, and duly allowed by the state auditing board on, August 5, 1919; that there are outstanding unpaid claims, chargeable against said general fund, aggregating $108,794.93, which were presented for payment prior to, and allowed by the state auditing

board on, August 28, 1919; that there are claims for salaries of state officers and employees chargeable against the general fund aggregating $14,721.36, which were presented for payment and allowed by the state auditing board on August 28, 1919, among which is the claim of the relator; that there are unpaid claims in favor of the different state institutions chargeable against the general fund, aggregating $17,940.-01, presented for payment and allowed by the state auditing board on August 28, 1919. These different claims amount in all to $172,875.64. It also appears that there are unpaid claims chargeable against the general fund aggregating $23,876.06, which were presented for payment prior to July 1, 1919, but are held in abeyance on account of inadequate subvouchers, mileage reports, etc. It further appears that claims aggregating $78,464.64, chargeable to the general fund, were presented for payment prior to September 5, 1919, but have not been acted upon by the state auditing board. From the defendant's answer it appears that on September 5, 1919, there was a balance in the general fund of $22.61. If to this is added the $13,023.93, erroneously transferred to and remaining in the so-called Glanders and Dourine Horse Fund, there will be $13,046.54 in the general fund. And as already stated, it is undisputed that there are outstanding unpaid claims properly chargeable against the general fund, aggregating $172,875.67, which had been presented for payment and allowed on or prior to August 28, 1919. An examination of the list indicates that a great, if not the greater, portion of such claims are of equal rank with that of the relator. And the relator has neither made nor attempted to make any showing whatever that his claim is entitled to priority over any of the other claims. Under the circumstances I do not believe that the relator has shown that he is entitled to a writ of mandamus to compel the defendant to issue the warrant. The majority opinion is based upon the theory that this question is not presented. It is said: "The question whether the compulsory issuance of the salary warrant should be enforced as against outstanding prior claims, filed and unpaid by the state auditor, is not an issue before this court." The state auditor, in his contentions before this court, has not refused to issue such salary warrant for such reason. I do not agree with this reasoning. The writ of mandamus may be issued by this court

to compel the state auditor to issue a warrant only when the issuance thereof is "an act which the law especially enjoins as a duty" upon the state auditor. Comp. Laws 1913, § 8457. To entitle a relator to such writ he must show that he has a clear and complete legal right to have the particular act performed. Bailey v. Lawrence County, 2 S. D. 533–537, 51 N. W. 331; 26 Cyc. 151.

ROBINSON, J., concurs.

STATE OF NORTH DAKOTA EX REL. HENRY J. LINDE, Attorney General, Respondent, v. EQUITY CO-OPERATIVE EXCHANGE et al., Appellants.

(175 N. W. 634.)

Costs — application to tax costs denied after lapse of fifteen months.

In this case the parties stipulated that the action be dismissed. The stipulation was dated May 24, 1916. On August 4, 1916, the defendant caused judgment of dismissal to be entered. Neither the stipulation, nor the order for judgment, made any reference to costs, and none were taxed in the judgment. More than fifteen months thereafter the defendant sought to tax costs. It is *held* that the trial court was right in denying defendant's application.

Opinion filed July 22, 1919. Rehearing denied October 27, 1919.

From an order of the District Court of Cass County, *Cole*, J., defendant appeals.

Affirmed.

Wm. Lemke, for appellants.

William Langer, Attorney General, and *Edward B. Cox,* Assistant Attorney General, for respondent.

"To authorize an allowance of costs in special proceedings some statutory authorization is necessary." 15 C. J. 5455.

See also 11 Cyc. 53, and cases cited.

The state, like any other sovereign, does not pay costs unless otherwise provided by statute. 3 Bl. Com. 400.

CHRISTIANSON, Ch. J. This is an appeal from an order denying defendants' motion for taxation of costs. The record shows that the state commenced an action in the district court of Cass county to dissolve the defendant corporation, wind up its affairs, and distribute its assets. On May 24, 1916, the attorneys for the respective parties entered into the following written stipulation:

(Title and venue.)

It is hereby stipulated by and between the parties to the above-entitled action that the same be and it is hereby dismissed.

Dated this 24th day of May, A. D. 1916.

Henry J. Linde,
Atty. for Plaintiff.
M. D. Munn,
Atty. for Defendants.

On August 4, 1916, an order was entered upon the stipulation "that said action be and the same is hereby dismissed." On the same day judgment was duly entered, pursuant to said stipulation and order, "that said above-entitled action be and the same is hereby dismissed."

The record does not show upon whose application judgment was entered; but upon the oral argument defendants' counsel stated that at the time it was signed the stipulation of dismissal was delivered to defendants' attorney Munn, and that thereafter one of defendants' attorneys presented it to the district court and obtained the order of dismissal, and caused judgment of dismissal to be entered. It will be noted that no reference was made to costs in the stipulation, the order, or the judgment. A long time after the entry of judgment, defendants moved that certain costs be taxed in their favor. The record does not show whether the matter was ever presented to the clerk of the district court; nor does it show when the motion was made. It does show, however, that the motion was based upon a statement of costs and disbursements verified on November 9, 1917, and that the order denying the motion was made January 20, 1918.

As appears from the title, the action was instituted by Henry J. Linde, as attorney general of the state, and the stipulation of dismissal was signed by him. Linde was succeeded by the present attorney general in January, 1917. Honorable Charles A. Pollock was judge

of the third judicial district during the entire period of the pendency of the action. He signed the order of dismissal. In January, 1917, Judge Pollock was succeeded by Judge A. T. Cole, and the motion to tax costs was made before and decided by Judge Cole.

It appears from the memorandum opinion filed by Judge Cole, that he was of the opinion that the defendants were, in no event, entitled to tax costs against the state in this action. That is the principal reason given by the trial judge for denying the motion for costs, although he also refers to the long time which had elapsed since the rendition of the judgment. We find it unnecessary to determine in this case whether the principal reason advanced by the trial court was correct or incorrect. The question before this court is not whether the trial court assigned correct reasons for his ruling, but whether the ruling itself was right. If the ruling was right it must be sustained regardless of the reasons assigned. For "where a judgment or order is correct, it will not be reversed on appeal, because the trial court has based its decision on insufficient or erroneous reasons or grounds, or has stated no reasons therefor." 4 C. J. 663. See also Tribune Printing & Binding Co. v. Barnes, 7 N. D. 591, 75 N. W. 904; Davis v. Jacobson, 13 N. D. 430, 101 N. W. 314.

The question presented to the trial court was whether, upon the facts shown by the record, the defendants were entitled to recover costs against the plaintiff at the time the motion was made; not whether they would have been entitled to costs if the action had been prosecuted to final determination, and the defendants had prevailed. And we are satisfied that, under the facts in this case, defendants were not entitled to have judgment for costs against the state, and that the trial court was correct in so holding.

Costs are a mere incident to an action. If the cause of action is removed, the action cannot be prosecuted merely to determine the question of costs. Two Rivers Mfg. Co. v. Beyer, 74 Wis. 210, 17 Am. St. Rep. 131, 42 N. W. 232. And in most jurisdictions it is held that, where the cause of action is extinguished by agreement of the parties, no costs are taxable, unless there is an express agreement to that effect. Obert v. Zahn, 45 Okla. 219, 145 Pac. 403; Sheeks v. Sample, 89 Misc. 428, 151 N. Y. Supp. 884; 15 C. J. pp. 89–91, ¶¶ 168, 171.

And it has been held that a statute which provides that a judgment dismissing an action, with costs, may be granted when plaintiff voluntarily discontinues the action, has no application where the parties settle the case after the action is brought without making any provisions for payment of costs, and that an award of costs in defendant's favor on a judgment dismissing the complaint is erroneous. 15 C. J. 90. This action was not prosecuted to final judgment. It was terminated and extinguished by the mutual agreement of the parties evidenced by a written stipulation. Whatever agreement there was between the parties as to costs must be found in or implied from the stipulation. There is no contention and no showing that there was any error or mistake in the stipulation, or that there was any collateral agreement as to costs. The stipulation was silent as to costs. The defendants took the stipulation to the court, and obtained an order for judgment of dismissal. The order made no provision for costs. The defendants procured the entry of judgment, but made no attempt to have costs taxed and entered in and as a part of the final judgment.

There is another reason why the order should be affirmed. Our statute contemplates that costs shall be inserted in and become a part of the final judgment at the time the judgment itself is entered. It is provided that costs shall be taxed "as a part of the judgment." Comp. Laws 1913, § 7793. In the Encyclopædia of Pleading & Practice (5 Enc. Pl. & Pr. 120), it is said: "The award of costs must be made in the final judgment or decree, and after the case has been disposed of an application to have costs granted will not be entertained." The right to costs may be waived by failure to claim them. 15 C. J. 106, 107.

In this case defendants entered into a written stipulation for a dismissal of the action. They procured an order for judgment. They caused final judgment of dismissal to be entered. In none of these documents did they see fit to make any provision for costs. More than fifteen months after the rendition of judgment elapsed before they made any claim for costs. In making the claim they offered no excuse and made no explanation of the failure to make a seasonable application for allowance of costs. The right to costs, if one existed, must be

deemed to have been waived. 15 C. J. 106, 107; 5 Standard Enc. Proc. 924.

Order affirmed.

HANLEY and CRAWFORD, JJ., concur.

BRONSON and ROBINSON, JJ., disqualified, did not participate; Honorable W. C. Crawford, Judge of Tenth Judicial District, and Honorable J. M. Hanley, Judge of Twelfth Judicial District, sitting in their stead.

BIRDZELL, J. (dissenting). I dissent. As I view the matter before the court upon this appeal, the questions discussed in the majority opinion are not properly decisive. In dissenting, therefore, I do not wish to be understood as disagreeing with the principles stated in the main opinion, nor as expressing any opinion concerning them. The reasons for the dissent may be briefly stated: In the respondent's brief on appeal it is stated that the appeal "deals only with the question of the taxation of costs as against the state in a proceeding such as was before the district court in the case of State of North Dakota ex rel. Linde v. Equity Co-operative Exchange et al." Following this statement of the question, the brief is devoted to a presentation of the elementary principle, that the taxation of costs is entirely dependent upon the statute, since, under the common law, no costs or disbursements were allowed. Reference is made to the various sections of the statute governing costs as against the state when the state is a party, from which it is argued that costs are not properly taxable in this proceeding under the statutes. No question is raised by the respondent concerning the delay in moving for the taxation of costs. Thus, under the respondent's presentation, it seems to be tacitly conceded that if, under the statutes, the state is liable for costs in this character of proceeding, costs should be taxed. Litigants can, of course, waive any minor procedural questions if they see fit to do so, and if there is a desire to make the rule of ultimate liability controlling as to the question at issue between them, their waiver of procedural questions is not only valid, but commendable. I know of no reason why such consid-

erations should not apply as between the state and a private litigant, as well as between two private litigants. While every safeguard should be employed to prevent loss or squandering of public moneys, it is somewhat inconsistent with the dignity of the sovereign state to seek to evade a legal liability by resorting to technical defenses.

As I read the brief submitted on behalf the state by the attorney general, no such effort has been made on behalf the state.

The statutory provisions which are presented as being decisive of this appeal are briefly summarized as follows: Section 7807 provides that in all civil actions prosecuted in the name of the state by an officer authorized for that purpose, the state shall be liable for costs *in the same actions* and to the same extent as private parties, and that if a private person is joined with the state as plaintiff he shall be liable in the first instance for the defendant's costs, but that the state shall also be liable after execution against the private litigant is returned unsatisfied. Section 7793 provides that in all actions and special proceedings the clerk must tax certain costs as part of the judgment in favor of the prevailing party.

The action in which the present proceedings are had was an action brought for the purpose of annulling the charter of the defendant. Section 7969, Compiled Laws of 1913, provides that the remedies formerly attainable by the writ of quo warranto may be obtained by civil action under the provisions of the particular chapter, as well as under the provisions of chapter 27, which deals specifically with actions by and against corporations. Section 7994 (contained in chapter 27) provides that whenever an action shall have been brought against a corporation under the provisions of article 3 of chapter 27, the court shall proceed to final judgment if the proof be sufficient, that the attorney general shall have the right to appear and prosecute the action, and that the state, in case the action is continued by the attorney general without the participation of a creditor, shall be liable for costs. In both articles 3 and 4 of chapter 27, provision is made for the bringing of an action by the state where it is desired to obtain a judgment dissolving a corporation or vacating and annulling its franchise.

The principal contention is that inasmuch as the state, in bringing an action to dissolve a corporation and annul its franchise, does so

in its sovereign capacity, it is not liable for costs under § 7807, which purports to render it liable in "all civil actions;" and a distinction is sought to be drawn between such an exercise of the sovereign power and instances where the state may be a party to a civil action in which it would sustain no different relation to the opposing litigant than as though it were an individual. It seems to me that there is no warrant in the statutes referred to for any such distinction. In the classification of remedies in the Code of Civil Procedure, § 7329, they are divided into actions and special proceedings, and under § 7969 some remedies which are ordinarily classified as special proceedings (scire facias, quo warranto, and information in the nature of quo warranto) are abolished, and for them is substituted a *civil action* in district court, and the action in which these proceedings were had is clearly of that character. So that, under the Code of Civil Procedure and under the provisions enacted with special reference to the right of the state in certain instances to secure the annulment of corporate charters, the remedy provided is technically denominated a civil action. Therefore, under § 7807, the state is rendered liable for costs to the same extent as a private party. This conclusion is further supported by the provisions of § 7994, which expressly recognizes the liability of the state for costs in this particular kind of a proceeding. So far as costs are concerned, when the state brings an action against a corporation to annul its charter, I can see no distinction between actions under article 3 of chapter 27, which are predicated upon insolvency, and actions under article 4, which may be predicated upon fraud or violation of regulatory laws.

Under the statutory provisions noted, the state is, in my opinion, liable for costs in this character of civil action, but whether or not a judgment should be entered against the state, if it were resisting on procedural grounds, is a question which it seems to me is not raised, and therefore I express no opinion concerning it.

GRACE, J., concurs.

STATE OF NORTH DAKOTA EX REL. HENRY AMERLAND, Relator, Petitioner, v. JOHN N. HAGAN, Commissioner of Agriculture and Labor and Ex-Officio Member of the Workmen's Compensation Bureau of the State of North Dakota; L. J. Wehe and S. S. McDonald, Commissioners and Members of the Workmen's Compensation Bureau of the State of North Dakota; and Obert Olson, State Treasurer of the State of North Dakota, and as Such Member of the Workmen's Compensation Bureau of the State of North Dakota and as Such State Treasurer, Respondents.

(175 N. W. 372.)

Attorney general — states — appearance and defense — by state bureaus and departments; rights of attorney general.

1. In an original proceeding, where the attorney general has made a motion to strike the return and answer of the workmen's compensation bureau, made and filed by one of the members thereof, upon the ground that such attorney general is the sole legal adviser and person entitled to appear by law for such bureau, and that, further, such answer and return was filed without his knowledge or consent, it is *held* that any board or department of the state government have the right to personally appear in their own defense before this court, and that the attorney general, although he is by statute the legal adviser of the departments of the state government and entitled to represent them in actions, sustains, nevertheless, in such actions a relation similar to that of attorney and client, and he may not overrule or entirely disregard rights of defense or of personal appearance that such departments may desire to assert.

Master and servant — Workmen's Compensation Act — constitutionality of classification of hazardous employment.

2. In 1919 the legislative assembly of North Dakota enacted a compulsory Workmen's Compensation Act to cover employees engaged in hazardous employment, wherein hazardous employment is defined to be an employment in any business, trade, or occupation wherein one or more persons are employed, not casually, excepting agricultural, domestic, and railroad employees. Upon the issue raised by the relator engaged in the real estate and loan business, that this definition by legislature first covers his employment, which is nonhazardous and free from danger, it is *held* that it is within the province of legislative power, in the exercise of the police power pursuant to

NOTE.—Authorities discussing the question of constitutionality of workmen's compensation and industrial insurance statutes are collated in notes in 34 L.R.A.(N.S.) 162; 37 L.R.A.(N.S.) 466; L.R.A.1916A, 409; and L.R.A.1917D, 51.

public demand and as a matter of public policy, to classify generally a given employment as possessing elements of risk or hazard, and that such legislative expression will not be deemed arbitrary and unreasonable by the court unless a specific showing be made as a matter of fact that the employment of such relator is nonhazardous and without risk.

Master and servant — Workmen's Compensation Act — constitutionality of classification of hazardous and dangerous employment.

3. It is within the province of the legislature, in the proper exercise of its police power as a matter of public policy, to declare that there is an element of hazard or of danger in employment in the modern business world, and this court, upon construction of its definition in that regard, will not presume that the term "hazardous" must necessarily refer to employments that have heretofore been termed hazardous by reason of extra features of hazard inherent to the nature of occupation.

Master and Servant — Workmen's Compensation Act — constitutionality.

4. The legislature, within the exercise of its police powers in enacting a compulsory compensation act, may abrogate common-law defenses and impose liability without fault, substituting new rules of legal procedure in place of the old, so long as its action in that regard is not arbitrary, unjust, or unreasonable.

Constitutional law — due process of law — privileges and immunities — obligation of contract — workmen's compensation.

5. In the Workmen's Compensation Act of 1919, it is provided that employers subject to the act shall pay to the compensation fund, in proportion to the annual pay-roll expenditures, a rate prescribed by the bureau, pursuant to a classification of employments with respect to the degree of hazards, and that if an employer does not comply with such act he shall be deprived of common-law defenses concerning injuries sustained by his employees; and, further, that, upon compliance, the employer shall not be liable for injuries sustained by his employees, but that recourse must be had to the workmen's compensation fund. It is further provided that in such act no contract made by the employer with his employee which serves to deduct or retain any moneys that are paid to comply with this Compensation Act shall be valid. It is *held* that these provisions in the act are not deemed so arbitrary and unreasonable as a matter of law as to be violative of relator's constitutional rights, either under the due-process clause, the equal privileges and immunities clause, or the clause concerning the impairment of the obligation of contracts of either the Federal or state Constitution.

Statutes — subject and title — constitutional provisions.

6. It is further *held* that the Workmen's Compensation Act, which in the

title thereof states that the enactment is for the benefit of the employees engaged in hazardous employment, is not subject to the constitutional objection that it embraces more than one subject.

Constitutional law — delegation of judicial power to workmen's compensation bureau.

7. It is further *held* that the Compensation Act, which grants to the bureau power to classify employment and prescribe rates, is not unconstitutional upon the ground of an improper delegation of judicial power.

Opinion filed October 25, 1919.

Original application to enjoin and prohibit the workmen's compensation bureau from, in any manner, enforcing the Workmen's Compensation Act as against the relator, upon grounds of its unconstitutionality.

Petition dismissed.

Lawrence & Murphy, for relator.

Unless based upon the police power, such legislation would not have, and could not, have been sustained. Orient Ins. Co. v. Dages, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Magoun v. Illinois T. & S. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Cunningham v. Northwestern Improv. Co. (Mont.) 119 Pac. 562.

The right to exercise police authority as such over the operator arises, in part at least, from the fact that he is engaged in an extra-hazardous business. St. Louis Con. Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; Cunningham v. Northwestern Improv. Co. (Mont.) 119 Pac. 562.

It does not follow because an act of the legislature is ostensibly passed as an exercise of the police power that it must be held as a valid exercise of that power. Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Mygler v. Kansas, 123 U. S. 661, 31 L. ed. 210; Freund, Police Power, § 20, p. 15; 12 C. J. p. 929.

No law prohibiting that which is harmless in itself, or commanding that to be done which does not tend to promote the health, safety, or welfare of society, will be sustained. People v. Weiner, 271 Ill. 74, 78, L.R.A.1916C, 775, 110 N. E. 870.

"The legislature cannot invade the privacy of a citizen's life, and

regulate his conduct in matters in which he alone is concerned, nor prohibit him any liberty the exercise of which will not directly injure society." Com. v. Turner (Ky.) 118 S. W. 1199; Com. v. Campbell, 133 Ky. 50, L.R.A.(N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159.

The essential quality of the police power as a governmental agency is that it imposes on persons and property burdens designed to promote the safety and welfare of the public at large. Chicago, etc. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624; Com. v. Beatty, 15 Pa. Super. 5; Freund, Police Power, § 21, p. 16; Taylor, Due Process of Law, 255, 256.

William Langer, Attorney General, *Edw. B. Cox,* Assistant Attorney General, and *L. J. Wehe,* for respondents.

The police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518.

The welfare of the state, while dependent to a great extent upon the success of its employments and industries, is even more dependent upon the welfare of its wage earners. And, further, that the minor dependents of the wage earner of to-day are the wage earners of tomorrow. State v. Clausen, 117 Pac. 1101; State ex rel. Yaple v. Creamer, 85 Ohio St. 349; State v. Mountain Timber Co. 135 Pac. 645, L.R.A.1917D, 10; Special Pamphlet on Workmen's Compensation Acts, C. J. § 5, p. 7.

"Any provision in a statute which declares its meaning or purpose is authoritative."

It is binding on the courts though otherwise they would have understood the language to mean something different. Sutherland, Stat. Constr. § 402, and cases cited.

The Workmen's Compensation Act is reasonable, and the classification is fair and works no unjust hardships. New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 677. Opinion of Justices, 209 Mass. 607, 96 N. W. 308; Young v. Duncan, 218 Mass. 346, 106 N. W. 1; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037; Sayles v. Foley, 38 R. I. 484, 96 Atl. 340; Mathison v. Mpls. Street R. Co. 126 Minn. 286, 148 N. W. 71; State ex rel. Yaple v. Creamer, supra; Shade v. Ash Grove Lime & P. Cement Co. 93 Kan. 257, 144 Pac. 249.

Comprehensive legislation under the police power of the state such as the act in controversy is sustainable against constitutional objections under analogous decisions. Boyd Workmen's Compensation, § 77; Holst v. Rowe, 39 Ohio St. 340; Mitchell v. Williams, 27 Ind. 62; McGlone v. Wornock, 111 S. W. 688; Blair v. Forehand, 100 Mass. 136.

Statutes imposing a liability on fire insurance agents, based upon benefit of a fund to be used for the care and support of injured firemen, have been upheld under the police power of the state in the states of New York, Illinois, and Wisconsin. Fire Dept. v. Noble, 3 E. D. Smith (N. Y.) 440; Fire Dept. v. Wright, 3 E. D. Smith (N. Y.) 453; Exempt Firemen's Fund v. Roone, 29 Hun (N. Y.) 391, 394; Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Fire Dept. v. Helfenstein, 16 Wis. 136; State ex rel. Yaple v. Creamer, supra.

BRONSON, J. This is an original application to this court to restrain and prohibit the workmen's compensation bureau from applying, or in any manner enforcing, the Workmen's Compensation Act in this state.

The relator is a private citizen, alleging himself to be a citizen and taxpayer of Cass county, North Dakota. He is engaged in the real estate and loan business at Fargo, and employs two clerks, whose sole work, as he alleges, consists in keeping books, making records, writing letters and similar work, without any danger from any hazardous or dangerous work of any kind or nature whatsoever. He invokes the original jurisdiction of this court, claiming that the act by its term applies to him in his business; that the bureau are about to enforce the powers of this act as to him and deprive him of his constitutional rights; that multitudes of other citizens are likewise effected, and that the matter is of such public interest that it involves the franchises and prerogatives of the state and the liberties of its people. For the compensation bureau, the attorney general of the state has appeared and filed a motion to dismiss upon the grounds that the petition fails to allege facts sufficient to constitute a cause of action. The bureau itself, through one of its members, an attorney, has filed a return in the nature of a demurrer, which challenges the

jurisdiction of this court, the right of the relators to sue, and the sufficiency of the cause of action alleged. Furthermore, it has submitted, as its return, an answer, in the event of the demurrer being overruled, which alleges the legality and constitutionality of the Workmen's Compensation Act, under which such bureau is operating pursuant to the legislative enactment in 1919.

The attorney general has also filed a motion to strike from the records and files the answer of such bureau, upon the ground that the attorney general as such is the sole legal counsel of such bureau, and the only person entitled to appear in its behalf, and that such answer was filed without the consent, knowledge, or concurrence of such attorney general.

It is indeed unseemly that contentious strife should be made before this court between parties appearing for the respondents. These matters of contention will be noticed only to the extent of stating that the time has not yet arrived in this state when any board or officer of the state does not possess the same right as any individual to defend itself or himself by itself or himself in the courts of this state. Furthermore, although it is perfectly obvious under the statute that the attorney general is the general and the legal adviser of the various departments and officers of the state government, and entitled to appear and represent them in court, that this does not mean that the attorney general, standing in the position of an attorney to a client, who happens to be an officer of the government, steps into the shoes of such client in wholly directing the defense and the legal steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned.

It appears from the return filed by the bureau that the relator is the president of the Amerland Company, a corporation which is engaged in real estate, loan, and insurance business in Fargo. That this corporation, through this relator as president, has made application, has paid the rate, and has filed under the terms of the Compensation Act, that it does employ two persons in the corporation offices. The return specifically alleges that the relator as an individual has made no application to comply with the Compensation Act, and that the bureau has made no attempt, either by communication or other-

wise, to compel compliance. This is not denied by the relator. There are therefore serious questions raised concerning the jurisdiction of this court upon the record as well as upon the issues framed. However, upon the conclusions adopted by this court, which occasions, in any event, a dismissal of the petition herein, it is deemed proper to consider the merits of the issues raised concerning the constitutionality of the Workmen's Compensation Act in view of the public importance of this act. The parties have filed excellent briefs, particularly the brief of the relator is exhaustive and of great assistance to this court.

The relator makes no contention concerning the wisdom, benefits, or the necessity of workmen's compensation laws. The relator, however, seriously challenges, upon various constitutional grounds, both Federal and state, the legality of the act involved, principally, as follows:

1. That the act is violative of both the Federal and the state constitutional provisions concerning due process, in that such act by its terms applies to all callings whether the same be industrial employment or not, to all business whether it be termed hazardous or not.

2. That the act is violative of the Federal and state constitutional provisions with reference to acts impairing the obligations of contracts, or the freedom to make contracts, for the reason that the employer is prohibited from freely contracting with his employee concerning wages to be paid, without deducting or considering the deduction to be paid to the bureau under the terms of the Compensation Act.

3. That the act violates the provision of the state Constitution, which provides that no bill shall embrace more than one subject, which shall be contained in the title, for the reason that the act, in the title, covers only hazardous employment, whereas the act itself by its terms covers both hazardous and nonhazardous employment.

4. That the act is violative of both Federal and state constitutional provisions with reference to the equal privileges and immunities of citizens, in that it is discriminatory and compels one employer operating a nonhazardous, or even less hazardous, employment to contribute to a fund to compensate those that may be injured in a hazardous employment.

The act involved is known as House Bill No. 56, enacted by the legislative assembly in 1919, and approved in March, 1919, and effective as a law commencing July 1, 1919.

In the title the law is stated to be an act creating a workmen's compensation fund for the benefit of employees injured and dependents of employees killed in hazardous employment. The purpose of the act is specifically stated as follows:

Section 1. The state of North Dakota, exercising herein its police and sovereign powers, hereby declares that the prosperity of the state depends in a large measure upon the well-being of its wage workers, and, therefore, for workmen injured in hazardous employments, and their families and dependents, sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries, and all jurisdiction of the courts of the state over such causes, are hereby abolished except as in this act provided.

In § 2, employment is defined as including employment by the state and all political subdivisions thereof, and all public and quasi public corporations, and all private employments.

"Hazardous" employment means an employment in which one or more employees are regularly employed in the same business, or in or about the same establishment, except agriculture and domestic service and any common carrier by steam railroad.

"Employment" means every person engaged in a hazardous employment under any appointment of contract of hire, or apprenticeship express or implied, oral or written, including aliens, and also including minors, whether lawfully or unlawfully employed, but excluding any person whose employment is both casual, and not in the course of the trade, business, profession, or occupation of his employer.

Sections 6 and 7 provide that every employer shall contribute to such compensation fund in proportion to the annual pay-roll expenditure to persons subject to the act, in accordance with the rates prescribed by the bureau concerning employments classified with respect to their degree of hazard.

Section 6 further provides that an employer who contributes to the fund is thereby relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under the act, and that recourse only shall be had to such compensation fund for such injuries.

Under the terms of § 11 employers who fail to comply with the terms of the act are not entitled to the benefits of the act during the period of such noncompliance, and are liable to their employees for damages sustained in the course of employment, free from common-law defenses of the fellow-servant rule, assumption of risk, or the defense of contributory negligence.

The act by specific exemption (§ 2) excludes application to agriculture and domestic servants and any common carrier by steam railroad. Under § 12, any employer engaged in an employment not classed as hazardous may comply with the act by paying the premium, and avail of the privileges thereof. Under § 21 no agreement by an employee to waive his rights to compensation under the act, nor any agreement to pay any portion of the premium to be paid by his employer, shall be valid, with the further provision that an employee who deducts any portion of his premium from the wages of his employee is guilty of a misdemeanor.

The above-stated provisions comprise the legislative acts principally concerned in the consideration of the constitutional questions raised by the relator.

The act in question is a compulsory insurance act. No contention is made that it is not within the police powers of the state to provide for a compulsory compensation act. It is contended, however, that it is not within the police powers of the state to compel employment, with little or no hazard involved, to be subject to a compulsory workmen's compensation act, and that it is not within the province of such police power to make, by legislative definition, an employment hazardous, which, in fact, is nonhazardous. It is contended that the title of the act involved, as well as the purpose of it as stated, is for the protection of workmen injured in hazardous employment; whereas, the act itself is made applicable to every employment by the definition of a hazardous employment. It is further contended that this definition is

merely an indirect attempt by legislative fiat to make every employment a hazardous employment, and to make the act in question applicable by such circumlocution to every employment so designated by legislative will as a hazardous employment. The first question presented, therefore, is whether the legislative act, in terms at least, is applicable to every employment within the state. It is clear from the terms of the act that the term "employer" includes a person engaged in a hazardous employment; that the term "employee" includes a person engaged in a hazardous employment under a contract of hire in the trade, business, profession, or occupation of his employer; that a "hazardous employment" is an employment of such employee by such employer in the business of such employer. In terms, therefore, the act covers the employment and the business of the relator as a hazardous employment.

Under the act in question the employment of the relator is termed hazardous. The relator alleges that his employment is nonhazardous; this is denied by the respondents. The relator makes no record to prove that in fact, the employment in question is nonhazardous. This court accordingly will not accept as conclusive or even as a presumption, that the mere alleged declaration of the relator that his employment is nonhazardous overrides the legislative declaration or proves thereby the arbitrary character of said legislative declarations. It is fairly well settled that the court will only hear objections to the constitutionality of laws from those who are themselves effected by its alleged unconstitutionality in the feature complained of. Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570. It is contended, however, that the act, so extended by legislative definition as to include the employment of the relator, is arbitrary, unjust, unreasonable, and not to be included within the proper exercise of the police powers of the state. Again we recur to the oft-discussed and defined term," the police powers of the state." It is admitted that the subject of compensation insurance is within the police powers of the state. The question is the extent and reasonableness of the application.

Freund in his work on the Police Power, § 143, states some of the questions involved in legislation of this character to protect persons

engaged in industry, such as, whether a danger exists and of sufficient magnitude; whether it concerns the public, and whether the proposed measure tends to remove it; whether it is possible to secure the object sought without impairing essential rights and principles.

Fundamentally the test is one of reasonableness, whether the act conserves or is destructive of inherent rights and constitutional guaranties. 12 C. J. 934.

It is indeed interesting to observe, in legislation, the application, and in judicial interpretation, the recognition in increasing degree, of the police powers of the state, to alleviate the conditions and results that flow from the modern employment in the business world.

With seeming reluctance and hesitation, yielding step by step to the demands and necessities of the modern environment, has the legislative expression, as well as the judicial interpretation, abandoned or deemed it proper to recognize innovations upon the settled common-law principles applicable in the relation of employer and employee when the latter was injured.

Within recent years, in fact, within the last decade, the police powers of the state, as well as Federal legislation, has been applied to the problem of adequately enacting legislative rules and regulations for the protection of workmen. Now in a large number of states compensation acts of various kinds have been enacted, proceeding in the beginning, more upon the elective or even private insurance plan to the later and now increasing compulsory state insurance plans. It is no longer questioned that the state, in the exercise of its police power, has ample authority to establish by legislation departures from the old common-law principles affecting the employer's liability, and to substitute rules and regulations for the compensation of personal injuries that may be sustained by employees in the business of his master. The demand of the public has been insistent and increasing for the exercise of this police power as a matter of public policy and justice in the business world for both the employer and the employee. For several years commissioners on uniform state laws have been proposing and are proposing a uniform workmen's compensation act, compulsory in its features for all public industrial employment; also a

uniform act for compensation for occupational diseases incurred while in employment.

This police power was first seen in legislation and judicial interpretation concerning safety provisions and safety appliances acts for employees. Thence, in legislation and judicial interpretation, upholding abrogation of the common-law defenses for the employer, such as the fellow-servant rule and the comparative-negligence doctrine as applied to railroad employees engaged in extrahazardous callings. Thence, came along, with halting step almost, the early compensation acts, elective in principle, some supported by private casualty insurance, made persuasive for the employer by abrogating certain common-law defenses if he did not elect to comply. Now there is at hand state compulsory insurance acts. If the act involved differs from those of other states, such as, for instance, the Washington Act, it is a difference in the extent of its application to employments, not in principle.

It is needless to review or restate the reasons for the exercise of this police power. The adjudicated cases have stated them over and over again. It is interesting to note, however, the progressive judicial interpretation of the exercise of this police power, as a reasonable modern necessity, in a scant ten years, as disclosed in the celebrated Ives Case in New York, 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517, and as now stated in the last pronouncement of our United States Supreme Court in Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) decided on June 9, 1919 [250 U. S. 400, 63 L. ed. 1058, 6 A.L.R. 1537, 39 Sup. Ct. Rep. 553].

No longer is it regarded without the police powers of the state to provide for compulsory insurance to protect workmen and their families from the hazard of modern industry. No longer is it considered that mere novelty in legislation is a constitutional objection.

As stated in Arizona Copper Co. v. Hammer, supra: "Novelty is not a constitutional objection, since, under constitutional forms of government, each state may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several states; and it is to

be presumed that their legislatures, being chosen by the people, understand and correctly appreciate their needs."

The question occurs, What is the legislative policy as expressed in North Dakota? What is the public policy as disclosed by legislative enactment and the action of the people in regard thereto? Is there a demand and an expressed need, as a matter of public policy, for such exercise of the police power of the state? It is clear beyond peradventure that the legislative will of North Dakota has declared that the prosperity of the state depends upon the well-being of his wage workers, and of their securing, when injured in hazardous employment, sure and certain relief, regardless of the question of fault, and that the state should exercise its police and sovereign powers in that regard. This act was adopted by an overwhelming vote of both branches of the legislative assembly. The same legislative assembly adopted other acts which created new legislation establishing and providing for the establishment of a state bank, a state mill, state terminal elevator, and more legislation of a novel character; some of this legislation was referred to the people by referendum petitions. This legislation so referred, though novel in its character and entering perhaps somewhat upon experimental fields, was ratified and approved by the people as a whole. This Compensation Act enacted similarly at a time when these other acts were enacted, and also covering a wider field than heretofore under many compensation acts in other states, nevertheless was not questioned by the people of this state by any requirement that it be referred to and considered by the electors of this state at the poles. It may well be said, therefore, that the legislative policy, in the exercise of the police powers as stated in the act, meet with not only the approval quite unanimously by the legislators, but also with the approval of the majority of the people of this state.

But, again, it is argued that a proper exercise of the police powers does not warrant a legislative declaration that an employment is hazardous which in fact is nonhazardous.

The question of whether compensation insurance may properly cover nonhazardous employment, if they may be so termed, is not before this court. The act involved concerns hazardous employments; the act by definition defines the classes that fall within the term "hazardous

employments." The employment of the relator falls within the definition given. Strenuously the relator contends that his business is nonhazardous and his employees are without risk. In a manner, the relator assumes that the term "hazard" or "hazardous employments" must be referred to its application as formerly used in some compensation acts, where the hazard of the employee protected was extra, greater, or more exceptional than that which applies to an ordinary business or occupation. In ordinary acceptation or comprehension, a "hazard," whether applied to contract relation, personal relation, or to golf or gambling, means and covers a risk or peril assumed or involved. Simply because other compensation acts, pursuant to the demands of public policy in other states, have extended only to certain classified and stated employments, extrahazardous in their nature, furnishes no ground for the contention that "hazardous" means "extrahazardous," where the legislative intent is plainly to the contrary.

Can it plainly be held as a matter of law that the employees of the relator are under no hazard while employed? It is evident that, if one of such employees should be injured in the course of his employment, the relator, in an action brought against him for damages sustained, might or would have recourse to the common-law defense, that such employee assumed the risk incident to the business in which he was engaged.

As Justice Winslow has pointed out in Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649, there is now a vast difference between the simple risks involved in the relation of employer and employee in the business world when the common-law principles concerning the law of negligence came into recognition and the present day, intricate conditions of the modern world involving risks of every kind and character on every side of the employee while employed. In that case it is stated: "There are hazards in all occupations; indeed, they follow every man from the cradle to the grave. What constitutional requirement, either express or implied, clothes these court-made defenses with exceptional sanctity as to the less hazardous industries, and warns off from them the sacrilegious hand of the legislature? We are referred to none, and we know none."

Common observation, as well as ordinary reasoning, readily discloses that even the clerk or stenographer in the modern office engaged in the course of his occupation incurs risks vastly different than those applicable to similar situations in the comparatively similar business conditions that existed when the common-law principles concerning the law of negligence arose and were made applicable. Modern business conditions require a concentrated mind on the part of the employee on his work. His mind, instead of being required to be alert against dangers from without, is specifically required to be alert on the job.

His employment subjects him to possible risks on every side. It is possible to conceive that the employees of the relator are subject to risk not only from dangers within the modern office building while at work, from apparatus and instrumentalities used by the employee, but also from injuries that may occur proceeding from without, such as through faulty construction of the building, such as an injury that occurred in Chicago through a ship of the air crashing through the roof. His employee may be injured while on duty, wending his way through the crowds on the street or while ascending to his work on the elevator. It is no answer to state that this might likewise occur to one who is not so engaged or employed. It may likewise occur to one who is not engaged in an extrahazardous employment. It therefore is not within the province of this court to state as a matter of law that the employment of the relator is nonhazardous which the legislature has declared to be hazardous. As a matter of law this court is not in the position to declare that it is not within the legislative province to classify the business of the relator as possessing elements of hazard. By so doing the right is not necessarily taken away on the part of the relator to prove that in fact his specific business is not hazardous. There is no issue of fact before this court concerning this question. It appears, therefore, that the police powers of this state has been extended in the compensation act for the purpose of covering and protecting employees from injuries sustained in a hazardous employment, and that as a matter of public policy there is a well-recognized demand and need for legislation in this state through the exercise of such police powers, to cover employment as defined by the legislative will which are presumptively hazardous as a matter of law. The pertinent question

now presented to this court is whether such police power so exercised, as it effects the relator, runs contrary to the constitutional safeguards and inherent rights of the relator contained either in the Federal or state Constitution.

It is the undoubted duty of this court to uphold the constitutional rights of the relator, and to nullify the exercise of such police power if it has been so exercised unreasonably and arbitrarily as to interfere with relator's constitutional rights.

It is entirely unnecessary to review at length the adjudicated cases concerning the extent of the exercise of this police power with reference to such constitutional guaranties.

In the last expression of our United States Supreme Court in Arizona Copper Co. v. Hammer, 250 U. S. 400, 63 L. ed. 1058, 6 A.L.R. 1537, 39 Sup. Ct. Rep. 553, Justice Pitney has summarized, upon a review of the decisions, the principles of law that apply, by the following statement: "These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee, arising in the course of the employment, are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another, and respecting contributory negligence and assumption of risk, are subject to legislative change."

In this regard, in applying a rule of interpretation Judge Winslow in Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649, has stated as follows: "When an eighteenth century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes."

In the light of these principles and disclosed legislative and public

policy, this court does not deem the act so arbitrary and unreasonable in its application to the employee of the relator as to be termed violative of relator's constitutional rights under the due-process clauses of either the Federal or the state Constitution. The fact that the act is compulsory as to the relator is no ground of objection. The relator has no vested rights in the common-law defenses. Hawkins v. Bleakly, 243 U. S. 213, 61 L. ed. 683, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959. The fact that liability without fault is created is neither novel nor subject to constitutional objection. New York C. R. Co. v. White, 243 U. S. 204, 61 L. ed. 675, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1065, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886. The act in terms confers a benefit upon the relator, for it relieves him from any liability for injuries that may be sustained by his employees during the course of the employment, if he subjects himself to the act. For him the act sets aside one body of rules and establishes another system of rules in lieu thereof. Arizona Copper Co. v. Hammer, supra. As against the contention that the act imposes a liability upon the relator concerning an employment wherein there is neither danger nor hazard, and therefore subjects his property to a taking without due process of law as well as being discriminatory and denying the equal protection of the laws, this court is not prepared to say as a matter of law that the legislative policy stating the employment of the relators to have therein elements of danger and hazard is so unreasonable and arbitrary that it should be considered violative of relators constitutional rights, in an absence of a showing of fact that such employment is in fact neither dangerous nor hazardous. Relator makes no complaint that the classification made or the rate prescribed by the bureau is unjust and unreasonable by relation to other employments. Necessarily the legislative branch must be allowed a wide latitude in determining what employments shall be included and the rates for each. When the acts of that branch become unreasonable and arbitrary, it then only becomes the duty of the courts to declare them beyond legislative authority. Jeffrey Mfg. Co. v. Blagg, 235 U. S. 577, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570.

The act is not subject to the constitutional objection that it interferes with the freedom of contract. The new statutory liability imposed in no manner affects the right of the relator to make a lawful contract with his employees. It is wholly proper that the legislature, in the proper exercise of its police power, prohibit the relator from contracting against his statutory liability, the same as heretofore it has provided with contracts against one's negligence. New York C. R. Co. v. White, 243 U. S. 207, 61 L. ed. 676, L.R.A.1917D, 1, Ann Cas. 1917D, 629, 13 N. C. C. A. 943; Mountain Timber Co. v. Washington, 243 U. S. 246, 61 L. ed. 700, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1049, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886.

Likewise, in view of the interpretation given to the act, the constitutional objection made concerning the title of the act is untenable.

The fact that the act excludes from its operation domestic and agricultural employees, as well as railroad employees, does not give rise to the constitutional objection of unreasonable and arbitrary discrimination as a matter of law. The fact that the entire field subject to regulation has not been covered is not fatal. What trades and occupations may be regulated is ordinarily a matter for the legislature, in the absence of a distinctive showing of an unreasonable and arbitrary discrimination or classification. Similar exclusions in other compensation acts have been upheld. Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1054, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886; New York C. R. Co. v. White, 243 U. S. 208, 61 L. ed. 677, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 576, 59 L. ed. 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Matheson v. Minneapolis Street R. Co. 126 Minn. 286, L.R.A.1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871. See L.R.A. 1917D, 53, note.

Likewise the constitutional objection is untenable that the act improperly delegates judicial powers to the bureau to fix and prescribe rates. L.R.A.1917D, 55.

It therefore follows that the terms of the act are not vulnerable to

the constitutional objections as raised by the relator. The petition of the relator is accordingly dismissed.

GRACE, J., concurs.

BIRDZELL, J. In this matter I have the gravest doubt as to whether this court should exercise jurisdiction to determine the issues raised upon the plaintiff's complaint. The plaintiff's counsel very frankly state that the petitioner and those similarly situated, and his and their counsel (although who the latter are does not appear), are not before this court merely with a lawsuit, and that they do not desire to merely argue a case, but that they are rather desirous of presenting certain important legal questions. This frank statement by counsel, it seems to me, amounts almost to an admission that this suit was begun for the sole purpose of testing the constitutionality of a law, rather than for the purpose of vindicating or establishing a right of a client in a controversy wherein that right might be more or less jeopardized by a certain law.

There are certain elements in the case which strongly suggest that the suit is merely a friendly one, framed without the active participation of representatives of the state or the workman's compensation bureau, for the purpose of testing the constitutional validity of the Compensation Act as against certain specified objections. Litigation of this character should not be encouraged, and, in my judgment, deserves the condemnation applied to such an attempt by Mr. Justice Brewer in Chicago & G. T. R. Co. v. Wellman, 143 U. S. 343–345, 36 L. ed. 179, 180, 12 Sup. Ct. Rep. 400, when he said: "It was never thought that by means of a friendly suit the party beaten in the legislature would transfer to the courts an inquiry as to the constitutionality of the legislative act."

An examination of plaintiff's brief discloses that the principal attack upon the law is based upon its alleged violation of the Federal Constitution. A Federal question is thus presented upon which the decision of this court would not necessarily be final, and to refrain from taking such action as would enable the parties to test before the proper Federal tribunal the validity of the act under the Federal

Constitution would be to place an obstruction in the path of one who may in good faith desire to have a determination of his cause in the only court that can ultimately determine it according to law. For this reason I am unwilling to dispose of the case on the ground that the plaintiff does not properly invoke the provisions of the Federal Constitution. I am content to leave such questions for the solution of the tribunal that may or may not choose to make them decisive, and shall pass presently to the questions upon which our opinion is required.

The main question, then, is the Federal question. Does the act under consideration deprive the plaintiff of liberty or property without due process of law? Before passing to a discussion of this question it seems necessary to observe that the plaintiff's counsel do not complain of any rate that has been prescribed by the bureau as being excessive. The objection goes wholly to the question of the power to prescribe any rate that shall be applicable to the plaintiff as an employer. It is said not to be a question of dollars, but rather a question of right, and that the plaintiff has the same constitutional protection for $1 or the few dollars involved in the premium charge that he would have for a thousand. This, of course, is true, but it is to to be borne in mind that it characterizes the plaintiff's attack and limits it to the *power* of the state to prescribe any rate according to which he may be compelled as an employer to contribute to an insurance or compensation fund for employees, applicable to reimburse them for injuries which they may sustain in connection with their employment. It is contended, in short, that the plaintiff's business is not hazardous, and that he cannot be compelled to insure against the consequences of accidents to his employees. It is conceded that the plaintiff is within the definition of hazardous employment as prescribed in the law, but it is argued that legislative fiat cannot make an employment hazardous that is not in fact so. Whether or not the definition employed in the act be a mere concession to the basis upon which compensation acts have been judicially upheld, we need not inquire. This case properly turns upon the underlying principle upon which similar laws have been sustained, and not upon any terminology that

might be more or less accidental due to the phraseology of the laws under consideration in other cases.

Neither is the question presented that this act is unconstitutional, as involving arbitrary classification as between the plaintiff and other employers who are not brought within its terms; that is, employers of domestic labor, agricultural labor, and operatives of steam railways. No distinction in fact is attempted to be drawn between the law in question and other laws of similar character that have been upheld as against the contention that they involved arbitrary classification, discrimination, delegation of legislative or judicial power, or lack of uniformity. Our attention is directed primarily and almost exclusively to the question as to the right of the legislature to require employers such as the plaintiff to contribute to an insurance fund for the benefit of employees injured in the course of their employment.

In considering this question as primarily a Federal question, there is little need to go beyond the last expression of the Supreme Court of the United States. In the case of Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 6 A.L.R. 1537, 39 Sup. Ct. Rep. 553, that court sustained an employer's liability law of the state of Arizona which imposed liability upon the employer for death or injury caused by any accident arising in the occupation *regardless of fault on the part of the employer.* This statute clearly changed the rule of common-law liability, and gave the employer no reciprocal advantage, as his liability was unlimited. (The law under consideration here gives for the premium a reciprocal advantage to employers. It relieves them from further liability.) In answer to the suggestion that the Arizona act might be extended by construction to nonhazardous occupations, it was stated in the main opinion by Mr. Justice Pitney: First, that the occupations in which the actions arose were indisputably hazardous, and hence the defendants had no right to raise the question; and, second, that employers in nonhazardous occupations were in little danger from the act, as it imposed liability only for accidental injuries attributable to the inherent dangers of the occupation. It was not indicated to what extent the judiciary could properly go in determining what was or was not a hazardous occupation, but the implication from the sec-

ond answer is that any employment in which an accident occurs might be considered ipso facto hazardous to that extent and the employer be made liable without fault. Similarly, it might be suggested here that, inasmuch as the employer raises no question upon the *amount* of premium he is required to pay, the premium must be assumed to have been fairly apportioned to whatever risk there may be in the particular employment.

The dissenting members of the United States Supreme Court, without exception, regard the logic of the majority opinion as supporting the proposition that the element of hazard in the employment, as the term is commonly understood, is not essential to the validity of legislation which in one form or another fixes a liability upon the employer without his fault. In fact Mr. Justice McKenna not only proposes the query as to whether the logic of the majority will support an extension of the principle to nonhazardous employments, but he suggests that the very act in question in that case applies to all manufacturing without qualifying words which would distinguish between hazardous and nonhazardous manufacturing. And Mr. Justice McReynolds asserts in his opinion that the grounds suggested to support the Arizona statute "amount in substance to asserting that the legislature has power to protect society against the consequences of accidental injuries, and therefore it may impose the loss resulting therefrom upon those wholly without fault, who have afforded others welcomed opportunities to earn an honest living under unobjectionable conditions." It seems to me that these interpretations of the majority opinions are inescapable. If correct, the highest judicial authority has given its sanction to a construction of article 14 of the Federal Constitution that permits the states to establish at the expense of employers insurance funds to compensate for all occupational casualties resulting in injury or death to employees.

From the standpoint of the public welfare or the individual welfare of the employee or his dependents, it is indeed difficult to see why lines of demarkation should be drawn, except for purposes of practical administration, on the mere estimate of probable casualties, excluding employments showing slightly fewer casualties than a basic minimum. To my mind it seems wholly unimportant whether the

legislature or the bureau employs a definition that will be applicable to an employer in an industry in which it may safely be estimated from statistics that within a given time one in one hundred employees will be killed and three injured, or whether the definition be one applicable to an industry or employment in which the estimate be one and three, respectively, in a thousand or ten thousand. There would be ten and one hundred times the hazard, respectively, in the latter cases that there is in the first. From the standpoint of the public or of the dependents of the employee who happens to be the one in a thousand, there is no logical basis for distinction. Granted the constitutional power of the legislature to provide insurance at the expense of employers for the benefit of employees, is it for the courts to say with what occupations the legislature shall stop or what degree of hazard there must be in a particular employment to enable the legislature to authorize the inclusion of the employees? Of course it is assumed that an appreciable hazard must exist, and that reasonable and appropriate measures are provided to effect the desired end. But beyond this the matter would seem to be entirely for the legislature. And in providing measures, shall the legislature be confined to unbending definitions, or is there room for a policy that will admit of greater flexibility of application as experience demonstrates the need?

Counsels' argument that the legislative definition amounts to a legislative fiat declaring an employment to be hazardous that is not in fact so ignores the operative plan of the law. The plaintiff is not injured by a mere definition. A rate must first be promulgated applicable to him, and this can only be done after the classification of employments with respect to hazard is made by the bureau under § 7 of the act. Presumably this has been done. If the plaintiff's constitutional rights have been violated, therefore, they have been violated by the bureau, but yet we are not asked to review this action.

The bureau, acting under the section referred to, could clearly determine that there is no hazard in a particular employment and consequently no premium payable. They could determine, possibly with a fair degree of accuracy, based upon experience, the degree of hazard involved in employments that are commonly regarded as involving no particular element of danger. Methods of accounting and compilation

of statistical data are directed which should tend to greater accuracy in this respect. We cannot assume that the bureau has not been or will not be guided by such experiences as have a proper bearing on the question of rates. It follows from this that the property of the plaintiff is not taken without due process so long as the rate demanded is based upon a real hazard and properly prorated. If the plaintiff desires to raise an issue of fact as to the findings of the bureau in this respect, such proceedings should be had as would put the court in a position to ascertain the fact. It is clear, then, that the legislative definition of hazardous employment does not of itself obligate the plaintiff to contribute to the fund, and it must be assumed that the bureau has or will do its full duty. At any rate this court cannot take judicial notice that its findings are or will be erroneous.

Upon the question as to whether the subject of the act is expressed within the title within § 61 of the state Constitution, it seems to me that it is entirely clear that the subject is adequately expressed.

For the foregoing reasons I am of the opinion that the relief prayed for should be denied. In view of the fact that a majority of the court does not adopt any opinion as expressing the views of the court, I may properly add that I do not agree to the syllabus, except to the extent indicated in the foregoing opinion.

CHRISTIANSON, Ch. J. (concurring specially). The relator has applied to this court for a prerogative writ to enjoin the members of the workmen's compensation bureau from establishing the workman's compensation fund, and from assessing, levying, or collecting any premiums from the petitioner and others similarly situated. The application is made by the relator as a citizen and taxpayer of the state, and as an employer of office clerks and stenographers, after the refusal of the attorney general of the state to institute the proceeding, or permit it to be instituted in his name.

The Workmen's Compensation Act became effective March 5, 1919. By its terms $50,000 (or so much thereof as might be necessary) was appropriated from moneys in the general fund of the state to put the act into effect, with the proviso that the workmen's compensation bureau should reimburse the general fund of the state for all moneys

expended out of such appropriation from moneys collected under the provisions of the act. In due course the act was put into operation, the members of the workmen's compensation bureau were appointed, and they entered upon the discharge of their duties. Office and office equipment were procured; clerks, stenographers, and other assistants employed, and the expense incident thereto paid out of the moneys appropriated by the legislature for that purpose; premiums have been collected from a large number of employers, and claims filed by injured employees, and action taken thereon by the bureau. Sufficient moneys have been collected under the act so that the bureau is not required to expend any more of the moneys appropriated by the legislature, but, on the contrary, stands ready and willing to reimburse the general fund of the state for all moneys expended out of the appropriation. All this has occurred without any attempt on the part of the relator or anyone else to question the validity of the act. This is not a proceeding, therefore, to prevent the expenditure of state funds in putting an unconstitutional law into operation, nor is it a proceeding to prevent an unconstitutional act from being put into operation at all; but it is rather one to intercept and stay official action under an enactment which has been in full operation for some time.

The relator does not contend that the bureau has attempted to collect any premium from him, or in any other manner sought to compel him to comply with the law, or to apply any of its provisions to him. The respondents, on the other hand, expressly aver that no such attempt has been made. The relator, therefore, has hardly shown any such state of facts as would entitle him to maintain an injunctional action in his own behalf against the workmen's compensation bureau. For "courts, as a rule, will not interfere with the duties of any department of government unless under special circumstances and when necessary to the protection of rights of property." 14 R. C. L. p. 434. "The mere fact that a law is alleged to be unconstitutional does not confer jurisdiction on courts to interfere with the acts of executive officers while proceeding in pursuance of its requirements. The duty of the court is to determine actual controversies, when properly brought before it, and not to give opinions on mooted questions or abstract propositions. Before it can assume to determine the constitutionality of

a legislative act, the case before it must come within some recognized ground of equity jurisdiction, and present some actual or threatened infringement of the rights of property on account of such unconstitutional legislation, and where it is apparent that the remedy at law is adequate relief will be refused." 14 R. C. L. pp. 435, 436. See also 6 R. C. L. pp. 76, 77; 12 C. J. p. 783, § 214; Cooley, Const. Lim. 7th ed. pp. 213 et seq.

But, of course, the private rights of the relator are not material except as they may or may not appeal to the court in considering whether the relator should be given leave to institute and prosecute the proceeding. For it is well settled that the original jurisdiction conferred upon this court by § 87 of the Constitution was not conferred for the benefit of private suitors, or to vindicate merely private or local rights. It is a prerogative jurisdiction. It may be invoked only where the general interest of the state at large is involved in some way. "A case involving a mere private interest, or one whose primary purpose is to redress a private wrong, will not be entertained." State ex rel. Bolens v. Frear, 148 Wis. 456, 499, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147. The original jurisdiction "is not only limited to prerogative writs, but it is confined to prerogative causes." Atty. Gen. v. Eau Claire, 37 Wis. 400, 443. The people in their Constitution conferred this great power upon this court, that it might be used in their behalf to protect the sovereignty of the state and the liberties of the people. This principle was announced in the early history of this court, and has been steadfastly adhered to. As was well said by this court, speaking through Chief Justice Morgan, in State ex rel. Steel v. Fabrick, 17 N. D. 532, 536, 117 N. W. 860: "These sections [of the Constitution] have been under consideration in many cases by this court. From these cases it is established without dissent that the jurisdiction is not to be exercised unless the interests of the state are directly affected. Merely private rights are not enough on which to base an application for the issuance of original writs by this court. The rights of the public must appear to be directly affected. The matters to be litigated must not only be publici juris, but the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people, must be affected. Before the

court will, in the exercise of its original jurisdiction, issue prerogative writs, there must be presented matters of such strictly public concern as involve the sovereign rights of the state, or its franchises or privileges."

In the case at bar the chief law officer of the state refused to institute the proceedings. He appeared as attorney for the respondents. Under the circumstances I do not believe that a private relator should be granted leave to institute this proceeding. Anderson v. Gordon, 9 N. D. 480, 52 L.R.A. 134, 83 N. W. 993; State ex rel. Byrne v. Wilcox, 11 N. D. 336, 91 N. W. 955. For these reasons do I concur in a dismissal of relator's petition, but express no opinion upon the propositions discussed in the other opinions filed in this case.

ROBINSON, J. (dissenting in part). Within the past ten years many of the states have passed workingmen's compensation or wage earners' accidental insurance acts, which have been well sustained and approved by the courts. In this case it would be easy to write a book by quoting freely from the numerous statutes and decisions on workmen's compensation acts, or, more properly, wage earners' accidental insurance acts; but, so far as known to the writer, the decisions have little bearing on our act, because it is so different from the other acts.

The compensation or insurance act is to be liberally construed: Its purpose is beneficent and remedial and within the scope of proper state legislation. The purpose of such an act is to make a business that is hazardous and dangerous bear the inherent risks of personal injury arising in the course of the employment, regardless of ordinary negligence; also, to do away with long-continued and vexatious litigation and the exorbitant claims of personal-injury lawyers, who commonly take half the sum recovered, as if they had sustained half the injury. Then, as it were, they move heaven and earth to procure a verdict and to sustain it, and often stand in the way of a settlement of great benefit to the injured party.

The relators show they employ only two persons in the capacity of typewriters, and that the occupation is in no way dangerous or hazardous, and that the same is true of all the ordinary clerical occupations, and that on all such occupations the bureau has levied and demanded

a tax or premium for risks which do not exist, which is the taking of property in an arbitrary manner and without due process of law. The most material parts of the act in question and its title are as follows:

The title: An Act Creating the Workmen's Compensation Fund for the Benefit of Employees Injured and Dependents of Employees Killed in Hazardous Employment.

Sec. 2. Hazardous employment means any employment in which one or more employees are regularly employed in the same business or in or about the same establishment, except agricultural, domestic service, and common carriers by steam railroads.

Sec. 3. That from and after July, 1919, it shall be the duty of the workmen's compensation bureau to disburse compensation from the workmen's compensation fund to any employee subject to the act for injuries arising in the course of his employment.

Sec. 5. In the month of July of each year every employer carrying on a hazardous employment, as defined by this act, shall mail to the bureau a statement giving the number of his employees, the kind of employment, and the wages paid to each of them.

Sec. 6. Every employer subject to this act shall pay annually to the bureau the amount of premium determined and fixed by the bureau, the amount to be determined by the classification, rules, and rates *made and published* by the bureau.

Sec. 9. Employers who comply with this act are not liable to damages for any injury or death of their employees.

We should note well that no amount is payable until the rules and rates have been "made and published," and thus far no rates have been published. However, it is true the bureau has employed a party from Ohio to make the rates for $3,600, and to give advice concerning the same for $1,500 a year. He has made about 1,400 different rates, which the bureau has adopted and kept without publishing the same, though it has collected about $500,000.

In the state of Washington there are forty-two classes of rates fixed by statute and expressed by figures indicating a decimal part of the pay roll. 3 Rem. & Bal. Code, § 6604. The rates are classified and expressed thus:

Tunnels; bridges; ditches; sewers; house moving; house wrecking	.065
Iron and steel frame structures	.080
Shaft making	.060
Carpenter work	.035

In that way any hazardous industry is charged with a specific rate, which is not left to the conjecture of any expert or bureau.

In Washington each rate commences with a decimal .0, which means that the premium is less than 1 per cent of the pay roll, but in North Dakota the rates are much higher than in Washington, and not one of the 1,400 rates commences with a decimal .0. Here are a few specimens of the North Dakota rates on the pay roll.

Coal mining, lignite	4.95
Carpenter work—in shop	2.13
" " —out of shop	4.35
Newspaper offices	.40
Stores, wholesale and retail	.60
Insurance agencies	.65
Clerical and office employees	.20
Hotels	.85
Restaurants	.70
Domestic service	.70

The principal objection to the act in question and the procedure under it are as follows:

(1) The title of the act relates only to hazardous business. Hence, so far as the act relates to a nonhazardous business, it is not within the title. In the body of the act the word "hazardous" is given a meaning unknown to the English language. It defines the words "hazardous employment" to mean any employment in which one or more persons are regularly employed in the same business or establishment, with the exception of agriculture, domestic service, and steam railroads; but as there can be no employment in which there is not one or more persons, the act does, in effect, declare that every employment is hazardous, with the exceptions stated, which declaration is absurd. Section 61 of the Constitution makes the title of paramount impor-

tance. Its function is to indicate to the public and the legislature the subject of the legislation contained in the act. The words used in the title cannot be varied or changed by reference to the body of the act. Erickson v. Cass County, 14 N. D. 494, 92 N. W. 841. In the title of an act the legislature must use English words in their ordinary and accepted meaning. They may not use Greek or Latin and then explain the words in the body of the act.

(2) Now the Constitution provides all laws of a general nature must have a uniform operation. § 11. The act in question is of a general nature and its operation is not uniform. It excepts agriculture, domestic service, and steam railroads. It was passed by a farmer legislature, which did not care to impose on themselves the burdens of compulsory insurance for their employees. It is an act for the cities, and not for the country. The farmer legislature had no interest in the rates, and hence the rate-making power was delegated to a bureau, and it let out the job to a nonresident, who had no interest in the rates only to make them in keeping with his compensation of $5,100. Under the liberal power given by the statute the bureau might have fixed the compensation at $30,000 or $40,000. However, this court has held void a statute giving the secretary of state power to use all the motor vehicle tax for its collection. State ex rel Fargo v. Wetz, 40 N. D. 299, 5 A.L.R. 731, 168 N. W. 845.

(3) Under the statute the ratemakers do act as lawmakers, and levy a tax on a large class of persons without giving them a hearing, and the rates made are, to a large extent, arbitrary. To impose excessive rates for insurance against real hazards or to impose any rates or premiums when there is no hazard is to impose a burden without a corresponding benefit; it is to take property without due process of law. To hold otherwise would be to put the employers at the mercy of the ratemakers, and to subject them to loss of property without due process of law, for if a bureau can fix a rate at twice the amount of a just premium, why not ten times the amount; where is the line of limitation?

In this case special complaint is made of rates fixed on occupations in which there is no inherent risk, the service of typewriters, ordinary clerical help, domestic service, and service in hotels and restaurants;

and it appears that the rates for hotels and restaurants are nearly 1 per cent of the pay roll, which is the powder-making rate in Washington. As the business involves no material risk, the rate serves no purpose only to give an excuse for reducing wages and charging exorbitant prices, such as, 10 cents for a cup of tea, coffee, or milk. It gives an excuse for profiteering. We must hold that when power is given to any board without special limitation, the law does always imply a condition that the power must be used in a just and reasonable manner. The legislature itself does not possess arbitrary power to levy a tax or to deprive any person of property, and of course it cannot delegate such power to any board or person.

As the chief reason for state insurance is that it may carry the risk for less than private companies, the state rate must be excessive when it is higher than that of solvent corporations. In this case it does not seem necessary to hold void the Workmen's Compensation Act, but in regard to proceedings under the act the court should hold and adjudge:

(1) That, without first making and publishing a schedule of rates, the bureau has no authority to demand, receive, or collect any money from any party.

(2) The schedule of rates must be just and reasonable, and not arbitrary, excessive, and vexatious.

(3) In ordinary clerical service, in domestic service, in ordinary hotel and restaurant service, there is no inherent and material risk, and hence there is no reason for any insurance or premium on the business.

UNION NATIONAL BANK OF MINOT, NORTH DAKOTA, a Corporation, Respondent, v. WESTERN BUILDING COMPANY, a Copartnership Consisting of Andrew Person, J. H. Jenson and C. M. Knudson, and Andrew Person, J. H. Jenson, and C. M. Knudson, Appellants.

(175 N. W. 628.)

Partnership — membership in firm question for jury.

1. It is *held* for reasons stated in the opinion that there was sufficient evi-

dence to require submission to the jury of the question whether the defendant, Person, was a member of the Western Building Company, a fictitious copartnership, and as such liable upon notes given by that company to the plaintiff bank.

Evidence — pleading competent as an admission against the party.

2. It is not necessary to the competency of a pleading, as an admission against the party, that it be one filed in an action between the same parties. A pleading filed in any action is competent against the party if he signed it, or otherwise acquiesced in the statements contained in it, if such statements are material and otherwise competent as evidence in the cause on trial, not by way of estoppel, but as evidence, open to rebuttal, that he admitted such facts.

Judgment — not binding on strangers.

3. A judgment binds only parties and privies, not strangers to it. Against strangers, it is not evidence to prove any of the facts upon which it was rendered.

Opinion filed November 17, 1919.

From a judgment of the District Court of Ward County, Honorable *K. E. Leighton,* Judge, the defendant, Person, appeals.

Affirmed.

Theodore Koffel and *H. L. Halvorson,* for appellant.

The judgment and record was admissible as evidence particularly after the court had allowed evidence to go in of the reputation of the alleged firm. Jones Ev. 2d ed. § 588; 10 R. C. L. § 223; 15 R. C. L. §§ 482, 488; Bow v. Allenstown, 69 Am. Dec. 489; Vaughan v. Phebe, 17 Am. Dec. 770.

The court erred in its instructions to the jury in commenting upon the evidence, and in unduly expressing and emphasizing the liability or supposed liability of the defendant Andrew Person. Lee v. First Nat. Bank, 11 L.R.A. 283 and note; Sodiker v. Applegate, 49 Am. Rep. 252; Buzzard v. Bank v. Greenville, 60 Am. Rep. 7; Beecher v. Bush, 40 Am. Rep. 465, 7 N. W. Rep. 785; 30 Cyc. 479, 508; Mitler v. Simpson, 18 L.R.A.(N.S.) 963, and note, particularly pages 994 and 1071; Wooley v. Plaindealer Pub. Co. 5 L.R.A.(N.S.) 503 and note; Wilkinson v. Lincoln, L.R.A.1918E, 909 and note on page 912; Benson v. Post, 9 N. W. 684.

Fisk & Murphy, for the respondent.

Less proof is required to establish partnership in an action against alleged parties than in an action between the parties themselves. Frankel v. Hiller, 16 N. D. 387, 113 N. W. 1067, 15 Ann. Cas. 265.

The firm was clearly bound by the notes. Inmann v. Brookman, 133 N. W. 811; Comp. Laws 1913, §§ 6319, 6385.

CHRISTIANSON, Ch. J. The plaintiff brought this action to recover upon two promissory notes alleged to have been executed and delivered to it by the defendants Andrew Person, J. H. Jenson, and C. M. Knudson, doing business as a copartnership under the firm name of Western Building Company. The defendants Jenson and Knudson defaulted. The defendant Person appeared and answered. He denied that he was a member of said firm, or that he ever had been a partner of the codefendants, Jenson and Knudson. The case was submitted to the jury upon the issues thus framed. The jury returned a verdict for the plaintiff, and the defendant Person has appealed.

The defendant contends that the evidence was insufficient to sustain the verdict, and that the trial court erred in denying his motion for a directed verdict.

A careful consideration of the evidence brings us to the conclusion that the question whether Person was a member of the Western Building Company was one for the jury.

It appears that in August, 1915, the three defendants entered into an agreement with the plaintiff bank whereby they agreed to make certain alterations in the bank building of the plaintiff. The bid for this work was made in the name of the Western Building Company, but the written contract under which the work was performed was executed in the name of Knudson, Jenson, & Person by Carl M. Knudson. It was also signed by the three defendants individually.

The cashier of the plaintiff bank testified that before the contract was executed he had a conversation with the defendants with respect to the Western Building Company; that all three of the defendants were present at the time, and that during such conversation the defendant Person stated that he was a member of said Western Building Company. The cashier further testified that before the bank entered into any business relations with the defendants, inquiries were made

from commercial agencies and banks at Bismarck (where the defendant Person lives) with respect to the financial responsibility of the Western Building Company. The plaintiff offered in evidence certain business cards and letterheads of the Western Building Company on which the names of the three defendants appeared as members of the firm. The plaintiff also introduced in evidence certain written contracts entered into by the Western Building Company in May, 1916, for the construction of several different bank buildings. The contracts recited that they were entered into by "C. M. Knudson, J. H. Jenson, and A. Person, trading as copartners under the firm name of the Western Building Company."

The defendant Person in his testimony, admitted that a partnership arrangement existed between him and the other two defendants in regard to the contract with the plaintiff bank, but he contended that the partnership arrangement was limited to that contract. He also admitted that he knew of the existence of the letterheads on which his name appeared as a member of the firm, but claimed that he had instructed the codefendants not to use such letterheads. He admitted, however, that he used some of them himself in his business at Bismarck at a time when he had no letterheads of his own. Person denied that he had any interest in the contracts entered into in May, 1916, and claimed that his only connection therewith was that he assisted Knudson and Jenson to obtain the bonds required by the parties for whom the buildings were being constructed.

The notes sued upon are dated respectively October 2 and October 22, 1917, and it is contended by the appellant that in any event the partnership had ceased to exist prior to that time. It appears, however, that in August, 1916, the three defendants gave their notes to the plaintiff bank for the aggregate sum of $2,000. These notes were signed by all three defendants. The cashier of the plaintiff bank testified that the proceeds of that loan was credited to the account of the Western Building Company; and Knudson testified that such moneys were disbursed by the firm in payment of materials and labor. The cashier of the bank further testified that the notes given by the defendants in August, 1916, were renewed in all six different times, and that the notes sued upon in this action to a large extent represent

a renewal of the notes given in 1916. The cashier of the plaintiff bank further testified that during the time such renewal notes were taken, and in fact up until and after this action was instituted, the bank had no knowledge either that the defendant Person claimed that his interest in the firm was limited to a specific transaction, or that he claimed to have severed his connection with the firm. He further testified that the credit extended to the Western Building Company by the plaintiff bank, both originally and by way of renewal, was extended in reliance upon the fact that the defendant Person was a member of such firm.

The defendant Knudson testified positively that Person was a member of the firm from the time the contract was made with the plaintiff bank in August, 1915; that he was a member at the time the contracts were made in May, 1916, and in fact that the partnership relation had continued from 1915, and had never been terminated.

Under our laws "every general partner is agent for the partnership in the transaction of its business and has authority to do whatever is necessary to carry on such business in the ordinary manner and for this purpose may bind his copartners by an agreement in writing." Comp. Laws 1913, § 6403. And "every general partner is liable to third persons for all obligations of the partnership jointly with his copartners." Comp. Laws 1913, § 6410. And "any one permitting himself to be represented as a partner, general or special, is liable as such to third persons to whom such representation is communicated, who on the faith thereof give credit to the partnership." Comp. Laws 1913, § 6412. "If no term is prescribed by agreement for its duration, a general partnership continues until dissolved by a partner or by operation of law." Comp. Laws 1913, § 6414. But "the liability of a general partner for the acts of his copartners continues, even after the dissolution of the partnership, in favor of persons who have had dealings with and given credit to the partnership during its existence, until they have had personal notice of the dissolution. . . ." Comp. Laws 1913, § 6418.

It seems too clear for argument that under the evidence in this case, and the laws applicable thereto, the trial court ruled correctly when it refused to direct a verdict in favor of the defendant, and that the jurors had ample evidence before them to justify their finding.

Appellant also predicates error upon the admission of evidence. As already stated, the defendant Person denied that he had any interest in the buildings which the Western Building Company contracted for in May, 1916, or that he was in any manner a partner as to those contracts. Thereafter, during cross-examination of Person, plaintiff's attorney identified and introduced in evidence an answer, which had been interposed by the defendant Person, in an action that had been brought and was then pending against the defendants as copartners under the firm name of Western Building Company, wherein there was a specific admission that the three defendants were associated together under the firm name and style of Western Building Company for the purposes, among others, of constructing the buildings contracted for in May, 1916. Appellant contends that it was error to admit the admissions contained in the answer. It is well settled that such admissions are admissible. 1 Enc. Ev. 425; O'Riley v. Clampet, 53 Minn. 539, 55 N. W. 740. The admission in the answer was at variance with the testimony of the defendant in this case, and had a direct bearing upon the question whether the moneys loaned by the plaintiff to the Western Building Company was loaned to a firm of which defendant Person was a member. There was no contention that the admission in the answer was conclusive, and defendant's counsel was permitted to testify and fully explain the conditions under which the answer was prepared, and how the admissions happened to be made. He was further permitted to testify that he had prepared and intended to serve an amended answer withdrawing the admissions made, although he admitted that such amended answer had not been served or filed.

Defendant also assigns error upon the exclusion of evidence. It appears that one Hagan had brought action against the Western Building Company, and that judgment had been rendered therein in favor of the defendant Person. At least that is the contention of appellant's counsel. We have no means of knowing what the judgment was, or what the issues in the case were. Defendant did not offer the judgment roll in the action, but offered merely the judgment. The judgment is not contained in the record. In these circumstances there is nothing before us for review. It seems clear, however, that the judgment

could in no event have been admissible in this action. The liability of the defendant in this case depended upon the facts shown by the evidence in this case, and not upon what might have been shown or found in some other case between different parties. The plaintiff was in no manner a party to the Hagan case, and so far as the record shows had no knowledge either of the transaction involved therein or the proceeding had in the action. Manifestly the recitals in the judgment in the Hagan case would not blind the plaintiff in this case nor could they have any effect upon the obligations of the parties to this action. "Upon established principles, a judgment binds and is admissible against parties to the suit in which it is rendered; and privies are, of course, bound, as they are the representatives of the real parties; but beyond these a judgment *in personam* is evidence only of the fact of its own rendition; *it may not be introduced to establish the facts upon which it has been rendered.* It is an axiom of the law, that no man shall be affected by proceedings to which he is a stranger—to which, if he is a party, he must be bound. He must have been directly interested in the subject-matter of the proceedings—with the right to make defense, to adduce testimony, to cross-examine the witnesses on the opposite side, to control in some degree the proceeding, and to appeal from the judgment. Persons not having these rights are regarded as strangers to the cause." 10 R. C. L. pp. 1116, 1117, § 323. See also O'Riley v. Clampet, 53 Minn. 539, 55 N. W. 740.

Upon the record before us there is nothing to indicate that the defendant did not receive a fair trial. We find no reason for disturbing the judgment.

Affirmed.

BRONSON, ROBINSON, and BIRDZELL, JJ., concur.

GRACE, J., concurs in the result.

FOSSTON MANUFACTURING COMPANY, a Corporation, Respondent, v. HENRY LEMKE, Appellant.

(175 N. W. 723.)

Depositions — in former action inadmissible unless parties and issues were the same.

1. A deposition is not admissible in an action unless it was taken in a former action where the parties and the issues were the same.

Witnesses — confidential communications to attorney inadmissible, although relation has terminated.

2. It is the duty of an attorney to maintain inviolate the secrets of his client; communications received in this relation are confidential; an attorney appearing for the adverse party to, and as a witness against, his former client, may not disclose such communications, over the objection of his former client.

Opinion filed November 24, 1919.

Appeal from order of District Court, Ramsey County, *Buttz*, J., denying judgment *non obstante*, or a new trial.

Reversed and new trial granted.

W. M. Anderson (*E. T. Burke* on oral argument) for appellant.

The court can take judicial notice of the records of the cases, when the cases at bar are founded upon them, when called on to do so. Danforth v. Egan (S. D.) 119 N. W. 1021; Butler v. Eaton, 141 U. S. 240; Avocato v. Dell' Ara (Tex.) 84 S. W. 444; People v. Ackerman, 146 Ill. App. 301; Bank v. Reed (Ill.) 122 Am. St. Rep. 66; Jones, Ev. p. 243.

"The pleadings in the case, or certified copies, are the best evidence of their contents." 10 Enc. Ev. pp. 816, 819; 17 Cyc. 500; Amundson v. Wilson, 11 N. D. 193.

It is common practice to admit in evidence the judgment roll of another action when it is relevant and material to prove or disprove the issues in the case. 10 Enc. Ev. pp. 758, 759; Rogers v. Riverside, 132 Cal. 9; Mason v. Pelletier, 77 N. C. 52; State v. Logan, 33 Md. 1.

NOTE.—On the question of admissibility of testimony or deposition given against same party in two actions, see note in L.R.A.1916A, 990.

The plaintiff has not alleged an estoppel, or set up any of the elements of an estoppel in his complaint, and to rely upon an estoppel this must be done. An estoppel must be alleged to be proved. Morris v. Ewing, 8 N. D. 99; Schofield v. Cooper (Iowa) 102 N. W. 110; McQueen v. Bank of Edgemont (S. D.) 107 N. W. 208; Saginaw-Suburban R. Co. v. Connelly (Mich.) 109 N. W. 677; Union State Bank v. Hutton (Neb.) 95 N. W. 1061; Pratt v. Hawes (Wis.) 95 N. W. 965; Manbury v. Louisville, etc. Ferry Co. 60 Fed. 645; Henderson v. Kentzer (Neb.) 76 N. W. 965; 16 Cyc. 806, where this rule is laid down and cases from twenty-seven states cited in support thereof.

The representations or conduct relied on to raise an estoppel must have been concurrent with or anterior to the action which they are alleged to have influenced. 16 Cyc. 741; Bushnell v. Simpson (Cal.) 51 Pac. 1080; Strauss v. Minzesheimer, 78 Ill. 492; Hoover v. Kilander, 83 Ind. 420; Near v. Green (Iowa) 85 N. W. 799; Moors v. Albro, 129 Mass. 9; Hamlin v. Sears, 82 N. Y. 327; Workman v. Wright (Ohio) 31 Am. Rep. 546; Williamsport v. Williamsport (Pa.) 52 Atl. 51; Sugart v. Sugart (Tenn.) 76 S. W. 821; Grinnan v. Dean, 62 Tex. 218; Nolting v. National Bank (Va.) 37 S. E. 804; McCall v. Pamell, 64 Ala. 254; Townsend Sav. Bank v. Todd, 47 Conn. 190; Haugen v. Skjernheim, 13 N. D. 616.

"To create an estoppel the evidence must be clear and not a matter of inference." Haugen v. Skjernheim, supra; Morris v. Ewing, 8 N. D. 99; Lincoln v. McLaughlin (Neb.) 112 N. W. 363; McCormick Harvesting Mach. Co. v. Perkins (Iowa) 110 N. W. 15; Nash v. Baker (Neb.) 58 N. W. 706; McQueen v. Bank of Edgemont (S. D.) 107 N. W. 208.

Flynn & Traynor, for respondent.

BRONSON, J. This is an action to recover on a certain trust agreement made between the parties as the result of a former action. In the trial court the jury returned a verdict for the plaintiff. The defendant has appealed from an order denying judgment *non obstante* or for a new trial.

In December, 1913, the plaintiff herein recovered a judgment against Fred Lemke in an action upon a promissory note against Fred

Lemke, B. W. Lemke, and this defendant herein as copartners. The action was dismissed as to B. W. Lemke and this defendant.

As a result of that action, the trust agreement, involved herein, was made, by Fred Lemke. By its terms, he assigned to this defendant in trust, for the benefit of the plaintiff herein, any and all demands due or owing by one Albert Thompson to Fred Lemke on account of negotiations between Fred Lemke and Albert Thompson relating to those certain fanning mills for which the promissory note, involved in the above mentioned action, was given. He further authorized the bringing of any action necessary to enforce such claims, the payment of the necessary expenses therefor, and the applications of the proceeds realized upon the judgment. The complaint herein alleges the trust agreement; that this defendant accepted the trust created; that, pursuant thereto, this defendant commenced an action for the collection of such claim, recovered the judgment therefor and collected thereupon over $1,000. That this defendant, after demand, has not made payment of $170.49 the balance due on the judgment against Fred Lemke. The defendant herein interposed a general denial. The action was tried to a jury. The main point of contention, upon the issues raised, and facts presented, is whether the action instituted by the defendant Henry Lemke against Albert Thompson, for which recovery was had, involved and concerned the fanning mills that were involved and concerned in the prior action by the plaintiff against the Lemke Bros. It is the contention of the defendant herein that, in the former action, the trust agreement was made when it developed through conference of the parties that six fanning mills for the sum of $107 had been bought by Fred Lemke, which Albert Thompson had agreed to take at the invoice price; that as a result of such conference the trust agreement was made assigning to Henry Lemke, in trust for the plaintiff, the claim against Thompson, the amount of which, when collected, should apply on the judgment rendered in such former action. In the suit of Henry Lemke against Thompson the defendant herein denies that such fanning mills were any part of such suit. The plaintiff, on the contrary, contends that such fanning mills were involved, and that the appellant has collected thereupon as a result of the judgment obtained against Thompson. In this connection the facts are somewhat

involved. It is considered unnecessary to unduly extend this opinion by reciting them in detail, or other than as may be necessary to consider the questions of law presented by the defendant. However, it appears in this connection that Fred Lemke sold his machine business to one Albert Thompson and assigned the balance due him upon such sale to his two brothers, in trust for his creditors; That subsequently, this defendant, authorized by the two brothers, brought suit, as he insists, for the purpose of collecting the amount due Fred Lemke for such sale. When Frek Lemke sold this machine business, Thompson had not paid for the six fanning mills.

The defendant has specified thirty-five assignments of error. They principally concern the rulings of the trial court in the admission and rejection of testimony. Upon examination of the same we are of the opinion that no prejudicial error has been committed except as herein noted.

During the trial of the action the plaintiff offered in evidence a deposition with exhibits attached of a witness in the former action of the Fosston Mfg. Co. v. Lemke Bros. Over the objection of the defendant, the trial court admitted such deposition, expressing, however, doubt of its admissibility. This deposition contained testimony material to the question of the fanning mills involved. Although the defendant in this action was a party to the former action, nevertheless the issues in the former action were not the same and there were additional parties defendant. It was clearly prejudicial error to admit this deposition in evidence. See note in L.R.A.1916A, 991; Felton v. Midland Continental R. Co. 32 N. D. 223, 236, 155 N. W. 23; Flamer v. Johnson, 36 N. D. 215, 162 N. W. 307.

During the course of the trial, also, the attorney for the respondent herein who was the attorney for the defendant in the action of Lemke v. Thompson was permitted to testify concerning many conversations had between him and the defendant when apparently the relation of attorney and client then existed concerning matters that were litigated in the action of Lemke v. Thompson. In view of another trial, it is stated that such conversations, when given while the relations of attorney and client existed concerning the subject-matter of such relation, should not be received in evidence over the objection of the

client, not only by reason of the protection of the statute concerning confidential relations, § 7923, Comp. Laws 1913, but also by reason of the duty of an attorney to maintain inviolate the confidence, and at any peril to himself to preserve the secrets of his client. Comp. Laws 1913, § 7994. The order of the trial court is reversed and a new trial granted with costs to the appellant.

ROBINSON, J. (dissenting). In this case a verdict was rendered against the defendant for $170.49, and interest. He appeals from an order denying a motion for a new trial and a motion for judgment notwithstanding the verdict. He makes thirty-five assignments of error, but no specifications showing therein the evidence is insufficient to support the verdict, and for that reason alone, the motion was properly denied. On such small matters the parties should learn to abide the decision of the jury and the trial court, unless when the verdict is manifestly unjust or contrary to law. This court does not disturb a verdict which is based on a doubtful balance of right and wrong.

The complaint is that in 1912 the plaintiff commenced an action against Henry Lemke, Ben Lemke and Fred Lemke to recover money, to wit, $107 and interest, on a promissory note, dated May 1, 1909, made to it by Lemke Implement Company and Fred Lemke; that in 1913, during the progress of the trial of said action in the district court of Towner county, pursuant to agreement between the plaintiff and defendants, the plaintiff dismissed its suit against B. W. Lemke and Henry Lemke and took judgment only against Fred Lemke for $195.47, and in consideration thereof Fred Lemke sold and assigned to Henry Lemke, in trust for the benefit of the plaintiff, certain debts and demands due Fred Lemke from one Albert Thompson of Brocket, North Dakota. That pursuant to the agreement Henry Lemke did collect from Albert Thompson a sum in excess of the plaintiff's claim and refused to pay the judgment against Fred Lemke, on which there is due a balance of $170.49 and interest from December 23, 1913, which is the amount of the verdict. The verdict appears to be well sustained by evidence. There must be an end to litigation. The record shows no good reason for another bitter trial of this case.

W. E. PALMER, Respondent, v. GEORGE W. DONOVAN, Constable, Appellant.

(175 N. W. 866.)

Justices of the peace — justice had jurisdiction to award judgment on notes if not to foreclose chattel mortgage.

An action was brought in justice's court upon two notes secured by chattel mortgages. The plaintiff asked judgment for the amount due upon the notes, and, also, for foreclosure of the chattel mortgages. The defendant appeared and, without objection, tendered an issue as to his liability upon the notes. Such issue was tried, and the justice of the peace rendered judgment against the defendant for $106.44, the amount due on the notes. The justice further adjudged that the plaintiff was entitled to the possession of the property described in the chattel mortgages; that the amount found due the plaintiff was a lien upon such property, and that the property be sold to satisfy such lien. The defendant, claiming that the justice of the peace had no jurisdiction to adjudge foreclosure of a chattel mortgage, brought suit in conversion against the officer who made the levy and sale. In such suit it is *held* that that portion of the jeweler's judgment which awarded judgment for the amount due on the notes was valid, even though the portions relating to the enforcement of the chattel mortgages were invalid, and that the officer was not guilty of conversion in making levy and sale under the execution.

Opinion filed October 7, 1919. Rehearing denied November 25, 1919.

From a judgment of the County Court of Ransom County, *Thomas,* J., defendant appeals.

Reversed.

Bangert & Nollman, for appellant.

A justice court has jurisdiction to foreclose a chattel mortgage to exercise such equitable jurisdiction as is granted by law. Const. §§ 103, 111, 112, art. 4.

North Dakota Comp. Laws 1913, § 9006, gives a justice court jurisdiction to foreclose liens on personal property. Herkimer v. Keeler (Iowa) 81 N. W. 178.

The foreclosure of a mortgage is a special proceeding and a justice of the peace has such jurisdiction of special proceedings as is granted by law. Comp. Laws 1913, §§ 7329–7333; Hallaran v. Herbert, 57 N. Y. 411.

The term "civil actions" includes "special proceedings." College of Physicians & Surgeons v. Gilbert (Iowa) 69 N. W. 453; Herkimer v. Keeler (Iowa) 81 N. W. 178.

A chattel mortgage is in the nature of a "legal lien" and does not depend upon equitable principles or equitable jurisdiction for enforcement. Varney v. Jackson, 66 Mo. App. 348; Weathers v. Borders, 124 N. C. 610, 32 S. E. 881; 24 Cyc. 478.

J. V. Backlund, for respondent.

Courts of justice of the peace being courts of special and limited jurisdiction, they can exercise no jurisdiction except where it is distinctly and expressly conferred. Murray v. Burris, 6 Dak. 170, 42 N. W. 25; Pyle v. Hand County, 1 S. D. 385, 47 N. W. 401.

Courts of justice of the peace are of limited jurisdiction and no presumption will be indulged in favor of their jurisdiction. Phelps v. McCallam, 10 N. D. 536, 88 N. W. 292.

CHRISTIANSON, Ch. J. This is an action in conversion. In his complaint the plaintiff alleges that the defendant on October 16, 1917, was a duly elected, qualified, and acting constable within the county of Ransom in this state; and that on that day he wrongfully took away from the plaintiff certain personal property and converted the same. The defendant in his answer admits that he was such constable and further alleges that the plaintiff, Palmer, on January 6, 1916, and May 2, 1916, respectively, executed and delivered to the McLeod State Bank two certain chattel mortgages upon the property described in the complaint, to secure the payment of two notes aggregating $160; that on September 25, 1917, said mortgages were in full force and effect, and the obligations secured thereby past due and said mortgages in default; that on that date the said McLeod State Bank commenced an action against the plaintiff herein to foreclose said mortgages in the justice court of one R. R. Wolfe, one of the justices of the peace of Ransom county, North Dakota; that summmons was duly issued in said action in due form as prescribed by law, and duly served upon plaintiff herein as defendant in said action; that said action came duly and regularly on for trial before said justice of the peace on September 29, 1917; that both parties appeared when the action

was called for trial, the plaintiff filing a written complaint, and the defendant making an oral answer to the effect that the balance due on the notes had been tendered; that after having heard all the evidence of the parties and duly considered said matter, the said justice of the peace entered judgment in said action:

(1) That the said McLeod State Bank, as plaintiff therein, have and recover judgment against the said W. E. Palmer, as defendant therein for the sum of $74.89 on its first cause of action, and for the sum of $31.65 on its second cause of action, and for costs and disbursements of said action.

(2) That it is further ordered and adjudged that the said plaintiff, McLeod State Bank, have and recover the possession of the personal property described in said two chattel mortgages.

(3) That it is further adjudged that the amount adjudged to be due to the plaintiff is a lien on the said personal property, and that the property be sold to satisfy said lien in like manner as where personal property is sold under execution, and that execution issue accordingly.

It is further alleged in the answer that a special execution was thereafter duly and regularly issued upon said judgment by said justice of the peace, and delivered to the defendant, Donovan, as constable, for service and execution; that under and by virtue of said execution said defendant duly levied upon and took into his possession said personal property; that at the time of said levy he served upon the said Palmer a notice of levy, duly entitled in said action, which notice described the property seized and contained the following statement addressed to said Palmer: "Any claim or demand for exemption you may have against said levy must be made within three days after the service of this levy upon you." The answer further alleges that the defendant gave notice of the time and place of the sale of said property, and sold the same in the manner provided by law at the time and place so advertised. (The answer sets forth in detail what was done, and it appears therefrom that the notice of sale was given, and the sale conducted in strict conformity with the provisions of law relating to the sale of property upon execution in justice's court.) The plaintiff demurred to the answer on the ground that the facts stated did not constitute a defense. The demurrer was sustained. The action was

thereafter tried, and a verdict returned in plaintiff's favor. Judgment was thereupon entered in plaintiff's favor in the sum of $145.22. This appeal is from the judgment, but the sole question presented thereon is the correctness of the ruling on the demurrer. It is conceded that if that ruling was correct, the judgment should be affirmed; and that if such ruling was erroneous, the judgment must be reversed.

The contention of the plaintiff is that under § 112 of the Constitution a justice of the peace has no jurisdiction of an action to foreclose a chattel mortgage, and that consequently the judgment involved in this case and the proceedings had upon the execution issued thereon were wholly void. In support of this contention plaintiff cites and relies upon the decision of this court in Mead v. First Nat. Bank, 24 N. D. 12, 138 N. W. 365. The defendant on the other hand contends that a justice of the peace has jurisdiction of an action to foreclose a chattel mortgage or other lien upon personal property when the amount of the lien does not exceed $200. He calls attention to the fact that such jurisdiction is expressly conferred by § 9006 (subd. 3) Comp. Laws 1913. He further calls attention to the fact that under the laws of the territory of Dakota a justice of the peace had jurisdiction in all cases to enforce liens upon personal property when the amount of the lien was within the jurisdiction of the justice of the peace. See § 675, Rev. Code Territory of Dakota, 1883; Melville's Dakota Justice Court Practice, §§ 150–152. He asserts that there was no intention on the part of the framers of the Constitution to change the then prevailing practice and deprive the justice's court of the jurisdiction of an action to foreclose liens upon personal property; that the existence of such jurisdiction was recognized by the legislative assembly in 1891 by enacting a statute which provided that a justice of the peace had jurisdiction of an action to foreclose or enforce a lien upon chattels when the amount of the lien does not exceed $200; that such statute has remained in force since its enactment and is a valid legislative enactment. He further asserts that the only question involved in Mead v. First Nat. Bank, supra, was whether a county court with increased jurisdiction had jurisdiction of an action involving title to real property, and that the language contained in that opinion relating to the jurisdiction of a justice of the peace is obiter dicta.

We do not find it necessary to consider the merits or demerits of these different contentions. It is undeniable that the justice of the peace had jurisdiction to determine the amount due upon the promissory notes and render judgment therefor. It is conceded that the plaintiff, Palmer, appeared in the justice's court and without objection tendered an issue as to his liability upon the notes; that such issue was fully tried and determined by the justice, and judgment rendered against Palmer for the amount found due upon the notes, which amount was within the justice's jurisdiction. The part of the judgment which awarded judgment against Palmer for the amount due on the notes is clearly severable from the remaining portions of the judgment. On appeal that portion might have been sustained and the remaining portions of the judgment set aside. See Moher v. Rasmusson, 12 N. D. 71, 95 N. W. 152. Hence, even though it be conceded that the remaining portions of the judgment were void, as in excess of the justice's jurisdiction, the judgment for the amount due on the notes would not necessarily be void and subject to collateral impeachment. The better rule is that where a court awards relief in excess of its power the judgment is void only to the extent of the excess, provided the valid portion is severable from the invalid portions of the judgment. Van Fleet, Collateral Attack, §§ 740–742; Smith v. Pearce, 52 Mich. 370, 18 N. W. 111. We are of the opinion that the judgment of the justice of the peace, in so far as it awarded the amount due on the notes, was valid. We express no opinion whether the portions of the justice's judgment purporting to award foreclosure of the chattel mortgages were valid or invalid.

Under our statute "a sheriff or other ministerial officer is justified in the execution of and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceeding upon which they were issued." Comp. Laws 1913, § 3399.

The execution in this case recited, among other things, that on the 29th day of September, 1917, a judgment was duly rendered in favor of the plaintiff and against the defendant in said action for the sum of $106.54 debt and damages and costs taxed at $47, making a total judgment of $153.54. The execution was levied and the sale adver-

tised and conducted, precisely the same as though the judgment had been for the amount due upon the notes alone. As we have already observed the notice of levy even gave Palmer an opportunity to claim exemptions. That the property levied upon and sold under the execution was the same as that covered by the chattel mortgages which secured payment of the notes certainly did not prejudice Palmer. It was rather to his benefit. In our opinion the defendant was not guilty of conversion in making levy and sale upon the execution issued in this case.

While the question is not material, it may be stated that the plaintiff does not contend that the chattel mortgages were invalid or that he had any defense whatever to either the notes or mortgages. And upon the trial of this action it was established that the plaintiff owed upon the notes the full amount which the justice of the peace found to be due thereon.

It follows from what has been said that the answer of the defendant states full and complete defense to plaintiff's cause of action. The judgment appealed from is therefore reversed, and the cause remanded for further proceedings in conformity with the views expressed in this opinion.

BIRDZELL, BRONSON, and ROBINSON, JJ., concur.

GRACE, J., concurs in the result.

FIRST NATIONAL BANK OF CASSELTON, Plaintiff and Respondent, v. CASSELTON REALTY & INVESTMENT COMPANY and E. F. Gilbert, Defendants, E. F. GILBERT, Appellant.

(175 N. W. 720.)

Acknowledgment — mortgage cannot be recorded where certificate of acknowledgment did not show execution by person authorized to execute it for corporate maker.

In an action to foreclose a mortgage it is *held:*

1. That the mortgage was not entitled to be recorded for the reason that

the certificate of acknowledgment did not show that the mortgage was executed by a person authorized to execute it for the corporation, as required by the laws of this state.

Mortgages — record of mortgage not entitled to be recorded not notice to creditor.

2. That the record of such mortgage did not constitute notice to a creditor, who lawfully obtained a judgment against the mortgagor, in whose name the title to the real estate described in the mortgage appeared of record.

Mortgages — lien of judgment superior to mortgage not entitled to be admitted to record.

3. That the judgment is a lien prior to the mortgage.

Opinion filed July 15, 1919. Rehearing denied November 25, 1919.

From a judgment of the District Court of Cass County, *Cole,* J., defendant Gilbert appeals.

Reversed.

Spalding & Shure, for appellant.

Where a deed was under consideration which contained a proper certificate of acknowledgment and notary's seal, but the certificate was unsigned by the notary, the court held that it did not create a valid encumbrance on the real property. Davis v. Hale (Ark.) Ann. Cas. 1916D, 704.

An acknowledgment was insufficient which did not recite that the persons making it were known to be the president and secretary of the corporation which purported to make the assignment of a mortgage. Holt v. Metropolitan Trust Co. 11 S. D. 456; Comp. Laws 1913, § 7619.

The corporation could only exercise its power in the manner provided by statute and through an instrument acknowledged by the corporation, and that not having been acknowledged in the manner prescribed by the statute. Gessner v. Sioux City R. Co. 15 N. D. 560; Erickson v. Conniff, 19 S. D. 41; Plymouth Elevator Co. 191 Fed. 633, 208 Fed. 393.

An instrument not properly acknowledged and therefore not entitled to record, if, in fact, recorded, does not render such record admissible in evidence, and it is not admissible. Ann Arbor Sav. Bank v. Elli-

son, 71 N. W. 873; Wambole v. Foote, 2 Dak. 1; Saginaw v. Tennant, 68 N. W. 1118; Comp. Laws, § 3269.

An instrument recorded which was not entitled to record does not give constructive notice of its existence. Dannovan v. St. Anthony & D. El. Co. 8 N. D. 585; American Mortg. Co. v. Live Stock Co. 10 N. D. 290; Webb, Record Title, § 55.

Lawrence & Murphy, for respondent.

Correll had ostensible authority to execute the notes and mortgage.

Ostensible authority is such as the principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess. Comp. Laws 1913, § 6338; McCall v. Nichols, 29 N. D. 405; Bank v. Land Co. 28 N. D. 479; 2 Thomp. Corp. § 1558; McGowan v. Groneweg (S. D.) 86 N. W. 626.

A corporation was bound by the acts of its treasurer where he attended to the actual management of the financial affairs of the corporation, and where the board of directors failed to hold meetings according to the by-laws and left the entire business to be attended to by him. Bank v. Cochrane, 182 Mass. 586, 61 L.R.A. 760, 66 N. E. 200.

If a corporation permit the treasurer to act as their general fiscal agent, and hold him out to the public as having the general authority implied from its official name and character, and by their silence and acquiescence suffered him to draw and accept drafts and indorse notes payable to the corporation, they are bound by his acts done within the scope of such implied authority. Merchants Bank v. State Bank, 10 Wall. 604; Mining Co. v. Anglo-California Bank, 104 U. S. 192; Lester v. Webb, 1 Allen, 34.

A corporation is bound by the authority which it permits the agent or officer to assume to exercise, and not by secret limitations unknown to the public or to the persons dealing with such agent. Bank v. Bank (N. J.) 7 Atl. 318; Johnson v. Noxelbaum, 58 S. E. 56; Coke v. Bank (Pa.) 9 Atl. 302.

There can be no doubt of the general rule that a president of a corporation, by virtue of his official position, can only sell its assets in the usual and ordinary course of business. But a corporation may, by its acts and methods of conducting its business, so far as third persons are

concerned, as effectually clothe its agents with authority to handle, and even close out, its business, as though a formal vote of record were taken.

In Magowan v. Groneweg, 14 S. D. 543, 86 N. W. 626, the authority of the president, secretary, and treasurer and certain directors of the corporation to dispose of the entire assets of the corporation without authorization by official action of the stockholders or board of directors was challenged. The transfer was sustained on the ground that there had been no regular meeting of the board of directors since the organization of the corporation.

This case was affirmed on rehearing in 16 S. D. 29, 91 N. W. 335. Davis v. Coal Co. 21 S. D. 173, 110 N. W. 113; Wood v. Saginaw Gold Min. & Mill. Co. 20 S. D. 161, 105 N. W. 101; Hunt v. Northwestern Mortgage Trust Co. 16 S. D. 241, 92 N. W. 23; McElroy v. Minnesota Percheron Horse Co. 96 Wis. 317, 71 N. W. 652; Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115; Eureka Iron Works v. Bresnahan, 60 Mich. 332, 27 N. W. 524; Preston Nat. Bank v. George T. Smith Co. 84 Mich. 364, 47 N. W. 502.

The facts that an instrument is signed by a corporate officer and the corporate seal attached show prima facie that it is the act of the corporation. Koehler v. Black River Falls Iron Co. 2 Black, 715, 17 L. ed. 339; Pacific State Bank v. Coats, 123 C. C. A. 634, 205 Fed. 618, Ann. Cas. 1913E, 846; Graham v. Partee, 139 Ala. 310, 101 Am. St. Rep. 32, 35 So. 1016; Miners Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; J. S. Potts Drug Co. v. Benedict, 156 Cal. 322, 25 L.R.A.(N.S.) 609, 104 Pac. 432; Chandler v. Hart, 161 Cal. 405, 119 Pac. 516, Ann. Cas. 1913B, 1094; Conine v. Junction R. C. 3 Houst. (Del.) 288, 89 Am. Dec. 230; Veasey v. Graham, 17 Ga. 99, 63 Am. Dec. 288; Johnston v. Grawley, 25 Ga. 316, 71 Am. Dec. 173; Cannon v. Graham, 136 Ga. 167, 71 S. E. 142, Ann. Cas. 1912C, 39; Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 26 N. Y. 640, 35 Am. St. Rep. 401; Wisconsin Lumber Co. v. Greene Teleph. Co. 127 Iowa, 350, 69 L.R.A. 968, 109 Am. St. Rep. 387, 101 N. W. 742; Sherman Center Town Co. v. Swigart, 43 Kan. 292, 19 Am. St. Rep. 137, 23 Pac. 569; Burrill v. Nahant Bank, 3 Met. 163, 35 Am. Dec. 395; Emmerson v. Pacific Coast Packing Co. 96 Minn. 1, 1 L.R.A.(N.S.) 445,

113 Am. St. Rep. 603, 104 N. W. 573, 6 Ann. Cas. 973; St. Louis Public School v. Risley, 28 Mo. 415, 75 Am. Dec. 131; Musser v. Johnson, 42 Mo. 74, 97 Am. Dec. 316; Den v. Vreelandt, 7 N. J. L. 352, 11 Am. Dec. 551; Leggett v. New Jersey Mfg. Co. 1 N. J. Eq. 541, 23 Am. Dec. 728, and note; Gause v. Com. Trust Co. 196 N. Y. 134, 24 L.R.A.(N.S.) 967, 89 N. E. 476; Duke v. Markham, 105 N. E. 131, 18 Am. St. Rep. 889, 10 S. E. 1017; Berks Turnp. Road v. Meyers, 6 Serg. & R. 12, 9 Am. Dec. 402; Little Sawmill Valley Turnp. Co. v. Federal St. Pass R. Co. 194 Pa. 144, 75 Am. St. Rep. 690, 45 Atl. 66; Greensboro Gas Co. v. Nome Oil Co. 222 Pa. 4, 128 Am. St. Rep. 790, 70 Atl. 940; notes: 91 Am. Dec. 616, 12 Am. St. Rep. 134, 50 Am. St. Rep. 156, 64 Am. St. Rep. 260.

Upon the principles of policy and justice, the law will hold valid the acts of officers de facto, so far as they involve the interests of the public and third persons dealing with the corporation in good faith. State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; Richards v. Farmers Inst. 154 Pa. 449, 26 Atl. 210; King v. Philadelphia Co. 154 Pa. 160, 26 Atl. 308; People v. Collins, 7 Johns. 549; Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548.

CHRISTIANSON, Ch. J. Plaintiff brought this action to foreclose a certain real estate mortgage, which it is alleged was executed and delivered by the defendant Casselton Realty & Investment Company to C. H. Anheier, as receiver of the plaintiff bank on December 23, 1915, and subsequently assigned by said Anheier to the plaintiff. In its complaint the plaintiff also alleged that the defendant Gilbert has or claims some right or interest in the property described in the mortgage adverse to the plaintiff. The defendant Gilbert, in his answer, assails the validity of the mortgage. He avers that such mortgage was never executed by the defendant corporation or by any of its officers or agents authorized to so do. He further alleges that he duly recovered a judgment against the defendant corporation for $1,013.49 in the district court of Cass county, in this state, and that such judgment was duly entered and docketed in the office of the clerk of said district court on March 23, 1916, and became and still is a valid and existing lien upon

the premises described in the complaint. The plaintiff, by way of reply, averred that the mortgage described in the complaint was duly executed and delivered by the defendant, acting by and through its duly elected, qualified, and acting treasurer, Correll, pursuant to instructions from and upon authority and permission of R. C. Kittel, the qualified and acting vice president of the defendant corporation. It is further averred that Correll had ostensible authority to execute such mortgage. The case was tried to the court upon the issues thus framed, and resulted in findings and judgment in favor of the plaintiff for the foreclosure of the mortgage in accordance with the prayer of the complaint. The defendant Gilbert has appealed and demanded a trial anew in this court.

The Casselton Realty & Investment Company was organized under the laws of this state in 1906. It constructed a number of dwellings in Casselton, which it rented to various tenants. The defendant Gilbert was the first president of the corporation, and the records do not show that any successor has been chosen. However, it is undisputed that the defendant Gilbert, in 1912 went to California and has since been a resident of that state, and a list of stockholders offered in evidence by the plaintiff shows that the defendant Gilbert is no longer a stockholder. So far as the evidence shows, no meetings of the stockholders were held subsequent to 1909. The corporation, however, continued to own some houses in Casselton. The treasurer, Correll, looked after these properties. He rented them, collected rent, paid taxes, arranged for insurance and necessary repairs of the houses, and paid therefor. He also had in his possession the books and the seal of the corporation. But it is not contended that he ever attempted to execute notes, mortgages, or other written contracts for the corporation at any time prior to the execution of the notes and mortgage in controversy. The defendant corporation was indebted to the plaintiff bank in a considerable sum. And it appears that at a meeting of the directors of the bank held in July, 1914, the directors objected to the loan because it was not secured, and that R. C. Kittel (who was an officer of the plaintiff bank as well as vice president of the defendant corporation) then promised the bank directors that he would have the loan secured by a mortgage on the property described in the mortgage,

and that he afterwards informed them that the promise had been fulfilled. On December 6, 1915, the bank failed and C. H. Anheier was appointed receiver. It was discovered that the indebtedness of the defendant corporation had not been secured. The bank directors thereupon called on Kittel, and demanded that he procure a mortgage from the defendant corporation in accordance with his former promise. A few hours later Correll, the treasurer of the defendant corporation, delivered the notes and mortgage in question to the receiver, Anheier, with the remark that the same were given in accordance with the previous understanding between Kittel and the directors. The mortgage purports to be executed and acknowledged by the Casselton Realty & Investment Company, by L. E. Correll, its treasurer. It bears date December 23, 1915, and was recorded in the office of the register of deeds of Cass county on December 27, 1915. The body of the certificate of acknowledgment upon the mortgage is: "On this 23d day of December, A. D. 1915, before me personally appeared L. E. Correll, known to me to be the treasurer of the corporation that is described in and that executed the foregoing instrument, and he acknowledged to me that such corporation executed the same."

The Casselton Realty & Investment Company had five directors. It is conceded that Correll was never authorized by resolution of the board of directors to execute the mortgage in controversy. In fact the only express authorization claimed is that Kittel, the vice president, told Correll to execute it. The evidence shows that the Casselton Realty & Investment Company had adopted a by-law to the effect that all conveyances of real estate or any interest therein, and all assignments and satisfactions of mortgages, or other liens on real property, should be executed by the president or vice president and attested by the secretary of the corporation.

The appellant contends: (1) That plaintiff's mortgage is wholly invalid, and does not constitute a lien superior to the judgment held by the appellant; and (2) that even though the mortgage is enforceable as against the Casselton Realty & Investment Company, it was nevertheless not entitled to record, and such record did not impart notice to the appellant.

Under our laws, the corporate powers, business, and property of

§§ 5512 and 5513." Comp. Laws 1913, § 5548. "The certificate of conducted and controlled by the board of directors. Comp. Laws 1913, § 4541. Any foreign or domestic corporation in its by-laws may empower any one or more of its officers, severally or conjointly, to execute and acknowledge in its behalf conveyances, transfers, assignments, releases, satisfactions, or other instruments affecting liens upon, titles to, or interest in, real estate. Comp. Laws 1913, § 5512. But in the absence of any by-laws, the president or secretary of any corporation and the president, secretary, treasurer, or cashier of any loan, trust, or banking corporation may execute and acknowledge such instruments when authorized by resolution of the board of directors. Comp. Laws 1913, § 5513.

Section 5515, Comp. Laws 1913, provides: "The signature of a corporation to any instrument mentioned in § 5512 shall be as follows:

_____(Full name of corporation.)

By (some officer authorized by resolution or the by-laws of the corporation to execute and acknowledge such instrument).

_____(Official designation of person signing.)

Attest: _____

Secretary."

(Seal.)

Section 5594, Comp. Laws 1913, provides: "Every conveyance by deed, mortgage, or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, . . . is first duly recorded; or as against any attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance." But before any such conveyance "can be recorded . . . its execution must be acknowledged by the person executing the same, or, if executed by a corporation, by the person authorized to execute it by

§§ 5512 and 5513." Comp. Laws 1913, § 5548. "The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:—

State of————————}
County of————————} ss.

On this —— day of —— in the year ——, before me (here insert name and quality of officer), personally appeared ———————— known to me (or proved to me on the oath of ————————) to be the president (or the secretary) if the corporation that is described in and that executed the within instrument, and acknowledged to me that such corporation executed the same." Comp. Laws 1913, § 5574.

A corporation can act only through its representatives. Primarily, in the absence of provisions in the charter or by-laws of a corporation, the authority to mortgage the corporate real estate is vested in the board of directors. 7 R. C. L. p. 645; Comp. Laws 1913, § 4541. And neither the president nor the treasurer has such power by virtue of his office alone. Fletcher, Cyc. Corp. §§ 2048, 2091.

"The power of an officer or agent of a corporation to bind the corporation is governed by the general law of agency; the underlying principles are the same. The acts of corporate officers and agents are binding upon it only when done within the scope of their authority, express or implied; the same rules apply as in the case of an agent for an individual. The mere consent of one of the officers of a corporation that another officer may do an act requiring special corporate authority, manifestly, does not constitute any legitimate basis for the doing of such act." 7 R. C. L. pp. 620, 621.

Bearing these legal principles in mind, we approach the question presented in this case. Can it be said that the mortgage of the plaintiff was executed and acknowledged by a person authorized to do so, so as to constitute it the act of the corporation and entitle it to record as such under our laws? We think not. The provisions of our statutes are specific, and the intent of the lawmakers, as there disclosed, must be enforced. In our opinion the mortgage was not entitled to be recorded. (That is in accord with the views of the supreme court of our sister state, South Dakota, in applying statutory provisions almost

identical with those involved in this case. Erickson v. Conniff, 19 S. D. 41, 101 N. W. 1104. See also Duke v. Markham, 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017; Klemme v. McLay, 68 Iowa, 158, 26 N. W. 53; Bennett v. Knowles, 66 Minn. 4, 68 N. W. 111; Holt v. Metropolitan Trust Co. 11 S. D. 456, 78 N. W. 947.) This being so, the record thereof did not constitute notice to subsequent purchasers in good faith and for valuable consideration. Goss v. Herman, 20 N. D. 295, 127 N. W. 78. And by the plain words of the statute, a judgment creditor who lawfully obtains a judgment against the person in whose name title to land appears of record is regarded as "a purchaser in good faith and for a valuable consideration." Comp. Laws 1913, § 5594; Mott v. Holbrook, 28 N. D. 251, 264, 148 N. W. 1061; McCoy v. Davis, 38 N. D. 328, 164 N. W. 951.

In this case it is not necessary to determine whether the mortgage of the plaintiff is enforceable as against the defendant corporation. But it follows from what has been said that the judgment of the defendant Gilbert is a valid lien upon the land; and that the lien of plaintiff's mortgage, if it constitutes a lien at all, is inferior and subject to the lien of the judgment.

The judgment appealed from is therefore reversed, and the cause is remanded, with directions that judgment be entered in conformity with the views expressed in this opinion.

BIRDZELL and BRONSON, JJ., concur.

GRACE, J., concurs in the result.

ROBINSON, J. (dissenting). I dissent from the majority decision herein. I think it is based too much on technical reasoning. The mortgage in question was made by Correll, who had been for years the de facto and real president and treasurer and manager of the company. He was the corporation. The mortgage was given in good faith and for full value. It was duly made. And it was the duty of the judgment creditor to know that and to know of all the affairs of the corporation, and if the judgment creditor did not have notice of the mortgage it was because he did not open his eyes and examine the records.

It was because he had failed in doing his duty as an officer of the corporation. He has no superior equity. He is not a purchaser in good faith and for value. The judgment of the trial court should be affirmed.

NELS MARTINSON, Respondent, v. NILS C. FREEBERG, Appellant.

(175 N. W. 618.)

Words imputing crime slander within statute.

1. Under § 4353, Comp. Laws 1913, the false and unprivileged publication of an oral statement which charges any person with crime, or imputes to him want of chastity, constitutes slander.

Libel and slander — charge of unchastity in direct terms unnecessary.

2. It is not necessary that the charge of unchastity should be made in direct terms; but it is sufficient if the words used are such as impute unchastity and were so understood by those who heard them.

Libel and slander — charge of unchastity sufficiently definite to constitute slander.

3. A complaint charging the false and unprivileged publication by the defendant of an oral charge that plaintiff and defendant's wife went upstairs together, and that this did not look good to defendant; and that the charge was understood by the persons who heard it to mean that plaintiff and defendant's wife went upstairs for the purpose of having carnal intercourse,—states a cause of action.

Opinion filed October 3, 1919. Rehearing denied November 25, 1919.

Appeal from the District Court of Ransom County, *Allen,* J.

Defendant appears from an order overruling a demurrer to a complaint.

Modified and affirmed.

O. S. Sem. and *Jos. G Forbes,* for appellant.

"It is not actionable to charge one with a breach of conventional etiquette." Townsend, Slander & Libel, 2d ed. 252.

The rule is that the natural meaning is to be taken, and if in that view the language will bear a nonactionable meaning equally as well

as an actionable one, the courts will adopt the nonactionable construction. Townsend, Slander & Libel, 2d ed. 182.

"Words which are clearly not defamatory cannot have their natural meaning changed by innuendo." C. of G. R. Co. v. Sheftall, 45 S. E. 687; Casselman v. Winship, 19 N. W. 412; Brown v. Moore, 35 N. Y. Supp. 736; McHugh v. Equity C. P. Co. 167 N. W. 225.

If, however, the words are not per se actionable, there must be an innuendo showing, by reference to facts stated in the inducement, the injurious sense imported by the charge. 25 Cyc. 449; Townsend, Slander & Libel, 528; 18 Am. Eng. Enc. Law, 982; Newell, Defamation, S. & L. 619; Grand v. Dreyfus, 54 Pac. 389; McDermott v. Union Credit Co. 78 N. W. 967.

"Where the words declared are capable of conveying the defamatory meaning claimed for them, and also equally capable of conveying some other and innocent meaning, there must be an averment and innuendo showing not only that the words were intended by the plaintiff in a defamatory sense, but that the hearers understood the language as conveying the alleged defamatory meaning." 25 Cyc. 452; Newell, Defamation, S. & L. 248 (note 1) and 280 and 281; 18 Am. Eng. Enc. Law, 1019; K. v. H. 20 Wis. 252; Hughes v. Samuel Bros. 159 N. W. 589.

W. G. Curtis and *Hugo P. Remington,* for respondent.

The following statements were held to be actionable:

Bashford was undoubtedly down the railroad track with some woman, I believe it. He is guilty. Bashford v. Wells (Kan.) 18 L.R.A.(N.S.) 580, 96 Pac. 663.

What a pity we have got such a man for a director, You must have heard of his being caught with the housegirl, I have proof enough. I have been looking around and I know it's so. Lovejoy v. Whitcomb, 174 Mass. 586, 55 N. E. 322.

See also: Proctor v. Owens, 18 Ind. 21, 8 Am. Dec. 341; Sturtevant v. Root, 27 N. H. 69; Evans v. Tibbins, 2 Grant, Cas. 451.

CHRISTIANSON, Ch. J. This is an action for slander. The complaint alleges that the plaintiff was and is a married man, sustaining a good name and character among his neighbors and acquaintances for

moral worth and integrity; that at Ransom county, North Dakota, on the 27th day of March, 1918, the defendant in the presence of Mrs. Herman Martinson, Effie Hoganson, and divers other persons, spoke to and of the plaintiff the following false and defamatory words: "He couldn't do to other men's wives, that he had done to his," meaning thereby that the plaintiff had been criminally intimate with the defendant's wife, and the same was so understood by his friends; that on the 27th day of March, 1918, in the presence of Matt Johnson and divers other persons, the defendant spoke of the plaintiff the false and defamatory words, to wit: "They went upstairs together and that doesn't look good to me," meaning said Matt Johnson and others to understand, and the said Matt Johnson and such others did understand, his meaning to be that this plaintiff and Mrs. Freeberg, the wife of the defendant, went upstairs together, for criminal and unlawful purposes, to wit, sexual intercourse.

The defendant interposed a demurrer to the complaint, and to each of the alleged causes of action therein stated on the ground that the facts alleged do not constitute a cause of action. The demurrer was overruled, and defendant appeals.

Under our laws "slander is a false and unprivileged publication, other than libel, which:

"1. Charges any person with crime or with having been indicted, convicted or punished for crime.

"2. Imputes to him the present existence of an infectious, contagious or loathsome disease.

"3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualifications in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business, that has a natural tendency to lessen its profits.

"4. Imputes to him impotency or want of chastity; or,

"5. Which, by natural consequences, causes actual damage." Comp. Laws 1913, § 4353.

It will be noted that our statute enlarges upon the common law, and makes oral statements which impute unchastity actionable. Our statute also provides: "In an action for libel or slander it shall not be

necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken. Comp. Laws 1913, § 7463. Hence, the sole question before us on this appeal is whether the words which it is alleged that the defendant spoke of and concerning the plaintiff imputed want of chastity to the plaintiff.

It is not necessary in order to constitute actionable slander that the words should amount to a direct charge of fornication, adultery, or unchastity; but it is sufficient if the words used are such as to impute unchastity, adultery, fornication, and were so understood by those who heard them. 17 R. C. L. p. 282; 25 Cyc. 319. It has been said: "There is no offense which can be conveyed in so many multiplied forms and figures as that of incontinence. The charge is seldom made, even by the most vulgar and obscene, in broad and coarse language." Stroebel v. Whitney, 31 Minn. 384, 18 N. W. 98; Newell, Slander & Libel, 3d ed. p. 186. In ascertaining the meaning of the words constituting an alleged charge of unchastity, their context and the circumstances under which they were spoken must be considered. (17 R. C. L. p. 282.)

It is elementary that a demurrer admits the truth of all issuable, relevant, material facts well pleaded. 31 Cyc. 233; 6 Enc. Pl. & Pr. 334; 6 Standard Enc. Proc. 943. "It will only be sustained where the court can affirmatively say that the publication is incapable of any unreasonable construction which will render the words defamatory." 35 Cyc. 468.

In this case the complaint alleges that the defendant said that the plaintiff and defendant's wife went upstairs together, and that this did not look good to defendant, and that the persons to whom the statement was made understood therefrom that plaintiff and defendant's wife went upstairs for the purpose of having sexual intercourse. We are of the opinion that, in absence of explanation, reasonable men might and probably would draw this inference from the charge made. We do not, however, believe that the words, "He couldn't do to other

men's wives, that he had done to his," standing alone are fairly susceptible of imputing want of chastity or crime to the defendant.

It therefore follows that the demurrer should have been sustained as to this charge, but was properly overruled as to the other. The order appealed from is therefore modified accordingly. Neither party will recover costs on this appeal.

BIRDZELL and BRONSON, JJ., concur.

GRACE, J., (concurring in part and dissenting in part). I am of the opinion that demurrer should have been sustained to each charge or alleged causes of actions set forth in the complaint.

ROBINSON, J., dissents.

STATE OF NORTH DAKOTA EX REL. JOSEPH LEACH and Wm. Friesham, Plaintiffs, v. OSCAR OLSON, Defendant.

(176 N. W. 833.)

Ferries — complaint held to charge maintaining ferry without license — city cannot grant lease operative in another county.

The relators, Leach and Friesham, were arrested and brought before a justice of the peace of Morton county, charged with the operation of a ferry without a license, contrary to the provisions of Comp. Laws 1913, § 9777. To the complaint, they entered a demurrer which was overruled, and they were held to answer, and their bail fixed at $200, which they failed to give and they were committed to the custody of the sheriff. They applied to this court for a writ of habeas corpus, which was granted, and a day certain was set for the hearing upon said writ. After the hearing thereon, the same is quashed for the reason stated in the opinion.

Opinion filed November 25, 1909.

Hearing on writ of habeas corpus.
Writ quashed.

Benton Baker and *Nuchols & Kelsch,* for plaintiffs and relators.
L. H. Connolly, State's Attorney, for the defendant and respondent.

GRACE, J. This is a proceeding by habeas corpus to test the sufficiency of the criminal complaint. The complaint is as follows: "Harry Heskett being first duly sworn says that on the 24th day of July, A. D. 1919, in said county, the above-named defendants did commit the crime of maintaining an unlicensed ferry, committed as follows, to wit: that at said time and place the said Joe Leach and William Friesham, then and there being, did wilfully and unlawfully maintain and operate a ferry boat for profit and hire upon the waters of Missouri river, and did then and there transport and carry passengers, automobiles, teams, and wagons across the said river on said ferry for profit and hire from Morton county, North Dakota, to city of Bismarck, North Dakota, without having first obtained a license to operate the said ferry from the board of county commissioners of Morton county, against the peace and dignity of the state of North Dakota. Wherefore complainant prays that defendants, Joe Leach and William Friesham, may be arrested and dealt with according to law."

Upon the filing of this complaint, the warrant of arrest was issued by one Henke, the justice of the peace for the arrest of these relators and they were taken into custody and brought before said justice of the peace. The defendants demurred to the complaint upon two grounds.

(1) That the complaint does not substantially conform to the requirements of the Code of Criminal Procedure of the state of North Dakota in that it does not particularly set forth the facts constituting the alleged defense; that it does not allege there was a landing of the ferry alleged to have been operated either in the county of Morton, or in the city of Bismarck.

(2) That the facts stated in said complaint do not constitute a public offense or any offense against the laws of the state of North Dakota. The demurrer was overruled and the defendants held to answer, the offense charged in the complaint. The justice court fixed the bail at $200. The defendants did not procure any bail and were committed to the custody of Mr. Olson, the sheriff of Morton county. The rela-

tors then applied to the judge of the district court of Morton county for a writ of habeas corpus which was issued. The matter was heard before said judge, and the writ of habeas corpus theretofore issued by it was quashed.

Thereafter the defendants applied to one of the justices of the supreme court for a writ of habeas corpus which was issued and made returnable on the 5th day of September, 1919. The defendant, Sheriff Olson, has made his return to that writ and justifies his custody of the plaintiffs by reason of proceedings had in the justice court and by virtue of the commitment of the plaintiffs therein issued.

The relators, Leach and Friesham, maintained their imprisonment, detention, and restraint is illegal for three reasons: First, that the facts stated in the criminal complaint do not constitute a public offense; second, that the provisions of § 9777 of the Compiled Laws of 1913, are unconstitutional as being contrary to the provisions of § 61 of the Constitution; third, that for these reasons, the justice of the peace has no jurisdiction over the persons of the petitioners and had no right or authority to issue the warrant of arrest or warrant of commitment of the relators. There is no merit to any contentions of the plaintiffs and relators. The complaint filed with the justice of the peace properly charged a public offense, and the demurrer to it was properly overruled. The warrant of arrest and the warrant of commitment were each lawfully and properly issued.

One of the landings of the ferry in question is within the corporate limits of the city of Bismarck, Burleigh county, North Dakota. The city of Bismarck and the county of Burleigh are on the east side of the Missouri river. The other landing of the ferry is on the west side of the Missouri river, approximately opposite Bismarck, but the same is not within the corporate limits of any city, town, or village, but is within the limits of Morton county.

The relators procured a license from the city of Bismarck for the operation of the ferry, but did not procure a license from the commissioners of Morton county.

Section 2063, Comp. Laws 1913, of North Dakota, authorizes the board of county commissioners of the county to whom application shall

be made for a ferry, to grant a lease of such ferry for the time, and upon the terms in said section set forth.

The relators did not procure a license from the commissioners of Morton county, and hence had no right or authority to operate a ferry, or have a landing within the jurisdiction of Morton county. The relators, however, claim the right to operate the ferry between Bismarck and Morton county by reason of the license procured from the city of Bismarck, and based such claim of right on the following provision in the above section: "Provided . . . that the mayor and city council of any incorporated city, and the board of trustees of any incorporated town or village in the state of North Dakota, within whose corporate limits the landing of any ferry shall be situated, shall have the sole authority to grant a lease of such ferry and the right to fix the rates for crossing such ferry, etc." This provision of the law, as we view it, gives the city exclusive authority to grant a lease of the ferry, and fix the rates as against the county only in which such city is located. In other words, the landing on the east side of the river is within the corporate limits of the city of Bismarck. It is also within the corporate limits of Burleigh county. Hence, as between the city of Bismarck and Burleigh county, the exclusive right is given to Bismarck as against Burleigh county to authorize the ferry and to fix the charges for crossing such ferry. It is plain, however, that neither the city of Bismarck nor Burleigh county could make any lease of ferry or fix charges which would be of any binding legal effect within the jurisdiction of Morton county. The jurisdiction of Bismarck or the county of Burleigh extends no further than the center of the Missouri river. On the westerly side of the river, Morton county has jurisdiction from where it borders on the river to the center thereof. It would seem, therefore, that the ferry on the westerly side of the Missouri river, and the landing of such ferry being within the exclusive jurisdiction of Morton county, the county commissioners of Morton county would have the exclusive right to grant the lease of such ferry within the jurisdiction of Morton county.

The relators had not procured a license from Morton county to operate such ferry and, as we view it, were acting in direct violation of the provisions of § 9777, Comp. Laws 1913. The proper author-

ities to lease ferries are those denominated in § 2063, and the method of leasing and fixing charges is that prescribed by the same section. The authorities who lease ferries and the method of fixing charges was not changed by the amendment of § 2062 by the 16th Legislative Assembly. Section 2062, before its amendment by the 16th Legislative Assembly, contained the following which were left out of the amendment and re-enactment of the law by the 16th Legislative Assembly, to wit: "And when any ferry lease has been granted, no other lease shall be granted within a distance of 2 miles thereof across the same stream."

It is clear that the writ of habeas corpus issued by this court should be quashed, and it is so held. Costs are awarded neither party.

CHRISTIANSON, Ch. J., and BIRDZELL and ROBINSON, JJ., concur.

BRONSON, J. I dissent. The statutory provisions concerning the granting of a franchise for a ferry are not clear either as to the method of granting such franchise or the extent of the same. The application to some degree, of principles of statutory construction, and the ascertainment of the legislative intent, are the practically sole considerations involved in this proceeding.

Two sets of statutory provisions concern the licensing and operation of ferries.

Section 2062, Comp. Laws 1913 (§ 1167, Rev. Code 1899) was formerly § 1361, Terr. Codes 1887. This section and §§ 2063 to 2070, inclusive, provide for the licensing of a ferry by the board of county commissioners of the county to whom application is made excepting where the landing place of a ferry is within the corporate limits of a city, such city shall then have the sole authority to grant a lease of such ferry. Such sections further provide for the operation of such ferry. Said § 2062 contained also the further provision: "When any ferry lease has been granted no other lease shall be granted within a distance of 2 miles thereof across the same stream.

The Legislative Assembly of 1919 amended and re-enacted said § 2062 by eliminating therefrom the phrase quoted above and by further providing that the county commissioners upon a verified complaint

and hearing had upon ten days' notice to the licensee may cancel any license granted for good cause shown.

Section 9777, Comp. Laws 1913, has come down from statehood being formerly § 6662, Comp. Laws Terr. Codes 1887. This section provides that it shall be a misdemeanor to operate a ferry without a license and further that any license granted by the board of county commissioners of the proper county shall be exclusive to the licensee for a distance of 2 miles from the place where such ferry is located up and down such stream either way.

It is the contention of the relator that § 9777 is now inconsistent with the new re-enacted § 2062, and therefore repealed by reason of the former statute retaining the exclusive franchise feature for 2 miles and the new section expressly eliminating the same, and that further, in any event, said § 9777 is unconstitutional. Neither of these contentions can be upheld. The contention of the unconstitutionality of said § 9777 for the reason that such section contains more than one subject, not expressed in the title, is without merit.

The new § 2062 contains no general repealing clause. The mere fact that the legislature eliminated in the new act the exclusive franchise for 2 miles which is also similarly contained in said § 9777 is no argument that they intended thereby to repeal such provision in such § 9777. The argument can be equally applied that possibly the intention was not to repeal legislation in that regard twice, already more definitely stated in § 9777. The relator further contends that the criminal complaint which is the subject-matter of the writ herein does not state facts sufficient to constitute a public offense, in that it is not a necessary prerequisite in order to operate a ferry at the *locus in quo* that a license be procured from the board of county commissioners of Morton county. That in fact a license from the city of Bismarck to so operate a ferry at the place involved would be sufficient lawful authority to the relators. So it would appear to be if, in fact its concurrent jurisdiction had first been exercised. The complaint alleges that the relators did not have a license from the county commissioners of Morton county. The majority opinion has proceeded upon the assumption in quashing the writ herein that it is necessary for relators, in order to operate the ferry at the place involved, to procure and to

have a license or franchise from both the city of Bismarck and the county commissioners of Morton county. I am of the opinion that this view is erroneous. The granting of a franchise to operate a ferry is the exercise of the sovereign power of the state. 19 Cyc. 494; Patterson v. Wollmann, 5 N. D. 612, 33 L.R.A. 536, 67 N. W. 1040; Nixon v. Reid, 8 S. D. 507, 32 L.R.A. 315, 67 N. W. 57. Although this power is subject to the power of Congress, over navigable rivers the states have nevertheless exercised the power to establish and regulate ferries with no interference from Congress. Conway v. Taylor, 1 Black, 603, 17 L. ed. 191. It is not a power peculiar to a local community such as the town, village, city, or county. Well might the state directly exercise such power through one of the executive or administrative departments of the state government. 19 Cyc. 459; Bush v. Peru Bridge Co. 3 Ind. 21, 23. The local municipal corporation therefore when exercising this power acts as the agent of the state, and not for itself. Evans v. Hughes County, 3 S. D. 244, 52 N. W. 1062; Patterson v. Wollmann, 5 N. D. 608, 33 L.R.A. 536, 67 N. W. 1040. The franchise so granted may be made and is, by legislative act, exclusive. Patterson v. Wollmann, supra.

From this viewpoint it is wholly immaterial whether the franchise granted exists within or without the boundaries of the local community corporation to which has been granted the power of creating such franchising. It is well established that municipal corporations may be granted by the legislature sovereign powers that may extend in their execution even beyond and without their corporate boundaries.

In Patterson v. Wollman, supra, Judge Corliss has stated the view point as follows: "A ferry is a moving public highway upon water. The highway upon land meets at either shore with a physical obstruction in the shape of a stream of water. How shall this highway be carried over this stream? The solution of this problem is exclusively within the province of the sovereign power. In this country such power is exercised by the state legislatures. It rests with such bodies, subject to such constitutional restrictions as relate to the matter, to determine whether there shall be a bridge or an embankment of earth constructed or a ferry maintained to carry a highway over a stream. The ferry may be directly under public control or the sovereign power

may authorize a person or corporation to maintain this portable highway. When the power is delegated, the grantee of the franchise discharges a public duty in operating the ferry; and in the discharge of that duty he exercises a privilege which the state may grant or withhold at pleasure. The franchise does not consist of the right to sail his boat upon the stream, or to moor it by the shore. It is the privilege of operating a floating highway, of establishing and maintaining a public thoroughfare over water, and of charging tolls for the facilities for passage so afforded. Whatever right is enjoyed by the citizen in this regard is derived exclusively from the sovereign power, which has full control over the whole subject. The state may exclude all persons from the business. It may run all ferries itself."

In this regard the pertinent question involved is whether the legislature intended by said legislation to grant concurrent jurisdiction to a single municipal corporation to grant a franchise which when once exercised concerning a particular place exhausted the power, or whether it intended that two or more local municipalities should possess the power to grant a franchise covering only the ferry landing and the waters within the boundaries of its ordinary corporate jurisdiction. It is clear to me that the statutory provisions quoted cannot be harmonized and given effect so as to create an exclusive and full right to the franchise of a ferry excepting upon the construction which permits to a single municipal corporation the right to create a franchise by the first exercise of this concurrent jurisdiction.

Section 2063 plainly contemplates a granting of a franchise by a single board of county commissioners, or, when a ferry landing is located within the boundaries of a city, by the city itself in lieu of such board of county commissioners.

Section 2062 re-enacted, also contemplates a granting of such license by a single board. Section 2062 further contemplates the right to fix rates in the operation of such ferry by a single corporation. Section 2065 likewise contemplates action by a single authority, viz.: The secretary of state, in operating ferries in unorganized counties. For purposes of illustration it might be possible for a stream to exist wherein there are within the legislative limit, of 2 miles, four different landing places. Two within the limits of two different cities

or villages, and two other landing places within the limits of two other and different counties. Under the construction as cited by the majority opinion it would be necessary in such case for the relators to secure a franchise from each of the cities and from each of the county boards in order to maintain the ferry right and in such event all these local municipalities would possess the right to regulate the rates and would possess the right of canceling the franchise without regard to action by the other municipal bodies. I do not believe that the statute contemplates any such conflicting exercise of jurisdiction.

Under the terms of the statute, what is contemplated within the meaning of a ferry franchise? If such provision should be construed so as to create a legislative intent to grant to each board of county commissioners the control of the ferry privileges within its county, so that the franchise granted operated to convey a right to transport from a landing place within the county granting the franchise to the opposite bank, but not from the opposite bank to the place within such county, the construction as given by the majority opinion is probably correct. This idea is barely suggested in Patterson v. Wollmann, supra. It was so held in Power v. Athens, 99 N. Y. 592, 2 N. E. 609, where an act of the legislature granted in terms the right to a municipality to operate a ferry across the Hudson river from the west side of the river, and further held that it was within the legislative province to grant a franchise to ferry across the river in one direction only.

Under the statutory province involved herein, however, the franchise is exclusive. The intent of the act is clear to grant the full right of ferriage. The right to transport in one direction only is merely a portion of the right of the franchise. Ordinarily in the absence of the legislative restriction a ferry in the full sense of the word is a public highway and the franchise right thereover should include the right of transportation both ways. 19 Cyc. 493. In State ex rel. Driver v. Talladega, 3 Port. (Ala.) 412, it is stated: "The licensing and use of a ferry necessarily require the use of both banks of a river, and, if one is established on one side, it excludes the idea of legitimate establishment of another on the opposite side or within 2 miles by water on either side."

In Jones v. Johnson, 2 Ala. 746, where by legislative act the county

authorities were granted the right to create a franchise exclusive excepting when such ferry was situated at or near a town, it was held that when one of two counties had equal rights to establish a ferry the right was given to both, and that when the power was exercised by either it was exhauted; that such power was in the nature of concurrent jurisdiction, the proper exercise of which by one tribunal necessarily ousts all others. The court further held that where a river divided two counties the commissioners' court of either county might establish a ferry over the stream which divided them, and that, when so established in conformity to law, it was conclusive of the right of either county to establish another ferry within 2 miles thereof unless in the case of a ferry at or near a town. It was likewise held in State ex rel. Driver v. Talladega, supra. In a similar manner the fact that a franchise granted by a local municipality may extend upon land not subject to its jurisdiction does not militate against the validity or legality of such franchise. Vallejo Ferry Co. v. Solano Aquatic Club, 165 Cal. 255, 131 Pac. 864, Ann. Cas. 1914C, 1197; People v. Babcock, 11 Wend. 590; Patterson v. Wollmann, 5 N. D. 608, 33 L.R.A. 536, 67 N. W. 1040. Accordingly, I am of the opinion that the statutory provisions involved contemplate the granting of a franchise of ferriage to a single municipality with the right to exercise concurrent jurisdiction by either municipality when the stream is between two counties, the exercise of which jurisdiction by either municipality exhausts the power.

The writ should issue.

STATE OF NORTH DAKOTA, on Relation of WILLIAM LANGER, Attorney General, Appellant, v. GAMBLE-ROBINSON FRUIT COMPANY, a Corporation, and the Stacy Bismarck Company, a Corporation, Respondents.

(9 A.L.R. 98, 176 N. W. 103.)

Corporations — quo warranto lies to annul corporate franchises for unlawful combination to fix prices, notwithstanding other remedies.

In a civil action brought by the attorney general, in which it is sought

to procure the cancelation of the corporate charters of the defendants, where the complaint alleges a combination of the defendants to control the price at which they will sell fruits and berries contrary to chap. 65 of the Penal Code, it is *held:*

1. The civil remedy in the nature of quo warranto to procure the annulment of corporate franchises for abuse of powers, which is provided in § 8004, Comp. Laws 1913, in the Code of Civil Procedure, is the ordinary common-law remedy through which the state might vindicate its sovereign rights, and it is not to be deemed superseded by a criminal remedy, or another civil remedy, in the absence of a clearly expressed legislative intention to that effect.

Corporations — statutory forfeiture of corporate franchises on conviction of crime not exclusive remedy.

2. Neither the absence of provision for a civil remedy in a penal statute prohibiting trusts, pools, and combinations, nor the provision in such penal statute making a judgment of conviction operate as a forfeiture of corporate franchises, sufficiently evidences a legislative intention to make the criminal remedy exclusive.

Corporations — civil remedy to annul corporate franchises exists independently of criminal proceedings.

3. The civil remedy provided by § 8004, Comp. Laws 1913, is not conditioned on a successful criminal prosecution under the penal statutes, and may be brought independently of criminal proceedings.

Corporations — suit may be brought to annul corporate franchises for abuse of powers.

4. Section 8004, Comp. Laws 1913, in the Code of Civil Procedure, authorizes a civil action by the attorney general for the annulment of corporate franchises for abuse of powers, and the alleged acts of the defendants constitute abuse of their corporate powers within subdivision 2 of the section.

Corporations — misuse of franchise justifies civil remedy to annul franchise.

5. Misuse of a corporate franchise constitutes abuse of powers justifying the application of the statutory civil remedy whenever the acts of misuse involve injury to the public, although the same acts may constitute a violation of a penal statute.

Opinion filed December 27, 1919.

NOTE.—On criminal prosecution as a condition of a civil action or proceeding for cancelation of a corporate charter for violation of law, see note in 9 A.L.R. 106.

For authorities discussing the question of forfeiture of corporate franchise, causes for and how enforced, see comprehensive note in 8 Am. St. Rep. 179.

Appeal from district court of Burleigh County, *Nuessle*, J.

Reversed.

William Langer, Attorney General, and *Albert E. Sheets, Jr.*, Assistant Attorney General, (*S. L. Nuchols* and *Carmody, Louden, & Mulready* of counsel), for appellant.

A state has authority to forfeit the franchise of a domestic corporation, cancel the permit of a foreign corporation, or authority to do business in that state or to enjoin any corporation, foreign or domestic, from violating any of the laws of the state or exercising any franchise not conferred upon it by law. Hanger v. Com. 14 L.R.A.(N.S.) 683, and cases cited; Crawford Social Club v. Com. 14 L.R.A. (N.S.) 683; State v. Central Lumber Co. 42 L.R.A.(N.S.) 804; State ex rel. Young v. Standard Oil Co. 11 Minn. 85, 126 N. W. 527; State v. Drayton, 82 Neb. 254, 23 L.R.A.(N.S.) 1287, 117 N. W. 768; Waters-Pierce Oil Co. v. State, 106 S. W. 918, 212 U. S. 86; State v. Creamery Package Mfg. Co. 115 Minn. 207, L.R.A.1915A, 892, 132 N. W. 268; State v. Creamery Package Mfg. Co. 126 N. W. 126; State ex rel. Snyder v. Portland Natural Gas & Oil Co. 153 Ind. 483, 53 L.R.A. 413; People v. Northern River Sugar Ref. Co. 9 L.R.A. 33, and note. State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 137.

It is the contention of the plaintiff that upon the allegations of the complaint, the court has authority to enjoin the carrying out by the defendants of the agreement alleged in the complaint. State v. Creamery Package Mfg. Co. 115 Minn. 207, L.R.A.1915A, 892, 132 N. W. 268.

Fisk & Murphy, for respondent Gamble-Robinson Co.

That a court of equity has no jurisdiction, unless expressly conferred by statute, to decree the dissolution of a corporation or the forfeiture of its franchises, either at the suit of an individual or at the suit of the state, is well settled. 7 R. C. L. 731, 740. See also the many cases cited in the note in 8 Am. St. Rep. at page 200. See also 5 Fletcher, Cyc. Corp. § 3234, and many authorities therein cited.

The state has an adequate remedy at law through proceedings in

the nature of quo warranto. 7 R. C. L. page 726, ¶ 734 and cases cited, id. 732.

Murphy & Toner and *Butler, Mitchell & Doherty,* for respondent Stacy Bismarck Co.

No action lies for the forfeiture of the defendant's franchises under the allegations of the complaint. Boyd v. United States, 116 U. S. 616; Counselman v. Hitchcock, 142 U. S. 547, 562.

And this court has held that the decisions of the Supreme Court of the United States are a guide for its decisions in interpreting this section of the Constitution. State v. Donovan, 10 N. D. 203, 86 N. W. 709; Re Beer, 17 N. D. 184, 115 N. W. 672.

No equitable relief by injunction, or other relief of any form whatever, can be granted in this action or on the allegations contained in the complaint. 17 Enc. Pl. & Pr. 386, 390, 482; 32 Cyc. 1412, 1415, 1463; 22 R. C. L. 656, 719.

BIRDZELL, J. This is an appeal from an order of the district court of Burleigh county, sustaining a demurrer to a complaint. The action is one by the attorney general to secure the cancelation of the corporate charters of the defendants and is brought pursuant to leave of court obtained upon an order to show cause why the leave should not be granted. The complaint alleges the official relation of the plaintiff as attorney general of the state; the corporate existence of each of the defendants; that each defendant is a wholesale fruit dealer, engaged in selling to retailers in territory tributary to the city of Bismarck; and then, in paragraph 4 the allegations upon which the sufficiency of the complaint depends are set forth as follows:

"That in the year 1913, the defendants formed a pool, trust, and combination for the purpose of fixing a standard for the price, and fixing the price at which, fruits and berries should be sold by said defendants to the trade and to the public, and by which defendants agreed between themselves to establish, agree upon, and settle the price each week, or oftener, at which fruits and berries sold by defendants should be sold to retail dealers and to the public, and in pursuance of such combination and agreement, representatives of each of the defendant

corporations met together once each week and agreed together to sell fruits and berries to the retail trade and to the public at a certain price during the ensuing week according to a card or price list agreed upon by said defendants; and said defendants have ever since the summer of 1913 continued to combine and agree together for the purpose of fixing the price at which fruits and berries should be sold by said defendants to the retail trade and the public in the city of Bismarck and the territory tributary thereto, and since said last mentioned date, representatives of said defendants have regularly met together from time to time and agreed upon and fixed the price, and arranged a card and price list according to which said defendants should sell fruits and berries to the retail trade and the public, and said defendants still continue said pool, trust, and combination for the purpose of fixing the price at which fruits and berries shall be sold by defendants to the retail trade and the public, in the city of Bismarck and the territory tributary thereto, and in pursuance of said pool, trust, combination, and agreement for fixing prices, neither of said defendants will sell fruit or berries at any other price than the price agreed upon by said defendants, and each of said defendants, pursuant to said agreement sells fruits and berries at identically the same price in the same territory, and preclude and prevent a free and unrestricted competition between themselves in the sale of fruits and berries to the retail trade and to the public in the city of Bismarck and the territory tributary thereto, in violation of chapter 65 of the Penal Code Compiled Laws, State of North Dakota, for the year 1913."

A general demurrer was sustained to the foregoing complaint and the matter is here upon appeal from the order.

The complaint must be considered in the light of the following provisions of law: Constitution, § 21: "The provisions of this Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise." Constitution, § 146: "Any combination, between individuals, corporations, associations, or either, having for its object or effect the controlling of the price of any product of the soil or any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy; and any and all franchises heretofore granted

or extended, or that may hereafter be granted or extended in this state, whenever the owner or owners thereof violate this article, shall be deemed annulled and become void." Section 8004, Comp. Laws 1913, provides ". . . an action may be brought by the state, or by any private person in the name of the state, on leave granted therefor by the district court, upon cause shown for the purpose of annulling the existence of any corporation created by, or under the laws of this state, except a municipal corporation, whenever any such corporation shall:

"1. . . .

"2. Violate the provisions of any law by which such corporation shall have forfeited its corporate rights, privileges, and franchises by abuse of its powers."

The succeeding sections of the same article make provisions for the bringing of an action by an individual in case of the refusal of the attorney general, for notice to the corporation, for distribution of the corporate property to creditors, claimants, and stockholders following a judgment of dissolution; for the appointment of a receiver; for the payment of costs, for filing a copy of the judgment roll in the office of the secretary of state or the insurance commissioner (depending upon the kind of corporation), etc.

The substance of chapter 65 of the Penal Code requiring consideration may be stated as follows: It provides that those entering into prohibited pools, combinations, etc., shall be guilty of a misdemeanor; defines illegal combinations in such a manner as to bring the alleged acts of the defendants within its penal provisions and it provides as punishment the fining of the guilty corporation up to the maximum of $5,000 and fining and imprisonment, or both, of the guilty officers of the corporation. One of the sections (Comp. Laws 1913, § 9954) reads:

"Every domestic or foreign corporation authorized to do business in this state, which shall have been found guilty in any court of competent jurisdiction of violating any of the provisions of this chapter, is hereby denied the right of and prohibited from doing business in this state, and the charter, articles of incorporation or authority granted, authorizing such corporation to do business in this state, shall cease and become void, and it shall become the duty of the secretary

of state, upon the filing in his office of a certified copy of such judgment, to immediately cancel the authorization or charter of such corporation and give such corporation written notice of such cancelation."

It contains further sections rendering combinations and contracts made in violation of the chapter void and not enforceable in law or equity, excusing purchasers from liability to pay for commodities sold in carrying out prohibited combinations, and authorizing the taking of testimony by the attorney general upon notice. Injunction is also authorized to prevent the corporation from disposing of or removing its property during the pendency of suit unless a bond be given conditioned for the payment of any judgment, fine, and costs that might be adjudged in the action.

The principal contention of the defendants and respondents is that the relief demanded cannot be decreed unless and until the respondents are convicted criminally under the Penal Code. If this contention be correct, the complaint does not state a cause of action. The contention is based primarily upon an interpretation of the statutory provisions hereinbefore referred to in conjunction with a section (Rev. Codes 1905, § 9231) which was passed in 1905 as a part of an act dealing with trusts, pools, and combinations and which was omitted from the act as amended and re-enacted by chapter 259 of the Session Laws of 1907. The section, which was repealed by and omitted from the 1907 Act, provided specifically that it should be the duty of the attorney general, either upon his own motion, or upon complaint of any aggrieved person, to institute a suit or quo warranto proceedings to obtain the dissolution of the corporate existence of an offending corporation. The argument is that the omission of this section, when considered in connection with the provision hereinbefore quoted from the 1907 Law (Comp. Laws 1913, § 9954) evidences an intention by the legislature to do away with the civil remedy for dissolution and to substitute therefor an automatic cancelation by virtue of a judgment of conviction obtained in criminal proceedings and filed in the office of the secretary of state. Whether or not this is the proper construction of the laws pertaining to the forfeiture of corporate charters for illegal combinations, constitutes the sole question for decision upon this appeal; for it is manifest that the complaint states a cause of ac-

tion if civil proceedings not founded upon a criminal prosecution are possible under the law.

The right of the state to inquire civilly into the propriety of the continued exercise of a corporate franchise by those who are alleged to have misused it to the injury of the public has been recognized for centuries as an attribute of sovereignty, and the right of the attorney general to act for the state in such inquiry comes from the common law (Fletcher, Cyc. Corp. § 3241). This remedy, whether it be denominated a quo warranto proceeding, an information in the nature of quo warranto, or a civil action under § 7969, Comp. Laws 1913, is now recognized universally as being civil rather than criminal in its nature, and the right to proceed civilly generally exists independently of the right to prosecute criminally. Says Fletcher, Cyclopedia Corporations, vol. 5, § 3235:

"As has already been noted, quo warranto proceedings are usually considered civil in nature, and there is no merger of the civil liability in the criminal offense. A corporation may be proceeded against by quo warranto for a misuser or perversion of its franchise, although its officers and agents at the same time may be amenable to the criminal law for the offenses committed by them in the perversion of such franchises. Neither one of these proceedings is a bar to the other, and the corporation may be held to answer for its wrongful acts before its agents are tried and convicted of their guilty acts. For instance, it has been held that violators of an anti-trust act may be proceeded against by indictment or information, and the remedies by information and in equity, also exist."

The text of Cyc. is to the same effect. There it is said: "The right reserved by the legislature to repeal a charter which it has granted does not impair the right to proceed by quo warranto in case the legislature does not exercise its power, and it is no bar to quo warranto against a corporation for misusing its franchise that the acts constituting such misuser have rendered its officers criminally liable." 32 Cyc. p. 1417.

As to the presumption that the ordinary remedy by quo warranto is not superseded by a special statutory remedy, Cyc. further says (32 Cyc. p. 1417): "(2) In the absence of a constitutional prohibition,

the legislature has power to provide for remedies and thereby to supersede that by quo warranto, and an intention so to do, if clearly manifested, will be given effect, and the courts will recognize the statutory remedy as exclusive. Unless, however, the contrary intention clearly appears, the statutory remedy will be considered cumulative."

The text of Ruling Case Law supports the same principle (7 R. C. L. p. 711): "If a penalty is imposed for an act or omission, and the charter or statute imposing it does not expressly or by necessary implication deprive the state of the right to proceed for a forfeiture, then, on principle, such proceedings should not be cut off."

To turn to specific instances, where courts have held the civil remedy applicable though the acts complained of constituted violations of criminal statutes, see State ex rel. Atty. Gen. v. Capital City Diary Co. 62 Ohio St. 350, 57 L.R.A. 181, 57 N. E. 62; State v. Nebraska Distilling Co. 29 Neb. 700, 46 N. W. 155. In the former case the charter of the corporation was forfeited for the violation of a penal statute enacted to prevent fraud and deception in the manufacture and sale of oleomargarine. The statute contained no provision expressly authorizing the forfeiture of the charter. To the objection that the remedy by criminal prosecution was exclusive, the answer of the court was that the remedy was not adequate, and that the inadequacy of the criminal remedy was attested by practical difficulties in obtaining convictions. In the Nebraska case it was held, without reference to the anti-trust statute expressly authorizing cancelation of the charter, that a corporation entering into a contract in restraint of trade and commerce which was contrary to the policy of the common law rendered itself liable to the forfeiture of its charter in an original quo warranto proceeding. We deem the proposition to be fully established and well-grounded upon principle that the right of the state to proceed civilly to procure the forfeiture of a corporate charter for gross abuses of the franchise which are injurious to the public is not dependent upon the result of criminal prosecutions for the same wrongs, unless there is the clearest expression of the legislative intention to that effect.

From what is the legislative intention relied upon by the respondents in the case at bar to be deduced? The express direction to the attorney general to proceed by quo warranto, which formed a part of

the 1905 statute, was not made a part of the Act of 1907, and § 9954, Comp. Laws 1913, indicates that the filing of a copy of a judgment of conviction with the secretary of state, followed by notice, shall cancel the charter of the corporation. In short, the argument is that the implication resulting from the omission from the penal statute of express authority for a civil action, coupled with an apparent means of making a conviction operate automatically as a cancelation of the charter, evidences an intention to do away with the civil remedy which, prior thereto, had inhered in the state. We deem this argument untenable for two principal reasons:

1. The penal statute itself, as enacted in 1907, contains provisions, not theretofore existing in the statute, authorizing the taking of testimony and fixing the consequences of the failure of officers, agents, directors, and employees to testify, which consequences could only be visited upon the corporation in a civil action. While it is difficult to see why the legislature would make these sections part of a penal statute when they relate primarily to civil proceedings, nevertheless, such fact is a significant guide in determining intention where it is contended that the civil action was abolished. One of the added sections, too, provides for the issuance of an injunction to prevent the corporation during the pendency of "any action or suit" under "the provisions of this chapter" from disposing of or removing its assets or property from the jurisdiction. It is clearly intended that this section shall be employed in civil proceedings. Thus, there are expressions in the 1907 Act itself which are indicative of an intention to continue civil remedies. These, in our opinion, outweigh the negative implication.

2. The Code of Civil Procedure contains ample authority for the bringing of a civil action against a corporation for abuse of its franchise. And it should require something more than a negative implication derived from a penal statute to deprive the state of the civil remedy therein provided for. Section 8004, Code of Civil Procedure, is but the codification of the common-law doctrines according to which the state might vindicate its sovereign right to terminate any franchise granted by it when sufficient cause exists to justify its interference. It would be strange, indeed, if this civil proceeding were suspended entirely where the cause of forfeiture were made a penal offense.

Especially where the offense consists of such a public wrong as a combination to control prices, which is expressly inhibited in this state by constitutional provision. N. D. Const. § 146. If such were the situation, the result would be that the legislature has said that for the violation of minor regulatory provisions which are not even made penal, a corporate franchise may be forfeited in a civil action by the state, in which the state would only sustain the burden of proof by a preponderance of evidence; but for an offense so grave as to be made criminal, the franchise may not be forfeited unless the state has established guilt beyond a reasonable doubt in a criminal prosecution. Furthermore, by making the forfeiture dependent upon the outcome of a criminal prosecution it would be impossible to resort to evidence that might be available in a civil action; such, for instance, as depositions. We would be most reluctant to attach a construction to the statutes that would convict the legislature of intending such an inconsistent and unreasonable consequence.

In addition, the history of the legislation in this state on the subject of pools, trusts, and combinations, shows that though the Constitution forbids combinations to control prices and declares that for a violation of the provision corporate franchises "shall be deemed annulled and become void," express authority for civil proceedings was never made a part of any penal statute on the subject until 1905, and in the legislative session immediately following this provision was stricken out as hereinbefore noted. Thus, if the failure to expressly authorize in a criminal statute the forfeiture of the charter by civil proceedings makes the criminal remedy exclusive, the criminal remedy has been exclusive in this state since 1890, with the exception of the years 1905–1907. It is true that in some of these statutes an attempt was made to authorize special inquiry by the secretary of state looking toward the cancelation of corporate charters. But this summary method of cancelation by an executive officer has been held to be unconstitutional and could not take the place of a civil remedy for the same purpose. State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089. To us it seems more reasonable that the civil remedy provided in the Code of Civil Procedure has been available during all these years.

But it is argued that the commission of the criminal offense stated in the complaint does not amount to an abuse of corporate powers under subdivision 2 of § 8004. In the light of the authorities, we can see no merit in this contention. It will serve no good purpose to attempt a definition of the expression "abuse of its powers" as used in the statute, for there seems to be a general agreement that the commission of acts of the character alleged in the complaint in this case is entirely within any definition that might be attempted. For a case in point under an identical statutory provision, see People v. North River Sugar Ref. Co. 121 N. Y. 582, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834, 54 Hun, 355, 3 N. Y. Supp. 401. See also State v. Central Lumber Co. 24 S. D. 136–164, 42 L.R.A.(N.S.) 804, 123 N. W. 514; People v. Buffalo Stone & Cement Co. 131 N. Y. 140, 15 L.R.A. 240, 29 N. E. 947; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; State ex rel. Crow v. Armour Packing Co. 173 Mo. 356, 61 L.R.A. 464, 96 Am. St. Rep. 515, 73 S. W. 645; State ex rel. Hadley v. Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539; State ex rel. Hadley v. Standard Oil Co. 218 Mo. 1, 116 S. W. 902; State ex rel. Major v. International Harvester Co. 237 Mo. 369, 141 S. W. 672; State ex rel. Mason v. Springfield African Social & Improv. Club, 169 Mo. App. 137, 154 S. W. 458; State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; State ex rel. Snyder v. Portland Natural Gas Co. 153 Ind. 483, 53 L.R.A. 413, 74 Am. St. Rep. 314, 53 N. E. 1091.

Morawetz states the rule as follows (2 Morawetz, Priv. Corp. § 1024): "A corporation may incur a forfeiture of its franchises by the doing of an illegal act. Any act of a corporation which is forbidden by its charter, or by a general rule of law, and strictly every act which the charter does not expressly or impliedly authorize the corporation to perform, is unlawful; and, if the doing of such act is an injury to the public, it may be sufficient ground for declaring a forfeiture." 5 Fletcher, Cyc. Corp. § 32; 2 Cook, Corp. 6th ed. § 633; 5 Thomp. Corp. §§ 6627 and 6628; 7 R. C. L. 726.

The underlying principle of all of the authorities above cited has been well stated in the case of State ex rel. Hadley v. Delmar Jockey

Club, 200 Mo. 34, 98 S. W. 539, supra. It is there said (page 68): ". . . When a corporation receives from the state a charter granting certain franchises or rights, there is at least an implied or tacit agreement that it will use the franchises thus granted; that it will use no others, and that it will not misuse those granted. A failure in any substantial particular entitles the state to come in and claim her own—the rights theretofore granted—and this through a judgment of forfeiture in a proceeding like the one at bar."

After discussing nonuser as a ground for forfeiture, the court proceeds (page 71): ". . . Misuser is likewise a violation of the implied agreement with the state. So is usurpation. Each are but violations of the implied contract with the state, and for these violations we declare forfeitures. . . . The gist of each in quo warranto is the wilful violation of the rights of the state under the implied contract, and not the violation of some criminal law, for we do not try criminal cases and affix criminal punishments in quo warranto proceedings. The violation of the corporation's contract with the state by misuser or usurpation may be evidenced by the fact of the violation of some statute criminal in character, but in this kind of proceeding we try the right of the corporation to further hold the right of its franchises, not the question of finding its guilt or innocence under the statute and fixing punishment by the statute."

But it is argued that the expression "abuse of its powers," as used in the statute, can only refer to acts that the corporation is enabled to do because it is a corporation, or because of some special power given to it which it has abused. If this argument has not been sufficiently answered above, we need only add that such a construction appeals to us as highly technical and unreasonable. One of the most valuable privileges of the corporation is its right to do business with the public, and this right it enjoys in common with individuals who may do business on like terms. But yet it is only by virtue of the franchise granted that the corporation secures the right to do business as an artificial entity. So, whatever a corporation does in exercising the franchise to do business it does by virtue of the power which the state has conferred upon it, whereas the similar right of individuals is not so derived. The provisions of the Constitution and of the

statute, as well as the common law of the state, in so far as they affect the manner in which corporations may conduct their business, form the terms of the implied contract upon which the corporate franchise is granted, and therefore enter into the franchise itself. When the corporation breaks this contract in such a way as to work injury to the public, the state has a right to institute an inquiry into the extent of the abuse of the powers granted by it, and, in proper cases, to annul the franchise for the abuse. Even if the view be taken that the acts complained of are ultra vires, forfeiture might still be adjudged. State v. Nebraska Distilling Co. 29 Neb. 700, 46 N. W. 155.

To the suggestion that the acts alleged in the complaint do not show grave offenses against the public interests or a sufficient turning aside from the purposes for which the defendant corporations were organized to justify action by the state, it need only be replied that the acts alleged have been thought by both the constitutional convention and the legislature to be sufficiently grave to call for the application of the remedy sought.

For the foregoing reasons the order appealed from is reversed.

CHRISTIANSON, Ch. J., and ROBINSON, J., and ALLEN, District Judge, concur.

GRACE, J., concurs in the result.

BRONSON, J., disqualified did not participate. Honorable FRANK P. ALLEN, Presiding Judge of Third Judicial District sitting in his stead.

NILS FEKJAR, Respondent, v. IOWA STATE LIVE STOCK INSURANCE COMPANY, a Corporation, Appellant.

(177 N. W. 455.)

Insurance — defense that policy was obtained by false representations — the question of the falsity of the representations was for the jury.

This is an appeal from a judgment against defendant for $1,000 on its

insurance of a registered Belgian stallion that weighed 2,000 lbs and was worth $2,200. The defense is that the insurance for which defendant received $100 was obtained by a false representation, which was that the horse never had colic, while in the proof of loss it is written that the horse had a slight colic in the winters of 1916 and 1917. The proof of loss was written by the state agent of the plaintiff, and two witnesses swear that it did not contain anything about colic. It is *held:*

Under the evidence the question of the falsity of the representation was for the jury.

Opinion filed January 2, 1920.

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

Affirmed.

Winterer, Combs, & Ritchie (*Lester L. Thompson,* of counsel), for appellant.

"It was the duty of the court to declare the legal effect of the proof of loss instead of leaving that question to the jury." Thomas v. Burlington Ins. Co. 47 Mo. App. 169; Irving v. Ex. Fire Ins. Co. 14 N. Y. Supp. 507.

"Parol evidence to supplement or validate lost proof is inadmissible." Cannon v. Phoœnix Ins. Co. 110 Ga. 563, 78 Am. St. Rep. 124.

A. P. Paulson, for respondent.

Under § 7452, Compiled Laws of 1913, it is not required that a reply be filed to an answer of this nature. "When the answer contains new matter constituting a counterclaim, the plaintiff may, within thirty days, reply to such new matter. And in other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may in its discretion, on the defendant's motion, require a reply to such new matter; and in that case the reply shall be subject to the same rules as a reply to a counterclaim." Cornwall v. McKinney, 9 S. D. 213, 68 N. W. 333; Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743.

No request having been made on the part of the defendant in this case, a reply to the answer in question is deemed waived. Power v. Bowdle, 3 N. D. 107, 44 Am. St. Rep. 511, 21 L.R.A. 328, 54 N. W. 404.

Under our system of code pleading, a reply is never necessary or proper, except for the purpose of putting in issue facts alleged in the answer by way of counterclaim, unless the court, in its discretion and on defendant's motion, requests a reply to new matter constituting a defense by way of avoidance. American Case & Register Co. v. Walton & D. Co. 22 N. D. 187, 133 N. W. 309.

The equities are all on the side of the plaintiff, and the defendant insurance company should not now be permitted to avail itself of any technicalities which it either overlooked or voluntarily abandoned before and during the progress of the trial of the action. Piedmont L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610; Eclectic L. Ins. Co. v. Fahrenkrug, 68 Ill. 463; Mutual L. Ins. Co. v. Wiswell, 56 Kan. 765, 35 L.R.A. 258, 44 Pac. 996; New York L. Ins. Co. v. Graham, 2 Duv. 506; Boisblanc v. Louisiana Equitable L. Ins. Co. 34 La. Ann. 1167; Grangers L. Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. L. 576.

"The burden is on the insurer to show that the answers of the assured in the application were untrue, where it was claimed that the answers constituted warranties and were untrue." Indiana Farmers Live Stock Ins. Co. v. Rundell, 7 Ind. App. 426, 38 N. E. 588; Parno v. Iowa Merchants Mut. Ins. Co. 114 Iowa, 132, 86 N. W. 210; Maryland Casualty Ins. Co. v. Gehrmann, 96 Md. 634, 54 Atl. 678; Corbett v. Metropolitan L. Ins. Co. 36 App. Div. 152, 55 N. Y. Supp. 775; Mutual Reserve Ins. Co. v. Powell, 79 Ill. App. 482, 92 Ill. App. 326, 60 N. E. 806.

"A party alleging fraud must prove it." Ley v. Metropolitan L. Ins. Co. 120 Iowa, 203, 94 N. W. 568.

The proof of loss is subject to different rules of law than are applicable to the representations and warranties made in the application for insurance. Courts have recognized this distinction. Zielke v. London Assur. Corp. 64 Wis. 442, 25 N. W. 436.

Proof of loss may be waived by acts of the company. Carpenter v. Modern Woodmen, 160 Iowa, 602, 142 N. W. 411; Werner v. Fraternal Bankers' Reserve Soc. (Iowa) 154 N. W. 773.

ROBINSON, J. This is an appeal from a verdict and judgment

against the defendant for $1,000 and interest. The action is on an insurance policy. In January, 1918, at Fingal, the plaintiff owned a Belgian registered stallion, seven years old, weight, 2,000 pounds, for which he had paid $2,200. On his written application, and in consideration of $100, paid and retained, defendant made to plaintiff a policy or contract agreeing to insure him to the amount of $1,000 against loss of the animal for twelve months by death caused by sickness or accident. Four months afterwards, and on May 16, 1918, at Fingal, the animal sickened and died from strangulation of the small intestine. Due notice was given to defendant. Proof of loss was duly made as drafted by the state agent. The company refused payment on the ground that in the application for insurance the plaintiff was asked: Did the horse ever have any colic or indigestion? And his answer was: No, when, in fact, the animal had been afflicted with one or more attacks of colic in the years 1916 and 1917.

In the proof of loss, as drafted by the state agent of defendant, we have these questions and answers:

Q. 12. Was the animal ever sick before?
A. No, not to amount to anything.
Q. 13. What was the nature of the sickness?
A. Slight colic winter of 1916 and 1917.

The plaintiff, a witness to the proof of loss, swears that when it was signed it did not contain the answers given to question 13. He swears the state agent came to Fingal and made out the proof of loss. In answer to the question: Did you examine the proof of loss, his answer was, "No, sir." He signed it without reading it or examining it. He swears that he did not answer that the horse had colic at any time, and that in the making of the proof of loss nothing was said about colic. Testimony to the same effect was given by one Filter. He swears that nothing was said about colic, and on that question the jury found in favor of the plaintiff.

However, the materiality of the question is not apparent. There is no claim that the horse died of colic or slight colic or bellyache, which is not uncommon or dangerous in horses or in humans. The horse died of strangulation of the small intestine, which is always

dangerous. Were not good horses subject to slight colic, bellyache, and other ailments, there would be no reason for insuring them. When the horse was insured in January, 1918, it was a good insurable risk, though it died in May, 1918. Its condition was probably as well known to the agent and solicitor and insurance company as to the plaintiff. Insurance applications are commonly written by the expert agents and solicitors of the company who know what they are doing. The agent frames and writes the application. He frames the proof of loss and writes the same. The thing demanded of a party insuring is to pay a good premium. The rest is to a great extent form. The expert agents do, in effect, say to the insurer: You pay the premium; we do the rest.

Defendant, by its counsel, takes the position that its insurance contract was void or voidable from the beginning, because of a false representation made by the plaintiff, yet it has not attempted to rescind the contract; it has not restored, or offered to restore, any part of the $100 received for one year's insurance. It has offered no proof to show that it was deceived and misled to its injury. A party rescinding a contract must act promptly on discovering the facts which entitle him to rescind, and must restore everything of value received under the contract. Comp. Laws, § 5936. Insurance companies are too apt to play one tune when they induce a party to insure and another and very different tune when called on to pay a loss. They are too apt to pocket and retain the premium and give something in the form of a policy laden with technical niceties beyond ordinary comprehension, and then to defend against a claim of loss by some artifice or technicality. Hence those who honestly insure and pay their good money are entitled to the protection of the courts, even though in wariness and shrewdness they are no match for the expert insurance agents.

Judgment affirmed.

GRACE, J., concurs.

BIRDZELL, J. I concur.

BRONSON, J. I concur in result.

CHRISTIANSON, Ch. J. (concurring). In the application for insurance it was stated that the horse had never had colic or indigestion. In its answer in this case the defendant averred that this was a representation of a material fact; that the defendant relied upon the representation in issuing the policy of insurance; that the representation was false and known by the plaintiff to so be at the time he made it; that in truth and in fact the horse had been afflicted with one or more attacks of colic in the years 1916 and 1917. This was the only defense asserted. The only evidence submitted by the defendant in support of this defense was the proofs of loss signed and verified by plaintiff, wherein it was stated that the horse had had slight attacks of colic in the winter of 1916 and 1917. The plaintiff, however, testified that the proofs of loss were prepared by the defendant's general agent; that plaintiff did not read them over before signing them; that in the preparation of such proofs of loss the defendant's agent did not ask plaintiff any question regarding colic, and that plaintiff at no time stated that the horse had had slight attacks of colic in the winter of 1916 and 1917; and that in fact the horse had not had such attacks. Plaintiff's testimony was corroborated by one Filter, who was present at the time the proofs of loss were prepared and signed.

Defendant asserts that this evidence was inadmissible. It contends: (1) That the statements made in the proofs of loss were conclusive upon the plaintiff; and (2) that in any event there was no foundation in the pleadings for the introduction of such evidence. In my opinion both contentions are incorrect.

The statements in the proof of loss were admissible as admissions against interest, but they were not conclusive against the assured. So far as I can ascertain, the authorities are unanimous on that proposition. See, 7 Enc. Ev. 576; see also Messersmith v. Supreme Lodge, K. P. 31 N. D. 163, 173, 153 N. W. 989.

The new matter in the answer was deemed controverted by the plaintiff as upon a direct denial or avoidance, as the case might require. Comp. Laws 1913, §§ 7467–7477.

The trial court instructed the jury that the statement in the insurance application, to the effect that the horse had never had colic, was a material representation, but submitted to the jury as a question of fact

whether the statement was true or untrue. Clearly the defendant has no cause to complain because the latter question was submitted to the jury.

E. A. GREEN, N. W. Voight, E. M. Christianson, and F. D. Woodworth, Appellants, v. LYNN J. FRAZIER, Governor, William Langer, Attorney General, John N. Hagan, Commissioner of Agriculture and Labor, and Obert Olson, Treasurer of the State of North Dakota and the Industrial Commission of North Dakota, Respondents.

(176 N. W. 11.)

Constitutional law — where majority of qualified electors of the state approve an amendment to the Constitution and the same is ratified by the legislature and approved by the governor, it becomes part of the Constitution.

1. Where a proposed amendment to the Constitution of the state of North Dakota is, at a regular or special election, duly submitted to the electors for their approval, and a majority of the qualified electors voting at such election vote in favor of it, and it is later duly submitted to the legislature and by it agreed to and duly ratified, and it is thereafter approved by the governor of the state, it duly becomes a part of the Constitution of the state of North Dakota.

Constitutional law — all amendments which have been duly and legally adopted become a part of the Constitution.

2. It is *held*, the amendment to § 182 and to § 185 of the Constitution of the state of North Dakota each were regularly, lawfully, and in accordance with the provisions of the state Constitution relative to the amendment thereof, duly and legally adopted and are a part of the Constitution of the state of North Dakota.

Constitutional law — amendment of Constitution — right of people to amend same.

3. It is *held*, that the people of this state have the privilege, right, and authority, under the principles and prerogative of self-government, to adopt such Constitution and such amendments to it as to them may seem right and proper and best calculated to insure their general welfare, security, and

prosperity, subject, however, in this respect, to every limitation or restraint imposed upon them by the Constitution of the United States.

Constitutional law — issuing bonds in the aid of public enterprises by the proper authorities of the state does not deny due process of law as guaranteed by the Federal Constitution.

4. It is *held*, that neither of the amendments in question, in any manner, contravene any of the provisions of the Constitution of the United States; nor are they repugnant to it, nor are any of the laws relative to the construction and ownership of certain state-owned industries and utilities, invalid, void, or unconstitutional under the state Constitution; neither do they contravene any provision of the Constitution of the United States, nor are they within any of the restraints imposed by it upon the several states.

State — issuing bonds by state — interference with private business.

5. A private business or enterprise is one in which an individual or individuals, an association, copartnership, or private corporation have invested capital, time, attention, labor, and intelligence for the purpose of creating and conducting such business, for the sole purpose that those who make such contributions may, from the conducting and operating of it, make, gain, and acquire a financial profit, for their exclusive benefit, improvement, and enjoyment, and exclusively for their own private purposes and use.

State — what constitutes public purpose of public business for which bonds of state may be issued.

6. A public purpose or public business has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division, as, for example, a state, the sovereign powers of which are exercised to promote such public purpose or public business.

State — the entering of the state into business enterprises which are for the benefit of its citizens is for a public purpose.

7. It is *held*, that the building, owning, and operating of state-owned elevators, flouring mills, and other state industries in question, is for a public purpose as defined in paragraph 6, supra; it further appears that every resident and business in the state depends directly or indirectly upon the agricultural productions of the state for financial success, and that approximately 90 per cent of the wealth of this state is produced from the farms therein, and consists mostly of small grains, and, further, that great losses have been, and still are, being suffered by the farmers in marketing such grain outside the state, and that it is the purpose of such state-owned industries to establish a stable and fair market for such products within the state of North Dakota, where the producers of farm products within this state may receive the full market value of their products.

Constitutional law — state owned industries — right to issue bonds.

8. The building, owning, and operating of such state-owned industries and utilities being for a public purpose, and the profits from such inuring to all the people of the state, and are payable as such into the state treasury for the equal use and benefit of all the people of this state, it is *held*, that such ownership and operation of such industries and utilities constitute a public purpose, to carry out which the state may issue bonds as prescribed by law, and may levy a tax on all property of this state not exempt from taxation under the laws of this state or of the United States, for the purpose of paying the principal and interest of such bonds; and that in levying and collecting of such tax there is no violation of either the state Constitution nor the Constitution of the United States nor the 14th Amendment.

Constitutional law — fixing rate of interest not delegation of legislative power.

9. It is further *held*, that the authorization of the governor and industrial commission to fix the rate of interest, date of maturity, etc., of such bonds, is not the delegation of a legislative power or function, but merely the conferring of administrative duties upon them.

Constitutional law — amendments to Constitution promoting home ownership are valid.

10. The constitutional amendments and laws in question promote home ownership. The state, as such, is made up of units. Those units are represented by homes. The more homes, the more prosperous and secure they are, the more prosperous, secure and permanent is the state. The state, its integrity, morality, intelligence, prosperity, and permanence is measured largely by the average of those same virtues in its citizenship, and those virtues are greatly promoted by permanency of home ownership, which the laws in question are intended to establish.

Opinion filed January 2, 1920.

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

From an order sustaining a demurrer to the complaint plaintiffs appeal.

Order affirmed.

Harry Lashkowitz, for appellants.

"When a government becomes a partner in any trading company it devests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of

communicating to the company its privileges and prerogatives, it descends to the level with those with whom it associated, and to the business which is to be transacted. . . . The government by becoming a co-operator lays down its sovereignty so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter." United States v. Planters Bank, 9 Wheat. 905; Osborne v. United States, 9 Wheat. 240; Bank v. Whister, 2 Pet. 318; Bank v. Ashley, 2 Pet. 328; Darrington v. State Bank, 13 How. 12; Briscoe v. Bank of Kentucky, 7 Pet. 257; Curran v. Bank of Arkansas, 15 How. 304.

Taxation, except for public purposes, would be in violation of the 14th Amendment of the Federal Constitution. Loan Asso. v. Topeka, 20 Wall. 655; State v. Nelson County, 1 N. D. 96; Manning v. Devils Lake, 13 N. D. 47; Jones v. Portland, 245 U. S. 220; Cole v. LaGrange, 113 U. S. 1; Parkersburg v. Brown, 106 U. S. 487; Dodge v. Township, 107 Fed. 827; 2 Dill. Mun. Corp. 738 (587); 2 Beach, Pub. Corp. § 1440; Lowell v. Boston, 111 Mass. 454, affirmed on appeal to the Supreme Court of the United States.

The doctrine of the Massachusetts case was approved in the cases of Loan Asso. v. Topeka, 20 Wall. 654; Whitney v. Fon du Lac, 25 Wis. 188; Olcott v. Supervisors, 16 Wall. 689; People v. Salem, 20 Mich. 452; Jenkins v. Andover, 106 Mass. 94; Cooley, Const. Lim. 129, 174, 487; Rippe v. Becker, 57 N. W. 331; Davies v. State, 78 N. E. 995; Hackett v. Ottawa, 99 U. S. 86; Re Opinion of Justices (Mass.) 98 N. E. 611.

"The legislature has no rightful power to impose taxes on the people for any other than a public purpose. It is not legal taxation if the power is exercised for the benefit of private persons, or in aid of private uses and enterprises, even where there is no express constitutional prohibition." 37 Enc. Law, 721.

It is not sufficient to justify such taxation, that the private enterprises made incidentally or indirectly inure to the public benefit. Ibid.; Deal v. Mississippi, 18 S. W. 24.

When the expression is used that the property must be used for a public purpose, it is meant "governmental purpose." Covington v. Kentucky, 173 U. S. 237; Loan Asso. v. Topeka, supra.

It is not sufficient to justify such taxation, that the private enterprises may incidentally or indirectly inure to the public benefit. 37 Enc. Law 721; Deal v. Mississippi, 18 S. W. 24.

The words "public purpose" mean "governmental purposes." Covington v. Kentucky, 173 U. S. 237.

William Langer, for respondents.

An act of the lawmaking power will not be held unconstitutional unless it is clearly and palpably so; all reasonable presumptions are to be indulged in favor of the constitutionality of the given act. Laughlin v. Portland, 111 Me. 486, 90 Atl. 318.

"The determination by the legislature that the use for which property is authorized to be taken is a public one is, undoubtedly, subject to review by the court. But all reasonable presumptions are in favor of the validity of such determinations by the legislature, and the act must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution." Jones v. Portland, 235 U. S. 217; Union Lime Co. v. Chicago R. Co. 223 U. S. 211.

A decision of the highest court of a state declaring a use to be public in its nature would be accepted unless clearly not well founded. Falbrook Irrigation v. Bradley, 164 U. S. 112; Clark v. Nash, 198 U. S. 361, 389; Strickley v. Hyland Boy Min. Co. 200 U. S. 527; Offield v. New York R. Co. 203 U. S. 272–277; Hairston v. Danville, etc. R. Co. 208 U. S. 598–607.

"As the terms are used in reference to taxation, what is for the 'public good,' and what are 'public purposes,' and what does constitute a 'public purpose,' are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except perhaps where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful." Walker v. Cincinnati, 21 Ohio St. 14; Jarrott v. Moberly, 13 Fed. Cas. 366, 367.

"Courts cannot say that a statute authorizing a city to borrow money, etc., for building a railroad to be owned by it, is not for a 'public purpose.'" Walker v. Cincinnati, 21 Ohio St. 14, 42, 8 Am. Rep. 24; Saunders v. Arlington, 147 Ga. 581, 94 S. E. 1022, decided in Jan. 1918; Andrews v. South Haven, 187 Mich. 294, 153 N. W.

827; Louisiana in Union Ice & Coal Co. v. Ruston, 125 La. 898, 66 So. 262.

"Where a statute may or may not be in violation of constitutional rights according to circumstances, in the absence of a countershowing, the existence of circumstances necessary to support it will be presumed." Boutwell v. Champlain Realty Co. 89 Vt. 80.

William Lemke (*W. S. Lauder, S. L. Nuchols,* and *Frederic A. Pike,* of counsel) also for respondents.

GRACE, J. This action was commenced by the plaintiffs, in the county of Cass, to procure an injunction to restrain the defendants, each of whom is a state officer of the state of North Dakota, from disbursing certain public funds in the state treasury, aggregating perhaps several hundred thousand dollars; and, further, to restrain the defendants from issuing certain state bonds, and to have declared invalid, null and void, certain amendments of the state Constitution, and certain statutes authorizing the disbursing of such money, and the execution, sale, and delivery of such bonds. The venue of the action was changed by a proper order to the county of Burleigh.

The plaintiffs are taxpayers of this state, and as such bring this action. The decisions in this case, in so far as it interprets the provisions of the Constitution and laws of this state, will be binding upon not only these taxpayers, but all others of this state.

At a general election in this state, there were ten proposed constitutional amendments to the Constitution of the state of North Dakota, legally submitted to the electors for adoption or rejection. Each of them received a majority of the votes cast at such election, and thus they were duly adopted by the electors. They were then duly presented to the legislature of the state of North Dakota, and, by resolution of the House of Representatives of the state of North Dakota, the Senate concurring, agreed to and declared a party of the Constitution of the state, and each of said amendments was duly adopted, and thus became effective as part of the Constitution of the state of North Dakota.

The validity of two of such constitutional amendments is challenged by this action, and claimed, thereby, to be null and void.

Section 182 of the Constitution, prior to its amendment, is as fol-

lows: "The state may, to meet casual deficits or failure in the revenue or in case of extraordinary emergencies contract debts, but such debts shall never in the aggregate exceed the sum of $200,000, exclusive of what may be the debt of North Dakota at the time of the adoption of this Constitution.

"Every such debt shall be authorized by law for certain purposes to be definitely mentioned therein, and every such law shall provide for levying an annual tax sufficient to pay the interest semiannually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax to the payment of said principal and interest, and such appropriation shall not be repealed or the tax discontinued until such debt, both principal and interest, shall have been fully paid.

"No debt in excess of the limit named shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for public defense in case of threatened hostilities; but the issuing of new bonds to refund existing indebtedness, shall not be construed to be any part or portion of said $200,000."

As amended, § 182 is as follows:

"The state may issue or guarantee the payment of bonds, providing that all bonds in excess of $2,000,000 shall be secured by first mortgages upon real estate in amounts not to exceed one half of its value; or upon real and personal property of state-owned utilities, enterprises or industries in amounts not exceeding its value, and, provided further, that the state shall not issue or guarantee bonds upon property of state-owned utilities, enterprises or industries in excess of $10,000,000.

"No future indebtedness shall be incurred by the state, unless evidenced by bond issues, which shall be authorized by law for certain purposes, to be clearly defined.

"Every law authorizing a bond issue shall provide for levying an annual tax, or may make other provisions, sufficient to pay the interest semiannually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax, or of such other provisions, to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other

provisions discontinued until such debt, both principal and interest, shall have been paid.

"No debt, in excess of the limit named herein shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war or to provide for the public defense in case of threatened hostilities."

Section 185 of the Constitution, before its amendment, is as follows: "Neither the state nor any county, city, township, town, school district or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in any work of internal improvement, unless authorized by two-thirds vote of the people."

As amended, the section is as follows: "The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article 20 of the Constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

The specific laws claimed by the plaintiff to be unconstitutional, void and of no effect, and which were enacted by the 16th legislative assembly, are as follows:

House Bill 17, the Industrial Commission Act; House Bill 18, Bank of North Dakota Act; House Bill 49, Bank of North Dakota Bond Act; Senate Bill 130, Bank of North Dakota, Real Estate Act; Senate Bill 20, the Mill and Elevator Association Act; Senate Bill 75, the Mill and Elevator Association Bond Act; Senate Bill 19, the Home Building Act.

The Industrial Commission Act created and established the industrial commission, the duties of which are to conduct and manage, on behalf of the state of North Dakota, certain state utilities, industries, enterprises, and business projects, then and thereafter established by law. Numerically, the industrial commission consists of three mem-

bers, and its personnel is the governor, the attorney general, and the Commissioner of Agriculture and Labor, of the state of North Dakota. Its powers and duties are defined by the act creating it.

"The Bank of North Dakota Act" is one declaring the purpose of the state of North Dakota to engage in the banking business, and establishing a system of banking, under the name of "the Bank of North Dakota," operated by the state. The act defines the scope and manner of its operation, and the powers and duties of the persons charged with its management.

The powers, duties and privileges of "the Bank of North Dakota" are fully set forth in the act creating it, and its operation, management and control are, by the act, committed to the industrial commission.

"The Bank of North Dakota Bond Act" is one providing for the issuing of bonds of the state of North Dakota, in the sum of $2,000,000; such bonds to be known as "Bonds of North Dakota, Bank Series." In this act, the terms of the bonds are prescribed, and the purposes set forth. It provides a tax, and *makes other provisions for the payment thereof.* We shall have occasion to refer to this act, later in the opinion.

"The Bank of North Dakota, Real Estate Series," is one providing for the issuing of bonds of the state of North Dakota, in a sum not exceeding $10,000,000, to be known as "Bonds of North Dakota, Real Estate Series." It prescribes the terms and states the purposes of the act; it provides for a tax, and *makes other provisions for the payment of the bonds,* both principal and interest.

"The Mill and Elevator Association Act" is one declaring the purpose of the state of North Dakota to engage in the business of manufacturing and marketing of farm products, and for establishing a warehouse, elevator, and flour-mill system, under the name of "North Dakota Mill and Elevator Association,"—all to be operated by the state. The act clearly defines its purpose, method, and manner of operation. Its purpose is declared to be the encouraging and promoting of agriculture, commerce, and industry, by the state engaging in the business of manufacturing and marketing of farm products. The management, operation, and control of the association is placed with the industrial commission, by the provisions of the act.

The business of the association is declared by the act to include the doing of anything that a private individual or corporation may lawfully do in conducting a similar business, subject, however, to such restrictions as are contained in the act.

"The Mill & Elevator Association Bond Act" is one providing for the issuing of bonds of the state of North Dakota, in a sum not exceeding $5,000,000, to be known as "Bonds of North Dakota, Mill and Elevator Series." The act prescribes the terms of the bonds and states the purposes thereof. It provides for a tax, and *makes other provisions for the payment thereof,* in the manner specified in the act. It makes appropriations and other provisions for the payment of interest and principal of the bonds, and to carry into effect the provisions of the act.

"The Home Building Association of North Dakota Act" is one declaring the purpose of the state to engage in the undertaking of providing homes for residents of this state. Its purpose is the promotion of home building and home ownership by residents of this state. The purpose of the act is to establish a business system, operated by the state, under the appellation above mentioned, and for the purposes mentioned in it. It prescribes the powers and duties of the persons charged with its operation and management, and provides for an appropriation to carry its provisions into effect. The management of the business of the association is, like the other state industries, placed with the industrial commission.

The powers and duties of the association, and the manner of conducting the association, are prescribed in the act. To accomplish the purposes of the act, and to carry out its provisions, the industrial commission is empowered to acquire by purchase, lease, or by the exercise of the right to eminent domain, in accord with the provisions of chapter 36, Code of Civil Procedure, Comp. Laws 1913, requisite property or property rights, and is authorized to construct, repair, and remodel buildings, having strict regard for economy in the administration of its affairs.

Under the act, no home may be built, purchased, or sold at a price which exceeds $5,000, except in the case of a farm home, where the selling price shall not exceed $10,000. The foregoing is a short

synopsis of the laws, the validating of which is called in question in this case. As we proceed with the discussion of the objection of plaintiffs to such laws, we will refer to other provisions in them, or some of them, in a more specific manner.

The objections of plaintiffs to the constitutional amendments, and to the laws in question, may be stated in the order of their importance, under four heads:

(1) That such laws are unconstitutional in that no sufficient provision is made in them for a sinking fund, to meet and pay the principal of the bonds to be so issued, and the interest thereon, as required by § 182, Constitution of the state of North Dakota.

(2) That the acts are invalid, for the reason that the legislature did not exercise its function of fixing the amount, denomination, date of maturity, and rate of interest on the bonds; but that it delegated such legislative function of fixing and determining those matters, to the governor and the industrial commission.

(3) That all the bonds are issued in furtherance of private business, and not for public purposes.

(4) That, by reason of the plaintiffs being required to pay taxes, which will be used to pay the principal and interest on the bonds, in the manner prescribed by the various acts, and by the creation of the obligations to be evidenced by the bonds, the plaintiffs, so they claim, will be deprived of their property, without due process of law, all of which they claim is in violation of the 14th Amendment to the Federal Constitution.

Adverting to the first objection, it may be noted that it must be considered, in the light and according to the provisions of § 182 of the state Constitution, as amended, and not by its provisions as it originally existed prior to the amendment.

In the case of State ex rel. Langer v. Hall, post, 536, 173 N. W. 763, this court construed § 182 as amended. In that case this court held that, under that section as amended, the state was duly authorized to issue $2,000,000 of bonded indebtedness, unsecured except by the faith and credit of the state of North Dakota, in addition to the $412,000 of the then existing bonded indebtedness of the state.

The effect of that decision was to sustain and uphold the validity of § 182 as amended. This court is one of last resort, for the purpose of determining the validity of the provisions of the state Constitution, and the statutes and laws of the state enacted in harmony therewith.

The powers of this court in this regard are exclusive and unlimited, except as to the question whether such constitutional provision or statute is violative of any of the provisions of the Federal Constitution.

This doctrine has been universally recognized by the Federal courts, including the Supreme Court of the United States. Neither of the provisions of the state Constitution under consideration in this case, nor any of the laws drawn in question, which are above enumerated, violate any of the provisions of the Federal Constitution.

Later in the opinion, we will further discuss the constitutional provisions in question. There remains, so far as this objection is concerned, only the question of whether or not § 182 as amended has provided a method for the payment of the principal of the bonds at their maturity, and the interest thereon at the time of its accrual.

An examination of § 182 as amended will disclose that it requires that every law authorizing a bond issue shall provide for levying an annual tax, *or make other provision, sufficient to pay the interest, semi-annually, and the principal within thirty years from the passage of the law.* It further provides that the proceeds of such tax or other provision shall be specifically appropriated to the payment of the bonds and interest, and such tax or other provisions cannot be repealed until such bonds and interest have been paid.

Then, we see, § 182 as amended, in a most particular manner, provides a method for the payment of any bonds and the interest thereon, issued under the authority contained in said section as amended, and most specifically, by two methods, provides for the accumulation of moneys into special or sinking fund, to pay and retire the bonds, at their maturity, as well as to pay the accrued interest on them when due.

Keeping in mind that it is the purpose of the state of North Dakota to engage in the banking business, and, in pursuance of said purpose, has established a system of banking, under the name of the "Bank of North Dakota," and that the legislature, in consonance with the pro-

visions of the Constitution and laws of the state, has authorized the issue of the $2,000,000 of bonds, secured only by the faith and credit of the state, for the purpose of furnishing capital to the "Bank of North Dakota," and that such bank is a state industry or institution, we may, then, inquire what provision has been made, by law, in compliance with the constitutional requirement, under consideration, with reference to the payment of the principal of such bonds, and the interest, which may accrue upon them.

The act authorizing such bonds, in § 6 provides that "at the time of each annual meeting of the state board of equalization hereafter, the industrial commission shall deliver to said board an exact written statement of all bonds issued under the provisions of this act outstanding at that time, including therein the dates of maturity, interest rates and all other information proper to enable the board intelligently to comply with the provisions of this act in regard to tax levies.

"On the basis of such information the state board of equalization shall annually levy a tax, at the time other taxes are levied, sufficient in amount to pay such interest on said bonds as will become due during the year beginning on the next ensuing first day of January, and said tax shall be collected in the same manner as other state taxes are collected." [Laws 1919, p. 206.]

Section 2 of the act we are considering provides that the bonds must "be payable in not less than ten nor more than thirty years from the passage of this act."

Section 7 of the same act provides that "whenever it shall appear to the board of equalization from the information contained in any statement delivered to it by the industrial commission at any annual meeting of said board [of equalization] as provided by § 6 above, that there will mature, within a period of five years from such annual meeting, any of the bonds provided for in this act, the board of equalization shall thereupon, at such annual meeting, levy a tax, in an amount equal to one fifth of the amount of the principal of such bonds."

The board of equalization, however, in determining the amount of such tax, shall take into account whatever moneys, if any, shall have been paid to the state treasurer by the industrial commission, for the specific purpose of paying the principal of said bonds, and interest when due, as provided in § 5 of this act.

The board of equalization shall apply to the state treasurer for information as to the amount of such moneys, and as to the times when paid to him. If the amount of such moneys paid to the treasurer, since the date of the last preceding tax levy made by the board of equalization, shall equal or exceed one fifth of the amount of the bonds, so to mature, then such tax shall not be levied; but if the amount of such moneys paid to the state treasurer since the date of the last preceding tax levy shall be less than one fifth of the amount of said bonds and interest so to mature, then the board of equalization shall deduct the amount of such moneys so paid from such one fifth of such bonds, and shall levy the tax hereinbefore in this section provided, for the difference. It is the intention of this section to provide that in each of the last five years, before the maturity of any of said bonds, a state tax shall be levied, which, together with such moneys as shall, during the next preceding year, have been paid to the state treasurer by the industrial commission for the purpose, shall be at least sufficient to pay one-fifth part of the principal of said bonds.

Thus, by taxation, is provision made for the payment of the interest on the bonds, and the payment of the principal.

The second method for the payment of the principal and interest of the bonds in question is by the earnings of the "Bank of North Dakota." In order to have some definite idea about its earnings, it may be well to know something of its resources for transacting business.

First, it has a capital of $2,000,000, derived from the bond issue. Section 7 of chapter 147—this is House Bill No. 18, which in creating the bank—provides that all state, county, township, municipal, and school-district funds, and funds of all penal, educational, and industrial institutions, and all other public funds, shall be, by the person having control of such funds, deposited in the "Bank of North Dakota," within three months from the passage and approval of the act, subject to disbursement for public purposes, on checks drawn by proper officials, in the manner now or hereafter provided by law.

It is a matter of common knowledge, as it also appears from the records of the bank, that its resources, including the deposit of such public funds, are approximately $17,000,000; it is also by law authorized to receive deposits from other sources, including deposits from the

United States government; it is authorized by law to perform the functions and render the services of a clearing house, and is authorized to deal in exchange, both domestic and foreign, and is authorized to discount negotiable paper; it is authorized to make loans to counties, cities, or political subdivisions of the state, or to state or national banks. It may not make loans or give its credit to any individual, association, or private corporation, except that it may make loans to any individual, association, or private corporation, secured by the duly recorded first mortgage on real estate, in the state of North Dakota, in amounts not to exceed one half of the value of the security, or secured by warehouse receipts issued by the industrial commission, or by any licensed warehouse within the state, in amounts not to exceed 90 per cent of the value of the commodities evidenced thereby. It may not loan on real estate security more than 30 per cent of its capital, nor, in addition thereto, more than 20 per cent of its deposits.

The act establishing the bank appropriated $100,000 to carry out the provisions of the act, which appropriation will not be used, and is in process of being repaid into the state treasury, by the industrial commission; this, for the reason that, though the "Bank of North Dakota" has been in operation less than a period of six months, it has, in that short period of time, so firmly established itself, and so rapidly did its business materialize, that it has been enabled to earn net, approximately, $67,000; it has made or has in course of completion over one and one-half million dollars in real estate loans, and has received other applications for more than six million dollars of such loans from the farmers of this state.

It is apparent that, as it is longer established, and continues to exercise the powers conferred upon it by law, and multiplies its business relations, its earning power will be very large, and this, on account of its large capital and deposits, which will all become active in carrying on such business transactions as are contemplated by the act creating it. That the bonds issued by the state for the purpose of furnishing capital to the bank, and the interest thereon, will be repaid out of the earnings, without the necessity of exercising the power of taxation provided for, would seem certain.

Section 5 of chapter 148, being the act providing for the issuing of

the bonds for the capital of the bank, provides that "from time to time the industrial commission shall, out of the earnings derived from the operation of the 'Bank of North Dakota,' pay to the state treasurer such moneys as the Commission shall deem available, to devote to the purpose of paying said bonds and interest. In making such payment the commission shall file a statement with the State Treasurer specifying the purpose of such payment. When moneys shall have been so paid to the state treasurer, he shall apply the same to their specified purpose as hereinafter directed."

Thus, it is seen that the payment of the bonds and interest out of the earnings is what is meant in § 182 of the Constitution as amended, by the use of the words "or such other provisions," where the constitutional provision uses the language: "Every law authorizing a bond issue shall provide for levying an annual tax or make other provisions, sufficient to pay the interest semiannually, and the principal within thirty years from the passage of such law."

There is a third method, also, provided for in chapter 148 of Session Laws of 1919, which may be resorted to, to pay both principal and interest of the bonds, should there be a deficit from either of the other sources of revenue to which we have referred. It is found in § 9 of the chapter just referred to. Keeping in mind that the principal and interest of the bonds, for the "Bank of North Dakota," are to be duly paid by taxes and the earnings of the bank, and that those are required to be placed in a special fund for that purpose, it is further provided, "If for any reason the said fund shall for the time being, be insufficient, the treasurer shall apply the deficiency out of any other available moneys of the state in his custody; but in that case he shall as soon as possible, out of the bank bond payment fund, return the amount of such deficiency to the source whence taken."

That ample provision has, by law, been made to pay the principal and interest of the "Bank of North Dakota Bonds," within the time specified by law, in accordance with the provisions of § 182 of the state Constitution as amended, there is not the least doubt; indeed, there could scarcely be a more perfect and thorough method of compliance than that provided.

"The bonds of the state of North Dakota, Mill and Elevator Series,"

in the sum of $5,000,000, are not secured exclusively by the faith and credit of the state of North Dakota, but, when issued, the payment thereof may be guaranteed as provided in § 182 as amended; and, when issued, delivered, and paid for, their payment is secured by the faith and credit of this state, as provided in chap. 153 of the Session Laws of the Regular Session of 1919. In addition thereto, they are secured by first mortgage on the state-owned utilities, enterprises, or industries, which such bonds are issued to construct and operate, in an amount not exceeding the value of them. They are made payable to the state treasurer.

The earnings of the elevators, mills, etc., are accumulated into a special fund, under the direction of an industrial commission, for the purposes of paying the principal and interest of the bonds. In fact, the same method is provided by chap. 153 of the Session Laws of 1919, for paying the principal and interest of such bonds, as the bonds issued for the purpose of establishing the "Bank of North Dakota;" that is, such bonds and interest shall be paid by a special fund accumulated from the earnings, and by taxation in the manner prescribed in the act, and if for any reason a deficiency arises from either of these sources, then the bonds or interest may be paid by the state treasurer, out of any available money in his custody. What is true of the mill and elevator bonds, as to the method of paying the principal and interest thereof, is likewise true of the $10,000,000 of bonds to be issued by the state of North Dakota, for the purpose of loaning upon real estate in the state of North Dakota, and of all other bonds under consideration in this case.

There is not the least doubt that the laws in question provide an ample and complete method for the payment of both principal and interest of the bonds in question, and one in entire harmony with the provision of § 182 of the Constitution as amended.

As to the second objection, we are clear that it contains no merit. The provision of the law in question, which confers upon the governor and the industrial commission the power and duty of fixing the denomination, date of maturity, and rate of interest of the bonds, is not the delegation of a legislative function, but it merely authorizes them to perform certain administrative duties, in accordance with the provi-

sions of the law authorizing and determining their administrative duties.

We come now to consider the third objection, wherein it is claimed that the bonds are issued, or are to be issued, in furtherance of private business, and not for a public purpose. With this objection may be examined the fourth, which claims that the plaintiffs, being required to pay taxes to pay the principal and interest of such bonds, are being deprived of their property without due process of law.

It is necessary in determining these objections, and before we enter far upon the discussion of them, to define, and have a clear conception of, the nature and meaning of private business.

We have been unable, in the search of the authorities, to find any complete definition of the term "private business." Perhaps there is none. It is one, however, which is readily defined. It may be defined as a business or enterprise in which an individual or individuals, an association, copartnership, or private corporation, have invested capital, time, attention, labor, and intelligence for the purpose of creating and conducting such business, for the sole purpose that those who make such contributions may, from the conducting of such business, make, gain, and acquire a financial profit, for their exclusive benefit, improvement, and enjoyment, and, exclusively, for their own private purposes.

They are not concerned with the public health, safety, morals, or welfare, but are concerned wholly with making a financial profit from the operation of such business, for, exclusively, their own private use and benefit.

As contradistinguished from a private business, a public purpose or public business has for its objective the promotion of the general welfare of all the inhabitants or residents, within a given political division, as, for example, a state, the sovereignty and sovereign powers of which are exercised to promote the public health, safety, morals, general welfare, security, prosperity, contentment, and equality before the law, of all the citizens of the state.

Having thus drawn the distinction between what constitutes private business, and what a public purpose, it is next in order to determine whether the proceeds of the bonds issued, or proposed to be issued, are to be used for promoting and conducting a private business, for the

benefit of certain individuals, associations, or private corporations, or are the proceeds to be used for a public purpose by the sovereign power, the state, for the promotion of the general welfare of all the people of the state.

If the industries to be established, and which are established, are are owned and operated by the state, in order to promote the general welfare of all the people, and the net profits derived from the operation of such industries become public funds of the state of North Dakota, and payable as such into its treasury, for the use and benefit of the state and inhabitants and residents thereof, in like manner as other public funds, then it must follow that the purpose, business, and industries are public.

It must be kept in mind, also, that the "Bank of North Dakota," "the Mill and Elevator Association," and all other agencies established by the state for the purpose of operating the state industries in question, are not private corporations or private agencies, but are, so to speak, arms of the sovereign power, the state, reaching out to execute its mandates.

When the "Bank of North Dakota" functions, it does so as an agency of the sovereign power of the state, in like manner as the treasurer of the state of North Dakota. The same is true of every other state industry which is the subject of this controversy.

We may now turn for an instant, and seek the reason of the state for entering into the conduct of the industries in controversy.

In the case of Scott v. Frazier, 258 Fed. 676, the Honorable Charles F. Amidon, District Judge, used the following most expressive language: "The people of North Dakota are farmers, many of them pioneers. Their life has been intensely individual. They have never been combined in incorporated or other business organizations, to train them in their common interest, or promote their general welfare. In the main, they have made their purchases, and sold their products, as individuals. Nearly all their live stock and grain are shipped to terminal markets at St. Paul, Minneapolis, and Duluth. There, these products pass into hands of large commission houses, elevators, and milling companies and live stock concerns.

"These interests are combined not only in corporations, chambers

of commerce, boards of trade, and interlocking directorates, but in the millions of understandings which arise among men having common interests, and living through long terms of years in the daily intercourse of great cities. These common understandings need not be embodied in articles of incorporation or trust agreements. They may be as intangible as the ancient 'powers of the air,' but they are as potent in the economic world as those ancient powers were thought to be in the affairs of men. It is the potency of this unity of life of men, dwelling together in daily intercourse, that has caused all nations, thus far, to be governed by cities.

"As North Dakota has become more thickly settled, and the means of intercourse have increased, and the evils of the existing marketing system have been better understood, no single factor has contributed as much to that result as the scientific investigation of the state's Agricultural College, and the Federal experts connected with the institution. That work has been going on for a generation, and has been carried to the homes of the state by extension workers, the press, and the political discussion of repeated political campaigns.

"The people have thus come to believe that the evils of the existing system consists not merely in the grading of grain, its weighing, its dockage, the price paid, and the disparity between the price of different grades, and the flour-producing capacity of the grain. They believe that the evil goes deeper; that the whole system of shipping the raw materials of North Dakota to these foreign terminals is wasteful and hostile to the best interests of the state. They say in substance:

"(1) The raw materials of the state ought to be manufactured into commercial products within the state. In no other way can its industrial life be suffiicently diversified to attain a healthy, economic development.

"(2) The present system prevents diversified farming. The only way that it can be built up is to grind the grain in the state, which the state produces,—keep the by-products of bran and shorts here, and feed them to live stock upon the farms of the state. In no other way can a prosperous live-stock, dairy, and poultry industry be built up.

"(3) The existing marketing system tends directly to the exhaustion of soil fertility. In no way can soil depletion be prevented, except

to feed out to live stock, at least as much of the by-product of grain raised upon the state's farms as that grain produces when ground, and thus put back into the soil, in the form of enriched manures, the elements which the raising of small grains takes from it."

In addition to the clear and concise reasons given by Judge Amidon, there are many others why the state should engage in the conduct of these industries.

The principal source of the production of wealth of North Dakota is agriculture; it is a conservative estimate that 90 per cent of the wealth produced by the state is from agriculture. It is the foundation of the state's prosperity and welfare, and upon it, as such, rests all other business of the state.

The mercantile pursuits, the banking interests, and every business pursuit, within the state, depends directly for its success upon the wealth produced by the farmers of this state.

The wealth produced by the farmers of this state is the life blood of the business interest of the state; hence, the conservation and securing of the wealth produced by the farmers, to them, is of vital interest, not only to the farmers, but to everyone who is engaged in the carrying on of business within the state.

The word "wealth," however, is a relative term as applied to the farmers of this state. It means only the excess which remains after deducting from the selling price of the products of the farmers' toil, the cost of production; that the farmer receive the full value of the product, which he produces, minus the cost of production, is a question which is of vital interest not only to him but to every business interest in the state. For business must be done on whatever profit there is, over and above the cost of production. Likewise, the wages of labor in this state, to some degree, depends upon the same conditions.

The farmer cannot pay a laborer high wages, if the cost of production is but little less than the selling price of the products he produces. If the farmer makes a small profit, business interest must languish, and labor, which the business interests employ, will, no doubt, more or less suffer by this condition, so that it may be concluded that the interest of everyone in the state is so vitally affected by the profits derived from agriculture, that the matter may be said to be, and is, of public

interest, and vitally affects the public welfare of all. It is thus apparent that any condition which militates against the profits of the agriculturists of this state is inimicable to the general and public welfare of the inhabitants of this state. It may not be amiss to consider one of the principal productions of this state, and the great loss entailed in marketing it; namely, wheat. On the average this state produces annually, approximately 125,000,000 bushels of wheat.

Under the conditions which have heretofore existed, for the purpose of marketing, wheat has been graded. The grades are No. 1 hard, No. 1 northern, No. 2, 3, 4, and no grade. Under this system of wheat grading, the agriculturists of this state state have, in the last quarter of a century, unquestionably lost hundreds of millions of dollars. There has been what may be termed a "spread" between the No. 1 hard and lowest grade above named of perhaps 20 cents per bushel, and sometimes much more. This difference is made to exist on many pretexts; for instance, though one grade of wheat, say, for instance, No. 3, may contain wheat of just as good milling quality, and when manufactured into flour, that flour may be, and is usually, of just as high quality as that made from No. 1 hard wheat, there is, nevertheless, perhaps a "spread" of 10 cents per bushel between the two grades of wheat, based perhaps upon the fact that the lower grade of wheat may be somewhat bleached by having stood out in the weather, in the shocks, and have been subjected to inclement weather, while wheat, near the same field, may have been threshed and secured without having been subject to adverse weather conditions.

The only difference between the two grades of wheat, in this instance, is practically one of color. The wheat which has been subject to more or less inclement weather, being what is termed bleached, of course, readily affords an excuse for the difference in grade and price. Again, one grade of wheat, for illustration take the same grades, the lower grade may weigh 45 lbs. to the bushel, and the higher 60 lbs. to the bushel; while there may be a great difference in their weights, according to eminent authority, there is not, as a general rule, much difference in their milling qualities and values.

It must be remembered that wheat is not sold by the measured bushel; while a bushel, struck measure, of light wheat might not

weigh over 45 lbs. It must be remembered that 45 lbs. do not make a bushel, and that 60 lbs. do. It takes 60 lbs. of wheat to make a bushel, whether the wheat is heavy or light.

The 60 lbs. of the light No. 3 wheat, being of just as good milling quality as the No. 1 hard wheat, will substantially make just as much flour, of just as good quality, but, under the system of grading, by reason of the lightness of the poorer grade, there is perhaps a "spread" of all the way from 10 to 20 cents per bushel of 60 lbs.

Professor Ladd, President of the North Dakota Agricultural College, and one of the most eminent chemists and scientists of the United States, and well known, and his ability recognized in foreign nations, has demonstrated, scientifically, that the poorer grades of wheat, such as above referred to, are substantially of just as good milling value and produce flour equally of as high a grade as that of the highest grade of wheat, he concludes, and we agree with this conclusion, that the fair and equitable method of marketing wheat is to base the price thereof on its milling value.

It has been estimated that the loss to the farmers of this state, by loss in grains and the values fixed thereby, instead of by the milling value, coupled with the loss by dockage, and the failure to pay for the dockage, together with many other elements of loss in the marketing of wheat, outside of the state, including the loss of the fertility to the soil, by the failure to feed any of the by-products thereof to stock within the state, thereby enriching and revitalizing it, represents an annual loss of perhaps $55,000,000 to the wheat raisers of this state.

There is also, indisputably, considerable loss in the marketing of other grains, all of which taken together aggregate a vast sum. This vast loss is not only a loss to the farmers of the state, but it is as well a loss to the business, for it must be done on the profits above production.

These vast losses sustained by the farmer are reaped as rewards by the great elevators and milling interests, commission firms, chambers of commerce, located in Minneapolis, St. Paul, and Duluth, or other cities outside the state. Into their hands they have passed, as profits, never to return to the farmers or business interests of the state of North Dakota. To prevent these losses, to retain in the state of North

Dakota, in the future, these lost profits, to pay the farmer the full value of the product of the soil produced by him, and by thus so doing to secure the prosperity of every business and of every inhabitant of the state, and thus promote the general and common welfare of every inhabitant of the state, the Constitution has been amended, laws enacted, and bonds, by the legislature, authorized and issued, for the purpose of affording the producers of grain within this state a market where they will receive the full value of their products.

Under § 185 of the Constitution of the state of North Dakota as amended, which was submitted to the people at an election, and by the votes of a majority of the voters voting at such election duly adopted, and which constitutional amendment has legally become a part of the organic law of this state, and is now in full force and effect, the state is duly authorized and empowered to establish and operate state-owned elevators and mills.

The legislature has enacted into law, the laws in question, establishing these state-owned utilities, under and by virtue of such constitutional authority. Not only were such laws duly enacted by the legislature of this state, but, after being enacted, under the initiative and referendum provision of the Constitution, they were, each and all, referred to the people for their approval, and at a general election each of said laws was again approved by the majority of the electors voting thereon.

It is often said that bread is the staff of life; that it is one of the prime necessities, there is not the least doubt; that, out of each of the grains raised in this state, prime necessities are manufactured is quite clear. All the grain raised in this state must be, and is, considered a prime necessity. It is needed and must be had to sustain the very life of the people, and without it people would starve, as they would freeze if they had no fuel.

We are thoroughly convinced that the establishing and maintaining of state-owned elevators and state-owned mills, for the marketing and manufacturing of wheat and other small grains produced in the state of North Dakota, is a public purpose, for which taxes may be levied in the manner provided by § 182 of the Constitution as amended, and that such state-owned elevators and flour mills may be paid for by tax-

ation, or by the other provisions set forth in § 182 as amended, and that the levying and collecting of such taxes, in the manner provided for in such constitutional amendment, and the laws herein, in question, in no manner violates the 14th Amendment of the Federal Constitution, nor does it, in any manner, constitute the taking of private property without due process of law. See Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, L.R.A.1918C, 765, 38 Sup. Ct. Rep. 112, Ann. Cas. 1918E, 660. The appellants have cited a long list of authority upon which they rely to prove the correctness of their contentions. It is apparent to us after examination of such authority that the same is not in point. It relates to conditions and laws of an entirely different nature than those presented in this case. We cannot take time nor space to analyze all the authorities cited by appellant. Its character and inapplicability as authority is well illustrated by the case, Citizens Sav. & L. Asso. v. Topeka, 20 Wallace 655, 22 L. ed. 455.

In that case the city of Topeka, under an act of the Kansas legislature, undertook to issue $100,000 of its bonds payable to the King Wrought Iron Bridge Manufacturing and Iron Works Company of Topeka, to aid and encourage that company in establishing and operating bridge shops in Topeka. Such bonds were, as we view the matter, donated to said Bridge Company.

The Bridge Company was a private corporation engaged in a private business, the profits of which inured wholly to it. The donation of the bonds by the city of Topeka to it was the loaning of that city's credit to establish or carry on a private business or enterprise. The bonds were to be paid by the levy of taxes.

The Supreme Court of the United States held such bonds invalid for the reason that the bonds were issued to assist a private business, and not for a public purpose. It held, the city of Topeka having no authority to make the contract, there was no power to levy a tax.

That decision, however, does not apply in the case at bar. The industries under consideration in the present case are all public industries belonging to the state of North Dakota. None of them are private industries or enterprises, but, on the contrary, are public enterprises and businesses exclusively owned and wholly operated by the state of North Dakota in its sovereign capacity, for the use and benefit

of all the people of the state, in other words, for a public purpose. Hence the decision in the Topeka case, and largely all other authority cited by appellants, has no application to this case.

The creating and constituting of the "Bank of North Dakota" in the manner above set forth, the authorizing the $5,000,000 "mill and elevator bonds," and the $10,000,000 "bonds of North Dakota, real estate series," are, each and all, acts intended to stimulate the production of, and the caring for the marketing of, wheat and other small grains in the state of North Dakota, and that is held to be a public use, to effectuate which a tax may be levied and collected, and we so determine and decide. Each and all of said bond issues are in accord with the provisions of the Constitution in question and laws of the state of North Dakota, and we so hold.

In deciding, as we have, supra, that the state ownership and construction of elevators and mills, the creating of the "Bank of North Dakota," and the authorizing and issuing of all bonds in question, are for a public use, for which the legislature may authorize the levying and collection of a tax on the property within this state, it is clear, by the highest authority, that the decision of this court will be accepted and accorded the highest respect, if properly based upon merits and the provisions of the state Constitution, under consideration, and the laws in question are not contrary to the provisions of the Federal Constitution, and we hold they are not, for this court is presumed to be in better position to know the conditions existing in the state, affecting the matters in controversy, and is more favorably situated to acquire information in that regard.

See Hairston v. Danville v. W. R. Co. 208 U. S. 598, 607, 52 L. ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, 58 L. ed. 924, 34 Sup. Ct. Rep. 522; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 160, 41 L. ed. 369, 371, 17 Sup. Ct. Rep. 56; Clark v. Nash, 198 U. S. 361, 369, 49 L. ed. 1085, 1088, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 531, 50 L. ed. 581, 583, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 377, 51 L. ed. 231, 236, 27 Sup. Ct. Rep. 72; O'Neill v. Leamer, 239 U. S. 244, 253, 60 L. ed. 249, 265, 36 Sup. Ct. Rep. 54.

The two constitutional amendents under consideration were duly adopted by the deliberate act of the voters of the state and its legislature.

This state, through the Enabling Act of Congress, was authorized to organize an independent state, with the power of self-government, and this, with no limitations or restraints, save, and except, those prescribed by the Federal Constitution and its amendments, which are largely contained in § 10, article 1 of the Federal Constitution.

The state Constitution, and the amendments thereto, is the fundamental law of this state, and, as such, may be construed and carried into effect by the courts of the state, without their determinations, in this regard, being subject to a review by the Supreme Court of the United States, except, and unless, in cases where what is accomplished, or sought to be accomplished, is or may be assumed to be in conflict with the Federal Constitution, or some of the provisions thereof, or restraints therein imposed upon the state, prohibiting the exercise of certain powers by it.

Hence, the legislature of this state, except for the limitations and restraints contained in the Constitution of the United States, and the amendments adopted thereto, is left free to act, under the Constitution of the state of North Dakota, and it may enact such laws, in the exercise of its constitutional powers, as its legislative wisdom may direct.

The laws under consideration violate no provision of the Constitution of United States, nor of its amendments; nor are they violative of any provision of the state Constitution, nor any amendment thereto.

The direct benefits which the people of this state are to receive from the constitutional provisions and laws in question have been quite thoroughly discussed. We may be permitted to refer to some of the indirect benefits and beneficial consequences which reasonably may be expected to materialize as a result of the adoption of the constitutional amendments, and the enactment of such laws, after they have been given sufficient opportunity to function.

While all such laws will, in a greater or lesser degree, contribute to the beneficial results which may be reasonably expected to result therefrom, the Home Building Act, and the act providing for the loaning of the $10,000,000 upon the farms and real estate, within this

state for the purpose of securing and providing homes for the residents of this state, will serve best to illustrate the conclusions we wish to draw with regard to the anticipated beneficent effect of these laws. Each of the laws and constitutional amendments is based upon a broad public policy, intended to be beneficial to every citizen of this state, as well as the state as such.

The home is the unit of organized and civilized society. The state is composed, largely, of the aggregate of such units. The strength of the state is in proportion to the average strength of the units of which it is composed. Figuratively speaking, the morality, integrity, and every element of its character, is measured by the average of those virtues and qualities of character existing in the units composing it.

For the state to afford to the home the greatest opportunity for the development of all that ennobles that home is but to secure its own solidarity and permanence.

The home, in effect, is a miniature government, wherein legislative, executive, and judicial power is exercised. In order for that home, that miniature government, to function properly and in the highest degree, it is necessary that the abode denominated home should be a fixed one. That is, the members of or the family constituting such home should receive such encouragement, at the hands of the law, such assistance and opportunity as would enable those not otherwise in position to do so, or anyone a resident of this state who desires to benefit by such law, to acquire a permanent home.

With what fond recollection do many of us consider the home of our youth, however humble it may have been. There is indelibly stamped upon our mind, mental picture of all the things surrounding and connected with it. This, for the reason that perhaps fifteen, twenty, or more years of the most joyous period of life, that of youth, was enjoyed at, and within, such home. In other words, it is the very permanence of the home, and our long association with and attachment to it, that endears it to us, and thus we reach the philosophy which lies at the base of the Home Building Act and other acts under consideration of the same nature.

All the land in this state was, at one time, subject to homestead entry, under the laws of the United States, and this practically free

of charge. Nevertheless, and notwithstanding, this great gift of land to our people, many of them have been unable to prosper and maintain a home thereon, and this, notwithstanding the people of the state are as frugal and as of high character as any in the United States, or in the world.

There are 30 or perhaps 40 per cent of the people of this state, especially the farmers of the state, who are tenants. They have no fixed abode; they move from place to place, year by year, or at intervals. They have no permanent home, where they may stay, for fifteen or twenty years, or even a whole lifetime, and where their children may perhaps desire to remain after the parents have passed beyond. While, in some instances, some of the homeless and landless may be individually responsible for the financial condition in which they find themselves, nevertheless, as a whole, it is clear that their condition is brought about through circumstances and conditions, entirely beyond their control.

It may be, and perhaps it is, true that they have not received the full market value of the products which they have produced. It may be, and perhaps partly is, because they have been compelled to pay excessive rates of interest; it may be perhaps they have been compelled to pay excessive prices to procure the bare necessities of life; whatever the causes may be, it is sure that they exist.

To seek those causes, and to remove them, is a great task, to accomplish which the legislator must employ his greatest intelligence, guided by the dictates of his conscience. If he, however, does this, and does it well and wisely, by just and progressive laws, fairly and fearlessly enacted, his services to the state and the people thereof will be of immeasurable value. For, if opportunity is afforded those who desire it to obtain a home, and if beneficent laws are enacted which will enable the home owner, by the exercise of reasonable effort and the doing of a reasonable amount of labor, the value of which is secured to him by protective laws, to maintain and retain such home, he will become attached to it, and will be vitally interested in all that concerns it, and thus become more vitally interested in the welfare of his state and nation.

Such, we believe, was the spirit of the legislature, which duly

enacted the laws which are in question, and it was the same spirit that moved the people of this state to adopt the constitutional provisions in question.

We are fully convinced they had ample and full authority to do that which they have done, and that they have done it well and wisely, and their work should be, for no light or transient reason, undone.

The laws enacted are constitutional, and not contrary to any of the provisions of the Constitution of the United States, or the amendments thereto. The people of this state have the right, authority, and privileges to amend their Constitution, in the way it has been amended by the two provisions in question, neither of which are in conflict with the Federal Constitution or its amendments; and neither the laws nor the amendments to the state Constitution take from the plaintiffs any right guaranteed to them under the 14th Amendment to the Federal Constitution.

We are of the opinion that the order of the trial court sustaining the demurrer of the defendants to the complaint of the plaintiff was a proper one, and should be affirmed.

It is affirmed.

The case is forthwith remanded.

ROBINSON and BRONSON, JJ., concur.

BRONSON, J. I concur in the opinion of Justice Grace. Chief Justice Christianson, in an opinion which can be termed neither a dissent nor a concurrence, considered this case a friendly lawsuit, presenting no actual controversy, and in effect refusing to pass upon the issues submitted by reason of his dissenting opinion in a former case (State ex rel. Byerly v. State Canvassers, ante, 126, 172 N. W. 80) holding certain constitutional amendments to be not constitutionally adopted.

This case is here upon appeal from a demurrer to the complaint sustained in the trial court; there is no contention made by the parties that this is in any manner merely a friendly lawsuit. Real issues are presented. The fact that these issues, from a legal viewpoint upon the facts, are without merit, does not create thereby a case involving no actual controversy.

There is no contention by any of the parties that the constitutional amendments, now a part of the Constitution of this state, ratified by the people and the legislature, and approved by this court (ante, 126, 172 N. W. 80), upon which the particular acts now involved were enacted, are unconstitutional. Upon the issues presented before this court, three questions are presented, involving Federal and state constitutional provisions; (1st) That the acts involved are not for public purposes; (2d) that no proper constitutional provision has been made for sinking funds; (3d) that legislative powers have been improperly delegated; I desire to consider briefly one question. Do the acts involve public purposes? There can be no question that under the state Constitution the acts involved are all within the constitutional provisions, adopted both by the people and the legislature, for such purposes. From the viewpoint of the state constitutional authority, as ratified by the people and the legislature of this state, there can be no question that these acts involved cover a procedure which is deemed and declared by this state to be public in its nature. The only further question involved is whether this state in the proper exercise of its police power, pursuant to the will of the people, as declared in the Constitution and its laws, deprives or may deprive the relators, and those similarly situated, of the protection of the Federal Constitution in taking or attempting to take, by process of taxation, for such purposes, their property. If the acts involved, considered with reference to the Federal Constitution, and the Federal Judicial interpretation that may be placed thereupon, are for public purposes, they are valid, and not subject to Federal constitutional objections. Peculiarly in this state, for a great many years, the production, marketing, and sale of cereals has become a matter of public concern and public welfare. For many years, progressively statutory authority has been enacted covering state supervision, state aid and state regulation in the furnishing of seed, the quality of the seed, the raising or production of wheat, or other cereals, the grading of grain, the public storage of the same, covering dockage, regulation of elevators, state experimentation in cereals, and their manufactured products. Through a long-continued and persistent public demand, the people of this state, through constitutional amendment and legislative enactment, have stated that

it is essential for the public welfare of this state, dependent upon agriculture and its products, and for the well-being of the state and its citizens, to regulate, supervise, and, even own in a limited way, public elevators, warehouses, and mills engaged in handling or manufacturing these cereals.

In this connection and for these purposes, declared to be public by the people and the sovereign power of this state, the acts involved herein have been enacted. The State Terminal Elevator and Mill Act is the principal and fundamental act. It provides a means for all of the people of this state, both producers and consumers, to secure for its main and chief source of all of its wealth, a regulation, a supervision, and a demonstration of the real worth as a commodity of the cereals produced in this state, principally wheat, and the manufactured product, flour. It seeks to show, through state demonstration and experimentation in a limited way, to all of the people of this state, the enormous waste and loss that is suffered by the people of this state through improper marketing conditions, through unscientific grading of grain, through unnecessary loss by extensive railway hauls, and through excessive loss sustained at seasons of the year when grain so produced in this state must either lie in the field, or be taken in railroad transportation to terminals without the state. The other acts are all corollary to this main act. They aid and assist in carrying out this function of the state in behalf of its citizens, for public purposes, and for their public welfare. The Home Building Act is also corollary, evidencing in a manner governmental aid in upbuilding the homes for any or all of the citizens in this state, analogous somewhat to rural-credit systems. There ought to be no question that these acts present a public purpose upon a much higher plane, and much more for the general common good than that evidenced and upheld by the Supreme Court of our United States, concerning a municipal fuel yard, in Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, L.R.A.1918C, 765, 38 Sup. Ct. Rep. 112, Ann. Cas. 1918E, 660.

BIRDZELL, J. I concur in the affirmance of the order appealed from on the ground that the respondents, who were plaintiffs below, have not demonstrated the unconstitutionality of the acts of the legislature upon

which the defendants and appellants rely for justification of the acts complained of in the complaint filed. Neither upon oral argument nor in the briefs have the respondents pointed out wherein the provisions of the state Constitution are violated by the failure of the acts to provide for a sufficient sinking fund to pay the principal of the bonds to be issued, nor wherein legislative functions have been delegated in the matter of fixing amounts, denominations, maturities, and rates of interest. In fact, the appellants in their brief have contented themselves with a mere statement of the foregoing constitutional objections, without attempting to specify or point out wherein the Constitution has been violated in those connections. Obviously the ordinary presumption of the constitutionality of acts of the legislature obtains, and it is not overcome by a mere statement of a constitutional objection to legislation which does not purport to show wherein the Constitution has been violated in the manner stated. There is no argument in the brief in support of the foregoing objections. It is not contended that, in connection with the authority to issue bonds, provision is not made sufficient to pay the interest semiannually and the principal within thirty years from the passage of the law, within the requirements of § 182 of the Constitution as amended. So this objection might properly be considered as abandoned.

As to the objection that the provisions in the various laws authorizing the governor and the industrial commission to fix amounts, denominations, maturities, and rates of interest, involve delegation of legislative power, it is not apparent wherein the indebtedness for the specific purposes has not been adequately authorized by the legislature, nor wherein the provisions relating to denominations, rates of interest, etc., amount to anything more or less than regulations of detail in carrying out the authorized purposes. On its merits, therefore, this objection should be regarded as being without foundation.

With the exception noted above, the brief of the appellants concerns itself wholly with the argument that the purposes for which the bonds are authorized to be issued are not public purposes, and are therefore purposes for which taxes cannot be levied without depriving the appellants of property without due process of law, in violation of article 14 of the Amendments of the Constitution of the United States.

This question is one for the ultimate determination of the judicial authority of the Federal government. This court knows from facts stated upon the oral argument, as well as from facts which are a matter of general information in the state, that a similar suit is now pending for decision in the Supreme Court of the United States, the decision rendered by the Federal district judge being cited and relied upon in the principal opinion herein. It is also a matter of general information that at the special session of the legislature, just recently closed, a joint resolution was passed asking for the advancement of the hearing of that cause in the Federal Supreme Court. From these facts it might at first blush seem that the decision of this question now by this court would be a work or supererogation. But the Supreme Court of the United States has said that the decision of the highest court of a state, as to what should be deemed a public purpose in a particular state, is entitled to the highest respect, and therefore it may not be out of place for this court to concern itself with the Federal question, to the extent at least of expressing its opinion upon whether or not the purposes for which the indebtedness is authorized to be created are public. See Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, L.R.A.1918C, 765, 38 Sup. Ct. Rep. 112, Ann. Cas. 1918E, 660.

What is or what is not a public purpose must necessarily depend upon the condition which calls forth the particular activity on the part of the state. The economic and legislative history of the state affords the chief repository of information to be drawn upon in the decision of the question. This matter has been so clearly stated in the decision of the Federal district judge that it seems superflous to do more than adopt that opinion.

It is of course the prime function of government to secure and preserve equality of economic opportunity, and in order to do so the state must concern itself with the facts. It is confronted by a condition. If the people of the state, through the adoption of constitutional amendments (going back a number of years, for instance, to the adoption of amendments authorizing public ownership of terminal elevators), and by the adoption at referendum election of acts of the legislature submitted for their approval, conceive that the conditions to be dealt with require a limited public ownership of businesses or utilities as in-

strumentalities to be employed in securing a greater degree of equality of economic opportunity, their judgment upon such question is entitled to the greatest weight. I say "limited public ownership," for the reason that, after all, that is all that is attempted, for the government of the state of North Dakota cannot take a long stride in the direction of public ownership of businesses, heretofore considered exclusively private, with the means at its disposal, and manifestly all steps taken must be justified upon the basis either of experience or experiment. A court is not so gifted with assured wisdom or prophetic vision that it can say in advance of actual trial when the limit will be reached. Suffice it to say that the question as now presented is one partaking so strongly of a political character that the people can neither avoid the responsibility for, nor escape the consequences of, its decision either way. The Constitution, as I view it, is not a legal straight-jacket, restraining the movement of the governments of sovereign states at every turn in their attempts to grapple with their peculiar economic and governmental problems. Neither does it acts as a perpetual check upon the application of remedies which the people of a state might deem it expedient to employ in solving their own problems. Whatever damages the plaintiffs in this case may suffer, they will suffer as members of the democratic family associated as the government of the state. I know of no way a citizen in a democracy can be relieved of his share of the burden incident to the character of the government, and, as a matter of reciprocity, it may be noted that all the blessings of a democratic government are thrust upon an unassenting minority. Concededly the experiment attacked is a public one, and in this respect it differs from all attempts that have been heretofore made to accomplish governmental aims through aid to private individuals and corporations. The control here is also public.

From the standpoint of constitutional law the essence of the whole matter is that the validity of the laws assailed cannot be decided out of hand on the basis of what might or might not have been considered a public use under some anterior condition of society.

While the legislative declaration of the public purpose is not conclusive, it cannot be judicially declared erroneous or unfounded in this state, in view of the previous industrial and economic experiences of our population.

CHRISTIANSON, Ch. J. In my opinion this is a so-called friendly or "fictitious" lawsuit, and does not in fact present an actual controversy. Hence, I am agreed that the action should be dismissed. See Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

The majority members, however, treat the case as a real one, and pass upon the merits of the constitutional questions. In so doing they hold (as announced in paragraph 2 of the syllabus),—and their conclusions upon all questions discussed in the majority opinion are predicated upon the proposition,—that certain amendments proposed by initiative petition and submitted to the electors at the general election in 1918 were duly adopted and became a part of the state Constitution. For the reasons stated by me in my concurring opinion in State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, and in my dissenting opinions in State ex rel. Twichell v. Hall, post, 459, 171 N. W. 213, and State ex rel. Byerly v. State Canvassers, ante, 126, 172 N. W. 80, I am of the opinion that such alleged constitutional amendments were never constitutionally adopted, and in fact never became a part of the Constitution of this state.

Affirmed in 253 U. S. 233, 64 L. ed. 878, 40 Sup. Ct. Rep. 499.

MOHALL FARMERS' ELEVATOR COMPANY, a Corporation, Appellant, v. THOMAS HALL, Secretary of State of the State of North Dakota, Respondent.

(176 N. W. 131.)

Mandamus — refusal of secretary of state to file certificates — question as to whether majority stockholders are depriving minority stockholders of their rights cannot be raised by secretary of state.

This is a mandamus proceeding against the secretary of state to compel him to receive and file a certain certificate presented by the plaintiff corporation on August 4, 1919, showing that said corporation by a majority vote of its stockholders on July 12, 1919, decided to accept the benefits of and to be bound by the provisions of chapter 99, Laws 1919. The secretary of state asserts that the statute is unconstitutional for the reason that it impairs

the contract obligations existing in favor of stockholders, and that as to stockholders who do not consent it is violative of the contract and due process provisions of the Federal Constitution. For reasons stated in the opinion it is *held* that these defenses are not available to the secretary of state.

Opinion filed January 5, 1920.

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

Plaintiff appeals from an order sustaining a demurrer to its petition for a writ of mandamus.

Reversed.

Nuchols & Kelsch, *Geo. I. Rodsater*, and *Benjamin Drake*, for appellant.

No private corporation for profit can be created except by general laws for the organization of all corporations, and any such law shall be subject to future repeal or alteration. Const. § 131, art. 7.

A corporation is a creature of the law. Comp. Laws 1913, § 4494.

Every grant of corporate power is subject to alteration, suspension, or repeal in the discretion of the legislative assembly. Comp. Laws 1913, § 4495; Pratt Institute v. New York City, 183 N. Y. 151, 75 N. E. 1119; Citizens Sav. Bank v. Owensburg, 173 U. S. 636.

All presumptions are in favor of the constitutionality of a law, and the burden is upon the person attacking the constitutionality thereof to show beyond a reasonable doubt that Constitution has been violated. State v. Armour & Co. 27 N. D. 177; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924.

William Langer, Attorney General, *Edw. B. Cox*, Assistant Attorney General, for respondent.

It is well settled that there is a contract between a corporation and every person who becomes a stockholder or member thereof, either at the time of its creation or afterwards, that the business of the corporation shall be conducted within the limits fixed by the charter, and that there shall be no departure from the objects for which the corporation was created. Stevens v. Rutland & B. R. Co. 29 Vt. 203; Zabriskie v. Hackensack & N. Y. R. Co. 18 N. J. Eq. 178, 90 Am. Dec. 617; Mowry v. Indianapolis R. Co. 4 Biss. 78, 17 Fed. Cas. 9891; Academy of Music v. Flanders, 75 Ga. 14; Alexander v. Atlanta R.

Co. 108 Ga. 151; Frye v. Lexington R. Co. 2 Met. (Ky.) 314; Howey v. Henderson, 32 La. Ann. 1069; New Orleans R. Co. v. Harris, 27 Miss. 517; Kean v. Johnson, 9 N. J. Eq. 401; Black v. Delaware, 24 N. J. Eq. 401; Everhart v. West Chester R. Co. 28 Pa. 339; 24 Ann. Cas. 1203; 7 R. C. L. § 72; Clearwater v. Merideth, 1 Wall. 25, 17 L. ed. 604; Chicago City Co. v. Albertun, 18 Wall. 233, 21 L. ed. 902; American Printing House for Blind v. Trustees, 104 U. S. 711; Perkins v. Coffin, 84 Conn. 275; Hartford Railroad Co. v. Croswell, 5 Hill, 383; Kenosha, Rockford & R. I. R. R. v. Marsh, 17 Wis. 13; New Orleans, J. & G. N. R. Co. v. Harris, 27 Miss. 517; Winter v. Muscogee R. R. 11 Ga. 438; Garey v. St. Joe Min. Co. 32 Utah, 497, 12 L.R.A.(N.S.) 594, 91 Pac. 369.

CHRISTIANSON, Ch. J. The plaintiff corporation is an elevator company engaged in buying, storing, and handling grain. It was incorporated under the laws of this state relating to the formation of general corporations on April 10, 1906, and the certificate of corporate existence was issued to it by the secretary of state on that date. On June 1, 1906, certain by-laws were adopted. Article 8 of such by-laws reads:

"Dividends and Profits.

"Section 1. The profits and accumulations of this corporation shall be divided annually, as follows:

"1st. There shall be reserved and set aside as a surplus fund, 10 per cent of the net earnings of the corporation, annually.

"After the 10 per cent of the net earnings has been deducted as above, it shall be divided between the stockholders, as follows:

"There shall be paid to each shareholder of this corporation the net profits accruing from the number of bushels of grain sold by said shareholders to the corporation, provided nevertheless, that all grain sold by a shareholder to the corporation shall be grown on land owned by said shareholder, or on land rented by him, and if on rented land, only on such share as belongs to him.

"2d. There shall be paid to each shareholder according to his holdings a dividend on the balance of profits remaining."

This article has never been repealed or altered, but has remained in full force as originally adopted.

The legislative assembly in 1919 enacted a law which, among other things, provided: "All co-operative corporations, companies, or associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business under prior statutes, or which have attempted to so organize and do business, or which prior to March 12, 1917, were organized under the general corporation laws of the state, and whose articles of incorporation or by-laws did then provide for distribution of any portion of earnings or profits upon a co-operative basis, shall have the benefit of all of the provisions of this act, and be bound thereby on filing with the secretary of state a written declaration signed and sworn to by the president and secretary to the effect that said co-operative company or association has, by a majority vote of its stockholders, adopted at any time subsequent to March 12, 1917, decided to accept the benefits of and to be bound by the provisions of this act. No association organized under this act, or which has adopted the provisions of this act shall be required to do or perform anything not specifically required therein, in order to become a corporation or to continue its business as such." Laws 1919, chap. 99.

The plaintiff corporation has a subscribed capital stock of 190 shares, held by 68 different stockholders. A regular stockholders' meeting was held July 12, 1919. There was present at such meeting 51 stockholders, owning 158 shares of the capital stock. Fifty of the stockholders present, owing 157 shares of stock, voted in favor of the corporation accepting the benefits of and being bound by the provisions of the above-quoted statute; and one stockholder owning one share of stock voted against the proposition.

On August 4, 1919, plaintiff presented to the defendant secretary of state for filing a written declaration signed and sworn to by its president and secretary, setting forth that at a meeting of the stockholders thereof held on July 12, 1919, said corporation had, by a majority vote of its stockholders, decided to accept the benefits of and to be bound by the provisions of said law, and tendered to the defendant the fee provided by law for filing such declaration. The defendant refused to file the same. The plaintiff thereupon brought this proceeding in the district court of Burleigh county to procure a peremptory writ

of mandamus requiring defendant to receive and file such declaration. The above-stated facts were set forth in the plaintiff's petition. The defendant demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and plaintiff has appealed.

The defendant contends that chapter 99, Laws 1919, in so far as it permits a majority of the stockholders in a corporation organized under the general corporation laws of the state to transform the same into a corporation operated on the co-operative plan, is unconstitutional for the reason that it impairs the obligation of contracts as to the stockholders who do not consent to the change, and in effect deprives such stockholders of their property rights without due process.

To this contention the plaintiff makes answer:

(1) That the defendant has no right to raise these constitutional questions; and,

(2) That the state by § 131 of the Constitution and § 4495, Comp. Laws 1913, has reserved the right to enact such legislation.

In the celebrated Dartmouth College Case, 4 Wheat. 518, 4 L. ed. 629, the Supreme Court of the United States held that the charter of a corporation is a contract and entitled to protection under the provision of the Constitution of the United States which prohibits the several states from passing any law impairing the obligation of contracts. The same doctrine is of course applicable to corporations organized under a general corporation law. 7 R. C. L. p. 95. To avoid the rule laid down in the Dartmouth College case many of the states, either by constitutional or statutory provisions, similar to § 131 of the Constitution and § 4495, Comp. Laws 1913, reserved the right to alter or repeal the charters granted to any corporation or the laws under which it was created. Fletcher, Cyc. Corp. § 4007.

But the charter of a corporation constitutes not only a contract between the state and the corporation. It constitutes also a contract between the corporation and its stockholders and between the stockholders *inter se,* which latter contracts are entitled to protection under the Federal constitutional provision prohibiting the several states from passing any law impairing the obligation of contracts. 7 R. C. L. p. 97. And there is a diversity of judicial opinion as to the extent of

reservations like those embodied in § 131 of the Constitution and § 4495, Comp. Laws 1913, and to what extent, if at all, they are applicable to the contractual obligations existing between the corporation and its stockholders and between the stockholders *inter se*. Some courts have held that the reservation by the state of the power to alter or repeal the charter of a corporation or the laws under which it was created is intended not merely for the protection of the public, but also to enable the legislature in effect to change the contract between the corporation and its stockholders. Other courts have held that such power is not reserved in any sense for the benefit of the corporation, or of a majority of the stockholders, upon any idea that the legislature can alter the contract between the corporation and its stockholders, nor for the purpose of enabling it to do so, but that the power is reserved solely for the purpose of avoiding the effect of the decision in the Dartmouth College case, and to enable the state to impose such restraints upon corporations as the legislature may deem advisable for the protection of the public. See Fletcher, Cyc. Corp. §§ 4005–4007.

We do not find it necessary in this case to determine which of these views is the correct one. Nor do we find it necessary to determine whether chapter 99, Laws 1919, as applied to corporations organized under the general corporation laws of this state, contravenes the provisions of the Federal Constitution which prohibit the several states from depriving any person of life, liberty, or property without due process of law; and from passing any law impairing the obligation of contracts. For the question of constitutionality should not be determined unless it is necessarily involved and raised by one who has an interest in the question, in that the enforcement of the law would infringe rights guaranteed to him by the constitutional provision or provisions invoked. And "one who is not prejudiced by the enforcement of an act of the legislature cannot question its constitutionality, or obtain a decision as to its invalidity on the ground that it impairs the rights of others." 6 R. C. L. pp. 89–90.

The United States Supreme Court has held in many cases that a party who asserts that a state statute is violative of the due process or contract clauses of the Federal Constitution must show that he comes within the class protected by the provisions, and that he is one of

those whose constitutional rights are alleged to have been invaded. It has said that "unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all." New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736. That court has also held "that a party insisting upon the invalidity of a statute, as violating the contract clause of the Federal Constitution, must show that he may be injured by the unconstitutional law, before the courts will listen to his complaint. If, instead of showing any injury, the plaintiff shows that he cannot possibly be injured, he cannot, of course, ask the interference of the court." 6 Enc. U. S. Sup. Ct. Rep. 885. That "the parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it and of all claims under it, a third party has no rights to insist that it has been broken, nor invoke the constitutional provision as to impairment of obligation of contracts. In other words, a person who has no interest in the contract, as by being a party to it, cannot complain of a law alleged to impair its obligation." 6 Enc. U. S. Sup. Ct. Rep. p. 885.

Under the general principle that the constitutionality of a statute cannot be questioned by one whose rights it does not affect, and who has no interest in defeating it, the question has frequently arisen whether a public officer has such interest as entitles him to question the constitutionality of a statute and refuse to comply with its provisions. There is considerable conflict in the authorities upon the general proposition whether, in an action to enforce the performance of a statutory duty by a ministerial officer, he may question the constitutionality of the statute imposing the duty. In some cases the right is denied. In other cases it is held that the constitutionality of a statute imposing a duty may be questioned under certain circumstances. 12 C. J. 765.

It has been said that "the better doctrine, supported by an increasing weight of authority, is that a mere subordinate ministerial officer, to

whom no injury can result and to whom no violation of duty can be imputed by reason of his complying with a statute, will not be allowed to question its constitutionality; but that the constitutionality of a statute may be questioned by an officer who will, if the statute is unconstitutional, violate his duty under his oath of office, or otherwise render himself liable, by acting under a void statute." 12 C. J. 765. See also 6 R. C. L. p. 92, § 92. This principle was recognized in State ex rel. Miller v. Leech, 33 N. D. 513, 157 N. W. 492, where this court held that under the great weight of authority a public official cannot, under ordinary circumstances, raise the question of constitutionality in a mandamus proceeding; but that under the peculiar facts in that case (where the county auditor was required to determine whether to recognize the assessment which had been made by the state tax commission, or the assessment which had been made by the local assessor and reviewed and equalized by the local and the county boards of equalization) the county auditor might assert, in defense of his official action in recognizing one assessment and refusing to recognize the other, that the law under which the latter assessment was attempted to be made was unconstitutional. But no such condition exists in this case as that which existed in State ex rel Miller v. Leech, supra. Here the defendant is not required to determine which of two conflicting official acts he must recognize; or which of two conflicting statutes is valid. Here the statute is plain, and defendant can incur no liability by performing the acts which the statute says he shall perform. If the statute is unconstitutional, it is so solely because it violates the constitutional rights of stockholders who do not consent to a change of the corporation to the co-operative plan. It is not contended that any right of the state or the public generally is in any manner violated or impaired. We are of the opinion that the secretary of state cannot be heard to assert in this proceeding that the rights of nonconsenting stockholders have been or may be violated. Such stockholders are the proper parties to defend their rights, and the law affords them ample remedies for that purpose.

The order appealed from is reversed, and the cause remanded for further proceedings in conformity with the views expressed in this opinion. No costs will be allowed to either party on this appeal.

BIRDZELL, BRONSON, and ROBINSON, JJ., concur.

GRACE, J. (concurring in result). Section 16 of chapter 97 of the Session Laws of 1917, which is identical with § 16 of chapter 99 of the Session Laws of 1919, was before this court for construction, in the case of the Equity-Co-op. Packing Co. v. Hall, and the decision in that case is reported in 42 N. D. 523, 173 N. W. 796.

In that case, it was in effect held that the plaintiffs were entitled to the benefits of chapter 97. In that case, however, there was presented no constitutional question, as is presented in the present case.

I concur in the result of the opinion of the court, as written by Chief Justice Christianson.

W. A. CARNS, Plaintiff and Appellant, v. Mrs. C. L. PUFFETT, Formerly Elizabeth A. Evans, Defendant, NETTIE A. ISHAM, Intervener and Respondent.

(176 N. W. 93.)

Specific performance — no legal written agreement found upon examination of letters and other correspondence.

1. The plaintiff brought an action of specific performance to compel the defendant to convey to him by deed certain real estate which she owned, and which plaintiff claims to have purchased from her. It is claimed by plaintiff that there exists between them a binding, written contract of sale.

He bases such claim upon certain letters written by him to defendant, and answers received thereto from her, and upon other letters written by her to him: *Held*, on examination of all such letters and other evidence in the case, that, for the reasons stated in the opinion, no legal, written agreement between them, for the sale of the real estate, was made.

Vendor and purchaser — where the intervener bought the land and paid full purchase price thereof the intervener became the legal owner of the premises.

2. The defendant sold the real estate to Nettie A. Isham, the intervener, and received the full purchase price thereof, and delivered a deed of the

premises to her: *Held*, that the intervener, for the reasons stated in the opinion, became the legal owner, in fee simple, of the premises.

Opinion filed January 5, 1920.

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

Judgment affirmed.

W. A. Carns and *L. A. Simpson,* for appellant.

A definite and unconditional acceptance in the option (offer) is not avoided or rendered uncertain or conditional by matter contained in the acceptance concerning the method of performance, or where payment should be made, etc. Horgan v. Russell, 24 N. D. 490; 33 W. Va. 738, 11 S. E. 220.

If, contemporaneously with or subsequent to the making of the contract, either party suggest, request, or propose a time, place, or mode of performance different from that agreed upon, that does not of itself effect such change, nor does it cause a breach, giving right of action or rescission to the other party. Swiger v. Hayman, 48 S. E. 839; Turner v. McCormick, 67 L.R.A. 853, and cases cited therein; Kruetzer v. Lynch, 122 Wis. 474, 100 N. W. 887; Matteson v. Schofield, 21 Wis. 671.

T. F. Murtha, for the intervener.

At what place the price was to be paid was a part of the offer. The defendant was entitled to have the price paid to him simultaneously with the delivery of the deed, and he was not obligated to go to any bank for payment nor to communicate a deal with the bank before the price was paid. The following authorities fully sustain these principles: Harris Bros. v. Reynolds, 17 N. D. 16, 114 N. W. 369; Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364; Northwestern Iron Co. v. Meade, 21 Wis. 480, 94 Am. Dec. 557; Batie v. Allison, 77 Iowa, 313, 42 N. W. 306; Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; Weaver v. Burr, 31 W. Va. 736, 3 L.R.A. 94, 8 S. E. 743; Baker v. Holt, 56 Wis. 100, 14 N. W. 8; Wilkin Mfg. Co. v. H. M. Loud & Sons Co. 94 Mich. 158, 53 N. W. 1045; National Bank v. Hall, 101 U. S. 43, 25

L. ed. 822; Russell v. Falls Mfg. Co. 106 Wis. 329, 82 N. W. 134; Langellier v. Schaefer, 36 Minn. 361, 31 N. W. 690; 39 Cyc. 1195.

"There is no contract so long as the parties are merely negotiating, by correspondence or otherwise, to settle the terms of an agreement, intending to enter into a formal and final agreement, when the terms shall be settled." 39 Cyc. 1183, 1190, 1192; Gilbert v. Baxter (Iowa) 32 N. W. 365; Sawyer v. Brossart (Iowa) 25 N. W. 867; Langellier v. Schaefer (Minn.) 31 N. W. 690; Foss Invest. v. Aterm (Wash.) 95 Pac. 1017.

If no place is specified in the offer for payment of the purchase money and delivery of the deed, it is implied that payment is to be made and the deed delivered at the place of residence of the vendor or his agent, and an acceptance fixing a different place is had as varying from the offer. Arnett v. Tuller, 134 Ga. 609, 68 S. E. 330; Robinson v. Weller, 81 Ga. 704, 8 S. E. 447; Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364; Sawyer v. Brossart, 67 Iowa, 678, 56 Am. Rep. 371, 23 N. W. 867; Hinnish v. Oliver, 66 Kan. 282, 71 Pac. 520; Greenewalt v. Este, 40 Kan. 418, 19 Pac. 803; De Jonge v. Hunt, 103 Mich. 94, 61 N. W. 341; Bagger v. Nesbitt, 122 Mo. 667, 42 Am. St. Rep. 596, 27 S. W. 385; Ross v. Craven, 84 Neb. 520, 121 N. W. 451; Lopeman v. Colburn, 82 Neb. 641, 118 N. W. 116; Beiseker v. Amberson, 17 N. D. 215, 116 N. W. 94; Stearns v. Clapp, 16 S. D. 558, 94 N. W. 430; Foss Invest. Co. v. Ater, 49 Wash. 446, 95 Pac. 1017; Curtis Land, etc. Co. v. Interior Land Co. 137 Wis. 341, 129 Am. St. Rep. 1086, 118 N. W. 853; Baker v. Holt, 56 Wis. 100, 14 N. W. 8; Northwestern Iron Co. v. Meade, 21 Wis. 474, 94 Am. Dec. 557; Lacey v. Thomas, 164 Fed. 623; Sherp v. West, 150 Fed. 458; 39 Cyc. 1197.

GRACE, J. The action is one for specific performance. The complaint in substance avers that on or about the 5th day of April, 1918, the defendant entered into a written contract with the plaintiff to sell him lot 6, block 2, in the town of Manning, county of Dunn, this state, for the sum of $500; that the defendant agreed to deliver a good title to the premises by delivery of a deed, the premises to be free from encumbrances; whereupon the plaintiff should execute and deliver

to the defendant a mortgage on the premises for $500, to secure his note for that sum.

The plaintiff furthers avers his readiness and willingness to perform the terms and conditions of his contract, and in connection avers that he has deposited his promissory note for $500, dated April 22, 1918, due December, 1918, which draws interest at 8 per cent per annum, secured by a mortgage on the premises in question, and deposited the same with the First State Bank of Manning, with instructions to the bank to deliver such papers to the defendant, when she delivered a warranty deed to the bank, transferring the property to the plaintiff.

The complaint further shows that the plaintiff went into possession of the premises, under the contract, and performed certain work thereon, and made certain improvements to the value of $37.35; and it further shows of the refusal of the defendant to deliver to plaintiff a deed for the premises.

The defendant made no appearance and filed no answer to the case. A complaint in intervention, however, was filed by Nettie A. Isham, which shows that, on May 6th, the defendant was the owner in possession of said lot 6, block 2; that, on the said day, for valuable consideration, she conveyed the premises by warranty deed to the intervener, which deed was, on May 10, 1918, duly recorded in the office of the register of deeds of Dunn county.

The intervener further avers that since May 6, 1918, she has been the owner, in fee simple absolute of the premises. To the complaint of intervention, the plaintiff answered, and properly placed at issue, the allegations therein complaining, and reavers his purchase of the lot in the manner described in his complaint.

The material facts in the case are very few and easily stated, and are as follows: March 29, 1918, the plaintiff wrote Mrs. Puffett a general letter, in which he referred to the party who had the house rented (which, as we infer, was the house on said lot 6), and stated that he had spoken to the plaintiff about trading it for the place where the plaintiff was then living; and further stated that the plaintiff had been over to look at the house, with the idea of renting the same for the following year. He then made reference to the bad condition of the house, stating that the plaster was cracking, some of it off, etc.

The material part of the letter, as far as this case is concerned, is as follows: "I have never bought a place here in Manning, as I always considered it would be a poor investment, but I have about concluded to buy a place if I can get it right.

"I have not very much ready cash at present, and, if you desire to sell your place, I will give you my note for $500, due on or before next December 1st, at 8 per cent, secured by a mortgage back on the place.

"I cannot offer any cash on the deal, as I would want to plaster the house, paint it, and build a garage, which would take about all the cash I have on hand.

"If you do not want to sell as per my proposition, I will rent the place for the year, at $12 per month, if you fix it up and build me a small garage.

"Kindly let me hear from you at once, as my lease for the property on which I now live will soon expire, and I would like to know definitely about your place before my rental term is up."

The foregoing letter was received by Mrs. Puffett at Oxford, New York, on April 5th. She replied to the letter, and what is material in her reply letter is as follows:

"Just received your letter to-day, and will answer at once, as your letter had to be forwarded, and it will take some time for answer to reach you.

"Regarding the house, I have been thinking of selling it, as it is so far away, and not an easy matter to get anyone to look after it; so, if you want it, I will accept your proposition. I have had so many things to see to this winter, that I neglected to pay the taxes before the penalty went on, and, if you will pay the taxes, I will turn you the insurance policy I am just having made out; it is for three years, and will be more than the taxes ever have been.

"The record shows a mortgage against it, but that can be taken up any time. If you decide to take it, will you please send me some North Dakota blanks to make out, as they are a little different in each state, and they may not be up to North Dakota ways here. You can send your mortgage and note direct to me, to the First National Bank of Oxford, New York, and I will do likewise."

The remainder of this letter is not material to this case.

On April 18, 1918, the plaintiff wrote the defendant the following letter:

"Your letter of April 5th reached me in due time, in which you stated you will accept my offer of $500 for your property here in Manning, to wit, lot 6, block 2. I have drawn a warranty deed for your convenience; also a satisfaction of mortgage, which kindly send to the mortgagees, and have them send the same to the First State Bank here (Manning). Kindly sign the deed the same as I have drawn it, and have Mr. Puffett sign the same, as I have written his name. Be sure and date the deed, acknowledge the same before the notary public, and see that he dates the acknowledgment and fills in the date of the expiration of his commission. A great many notaries fail to do the latter.

"Send the deed to the First State Bank here (Manning). When the satisfaction reaches here, I will deliver the note and mortgage for $500 to the said bank. This will be the simplest and most convenient way for both of us, I believe.

"The taxes for the last year have not been paid, as you stated, and I will pay the same, provided you turn over the insurance policy, but the property is not insured yet, and I understand that the bank here is supposed to write the same as soon as they collect the rent from Mr. Etherton, the party who is living in the house at present, but it is doubtful if said party will pay the rent for sometime, as he is practically worthless financially, and, if you are willing, I will insure the property, and you may give me credit on my note for the premium.

"I notice you stated you were willing to insure it for three years, and assign the policy to me. If I insure it, and you give me credit for the premium, it will amount to the same thing.

"Mr. Kapelovitz told me he had not written the policy, and did not know when he would, as he had not collected rent, and did not know when he would be able to do so. There is considerable danger from fire, as you know we have no protection whatever, and I do not wish to run the risk without insurance, indefinitely."

The remainder of the letter is irrelevant, with the exception of a postscript written with pen and ink, at the bottom of the foregoing letter, which was typewritten, and which is as follows:

"Kindly hurry the paper to the bank as soon as possible, as I am

anxious to get the house fixed up and moved," which means that he was anxious to get the house fixed up and was anxious to move into it.

On April 26, 1918, Mrs. Puffett wrote the plaintiff the following letter:

Yours of the 18th received and noted. I wish it had reached me a few days sooner. Just after I wrote you, I received a cash offer on the house. I held up the answer, so that until two weeks, and from Friday until Tuesday, waiting to hear from you, as your first letter had to be forwarded to me, which took longer, and you wrote you had some deals sort of hanging fire. I fully believed some of those had materialized, or I would have heard from you sooner; therefore, I wrote the other parties they could have the house, as I am anxious to get squared around one way or the other. As I waited so long to answer them, they may have changed their mind about it, also. If they do take it, they will fix it up to rent, so you may rent it anyway.

I am sorry if I have put you out any. Yet it will spoil your plans more or less anyway, but, under the circumstances, I think you would have done the same.

Trusting this proposition may come out all right for you, and wishing you success, I am,

Yours truly,
Mrs. C. L. Puffett.

The letter contained some immaterial matter not included. In answer to this letter, plaintiff wrote defendant the following letter, which bears the date of April 29, 1918:

"Your letter of the 26th inst. is at hand, and I note that you say you have sold the house, which I sent you a deed for recently, to be executed. Now, in my letter of Mar. 29 last, I made you an offer, which you accepted by your letter of April 5th; this constituted a contract of sale, and I went ahead and did considerable work on the property, cleaning it up, and having the plastering repaired; also the chimney, and, of course, I fully expected you to go ahead with the deal and execute the deed.

"I sent you telegram to-day as follows, and this is to confirm the same.

"'Manning, N. Dak. April 29, 1918, Mrs. C. L. Puffett, Chenango County, N. Y.:—Have done work on property, and expect deed.'"

As we read the matter, this was all of the telegram. The letter then continues:

"Now, I did not desire to cause you any trouble or expense in the matter, but I have been to considerable expense and trouble, and I shall be compelled to protect myself in the matter.

"I do not know who could have made you the offer on the property, but am of the opinion that it is someone who desires to spite me, as this is their game. I shall cause them considerable trouble before they get the property.

"I am certainly sorry you got into this double deal, but you should have telegraphed or written to me before you sold the property to another party, who made you an offer after you had accepted my proposition, as by doing so you sold the property to them after you had sold it to me. But I believe you will be able to settle the matter by simply notifying the party that you had sold the same to them by mistake, and that you cannot execute the deed to them, and I do not believe they will go to any expense in trying to compel you to execute the deed, and they look into the matter as they undoubtedly know I had purchased the property of you before they made you the offer, and they thought they could jump in ahead of me, and do me some dirt, regardless of the consequences to you.

"Now to show you that I am right with you, and, if you execute this deed as per our agreement, and the second offerer should attempt to make you any trouble, I will defend the action for you, free of charge for my services.

"I have made all plans to live here in said house this summer, and I intend to do so, even though it may cause you some trouble and expense, I expect a wire from you to-day in reply to my telegram, and my future actions shall depend on that answer.

"Trusting that you will get this matter settled without any trouble, I remain,

"Yours truly,"

The appellant has assigned five errors, in one of which it is contended that the decision of the court is against the law. It is further

claimed that the evidence is insufficient to support the findings of fact, the conclusions of law, and the judgment; and that the court erred in giving and entering judgment.

We are of the opinion that these contentions are certainly without merit. In order for the plaintiff to establish a case, it is incumbent upon him to show that he entered into a valid, binding, written contract with the defendant, for the purchase of the lot in question.

The only claim of a written contract is that founded upon the letters passing to and fro between the plaintiff and the defendant. In order for those letters to constitute a contract between the parties, there must have been a meeting of their minds upon the terms of sale of the premises; that is, there must have been an offer, on the part of the plaintiff to the defendant, to purchase the premises upon certain specified terms, which were accepted without qualifications by the defendant, or there must have been an offer to sell the premises to the plaintiff, by the defendant, upon certain terms which were unqualifiedly accepted by the plaintiff.

It clearly appears from the letters that the minds of the plaintiff and the defendant never met upon the terms and conditions of the sale of the premises. It is true the plaintiff offered to pay the defendant $500 for the premises, the purchase price to be evidenced by the plaintiff's promissory note, secured by a mortgage upon the premises. It is also true that the defendant wrote plaintiff and accepted his offer as to price and method of payment, but specified certain terms, with which she asked the plaintiff to comply.

These terms were that plaintiff should send his note and mortgage to her personally, or to the First National Bank of Oxford, New York, and she would do likewise, meaning thereby, we presume, that she would deliver her deed to the bank, together with an abstract and a satisfaction of the mortgage against the premises.

The requirement by the defendant that the plaintiff pay the taxes, under the conditions named by the defendant, and that he send his note and mortgage to the First National Bank at Oxford, New York, where she would deliver her deed to him, together with an abstract and a satisfaction of the mortgage, constituted terms of the proposed contract, and were not matters merely relating to the execution and performance of it.

If the plaintiff upon receiving this letter had sent his mortgage and note, and had paid the taxes as directed by the defendant, he would be then, legally speaking, in the position which he now claims, but in which we think he is not. The defendant as the owner of the property had a perfect right to impose those terms, and in so far as she did do so she rejected plaintiff's proposition, in so far as it was inconsistent or in conflict therewith.

The plaintiff, however, instead of accepting her terms, replied by proposing others, by asking her to send the deed, abstract, and a satisfaction of the mortgage, to the First State Bank of Manning, where he would deliver the note and mortgage.

The plaintiff also made a counter proposition, as to the method of disposing of the taxes, which were unpaid, than that directed by the defendant. At this point, the negotiation as to terms between the parties terminated, and it is clear their minds had not met upon the terms and conditions of the sale of the premises.

There was no contract, for proposals and counter proposals of terms desired in a contract do not constitute a contract until the minds of the parties thereto agree upon and accept them. The letters conclusively show there was no contract, nor binding obligation concluded between the parties. Further discussion cannot aid this conclusion, nor make it more clear.

Some two weeks after the plaintiff had written his counter offers, the defendant, without knowing, and before she had received notice of them, sold the premises to the intervener, and received from her $500, the purchase price, which was delivered to defendant at First National Bank of Oxford, New York, where defendant and her husband, on the 6th day of May, 1918, delivered their deed of the premises to the intervener, which was sent by the bank to her, and by her duly recorded; and she thereby became the legal owner, in fee simple, of the premises in question.

However, had defendant known, at the time she accepted the money from the intervener and delivered her the deed, that the plaintiff was making counter proposals, or if she, at that time, had his letters in which he made such counter proposals, she could nevertheless have sold to the intervener the premises in the manner in which she did, and

thereby have been under no obligations whatever to the plaintiff, for she had entered into no binding or legal agreement with him to sell him the premises; this, for the reasons above stated.

Hence, the notice which plaintiff served upon the defendant by letter and telegram, and the filing of the lis pendens, availed him nothing. He had acquired no legal nor equitable interest or claim in the land, and the intervener took the premises clear and free from any claim or interest of the plaintiff.

After the plaintiff had deposited his note and mortgage in the bank at Manning, and after he had notified the defendant that he intended to insist on his alleged contract and his right to the premises, and after he had knowledge of the sale to the intervener, he brought an injunction proceeding against the intervener to restrain her from interfering with his possession of the premises. In that proceeding, he gave a bond to indemnify and protect the intervener from any damages that might accrue to her by reason of the injunction proceeding.

The intervener was entitled to the possession of the premises from the time of the execution and delivery to her, by the defendant and husband, of the deed to the premises. She has been kept out of possession during all the time of her litigation, and has lost the use of the premises, and it follows, as a matter of course, that she has been damaged to the extent of the value of the use of the premises, or the rental value, which has been determined to be $10 per month, and this she is entitled to recover as damages from plaintiff. Proof of such damages having been made, she did recover therefor, and the same were properly allowed and incorporated in the judgment.

We think there is no valid reason for disturbing the expenses allowed the intervener, on account of the injunction proceeding, nor her recovery for costs.

It may be stated in conclusion that the plaintiff, as we infer from the record, while proceeding in absolute good faith in the matters involved in this case, nevertheless, as clearly appears, was entirely mistaken in his belief that he had entered into a valid, binding, written agreement with the defendant. For the reasons above stated, it clearly appears he had no such agreement with her.

Cases which support the view which we have taken of this case are

as follows: Kvale v. Keane, 39 N. D. 560, 9 A.L.R. 972, 168 N. W. 74; Beiseker v. Amberson, 17 N. D. 215, 116 N. W. 94; Ness v. Larson, 41 N. D. 211, 170 N. W. 623.

The judgment appealed from is affirmed. The respondent is entitled to statutory costs of appeal.

W. S. DAVIDSON, Respondent, v. C. A. HOUGE, Appellant.

(176 N. W. 121.)

Mortgages — statutory provisions as to foreclosure.

1. Sections 8075 and 8076, Comp. Laws 1913, provide: "It shall be unlawful for any agent or attorney of any mortgagee, assignee, person or persons, etc., owning or controlling any real estate mortgage to foreclose the same until he shall receive a power of attorney from such mortgagee, assignee, person or persons, etc."

It is further provided that a power of attorney shall, before the day of sale, be filed for record in the office of the register of deeds of the county wherein the real estate is located.

Mortgages — foreclosure by mortgagee where mortgagee's name is signed thereto by agent or attorney.

2. Where the notice of foreclosure sale is signed by the mortgagee, or his name is signed thereto by his agent or attorney, without such agent or attorney's name appearing on such notice, and such notice is published and foreclosure proceedings completed, and the property is bid in in the mortgagee's name and by his direction, and he accepts, receives, and retains the benefits thereof, such foreclosure proceedings may be considered under these circumstances as the act of the mortgagee, and a foreclosure by him is a valid foreclosure.

Mortgages — exclusion of exhibits tending to show knowledge of the mortgagee was error.

3. Certain exhibits were excluded from evidence which tended to prove that foreclosure was made with the knowledge, consent, and acquiescence of the mortgagee, and that he received and retained benefits under such foreclosure, while contending the foreclosure was void by reason of failure to comply

with the above laws: *Held,* that the exclusion of such exhibits was reversible error.

Opinion filed January 6, 1920.

This is an appeal from a judgment of the District Court of Williams County, *Frank E. Fisk,* J.

Judgment reversed.

John J. Murphy, for respondent.

Craven & Converse, for appellant.

GRACE, J. The facts in the case are as follows: J. J. U. Dvorak and Barbara Dvorak executed and delivered to the defendant their certain promissory note in the sum of $700, which was dated June 8, 1914, and bore interest at the rate of 7 per cent per annum. It was secured by real estate mortgage upon the southeast quarter of section 32, township 155, range 99. The defendant, before the maturity of the note, indorsed and delivered it to plaintiff. The defendant assigned to the plaintiff the real estate mortgage above mentioned, which secured the note. Plaintiff thus became the owner and holder of the note and mortgage. Protest of the note was waived by indorsement to that effect over the indorsement of the defendant. Dvorak did not pay the note at its maturity.

The plaintiff brought this action against the defendant as indorsee to recover upon the note. The defendant denies any liability on the note and maintains that it is paid. His claim, in effect, is that the mortgage was foreclosed by plaintiff or by his authority, and the premises described in the mortgage bid in at the foreclosure sale at his request for him by the sheriff for the full amount of the note, or mortgage indebtedness. Whether the note was so paid or whether there was a valid foreclosure of the mortgage are the principal questions to be decided in this case.

It appears from the testimony of the defendant, that in May, 1915, the plaintiff and defendant had a conversation in reference to the foreclosure of the mortgage in question. With reference to such conversation, the defendant in substance testified as follows: "He had seen me about this paper after it was due and I had explained to him that the

maker of the note at Wyndmere, North Dakota, had sold the land to a man in Iowa, and that he wanted the title clear, and therefore was going to pay immediately, but Davidson did not want to wait for this, so we made the arrangement that we should foreclose, and, to save the man the expense or the attorney fee which in this case would be $50, the arrangement was, and the mutual agreement was, that I should copy from Mr. Braatelien's foreclosure just previous to that because it was so short, so when Davidson got title it would be so much less expense in the cost of the land, so I immediately went back to the office and copied the foreclosure from Braatelien."

The defendant further in his testimony shows that there was a mutual agreement between the plaintiff and him that defendant should foreclose the mortgages; that the plaintiff told him to copy the notice of publication Mr. Braatelien had used in another foreclosure, and to be sure that it was right; that the defendant and his stenographer verified the facts in the copy, and again verified them after the first publication.

The defendant further testifies that it was agreed that the sheriff, on the date of sale, should bid in the property for Davidson; that Davidson had said he wanted it bid in in his name. The defendant further testifies that Davidson and he figured up the full amount due upon the note, and that the amount inserted in the foreclosure notice was in accordance with those figures. The defendant made out the notice of foreclosure in accordance with the conversation, his stenographer writing out the notice of foreclosure under his directions, and to it in typewriting at the bottom of the notice of foreclosure, she signed name of W. S. Davidson.

After the notice was published in the Williston Herald for the required length of time, the defendant delivered a copy of the notice of foreclosure sale to the sheriff and told him to make the sale and bid the property in in Mr. Davidson's Name.

The plaintiff has assigned seven errors, all of which we have carefully considered, and three of which we regard as principal and material ones. The first assignment of error is that the court erred in sustaining plaintiff's objection to the offer of the defendant, to introduce in evidence exhibit "C," being the publisher's affidavit of the

notice of mortgage sale, and exhibit "D," being the sheriff's certificate of mortgage sale.

The second material error assigned is that the court erred in granting the motion of the plaintiff to strike out all the testimony of the witness Houge as to the foreclosure proceedings.

The third assignment is that the court erred in sustaining the plaintiff's objection to the following question asked witness Rutledge, the deputy sheriff: Question: "After you had completed that instrument (meaning the sheriff's certificate) by placing your acknowledgment upon it, what did you do with it?"

We will discuss the first assignment of error. In considering it, the question before the court is, Was it error to exclude as evidence the notice of publication and the sheriff's certificate of the foreclosure sale of land in question? This can only be answered by determining three propositions:

(1) Whether or not the foreclosure sale was in reality conducted by the mortgagee, the defendant merely acting in a clerical position, and, while so acting, carrying out the instructions of the mortgagee.

(2) Whether or not the defendant was acting as an agent of the mortgagee, though without a power of attorney; and, if so acting, did the mortgagee have knowledge of his acts, and adopt and ratify them by acquiescing in the foreclosure proceedings with full knowledge thereof, accepting and retaining the benefits thereof by receiving the sheriff's certificate, and acquiring title in fee to the land foreclosed by the expiration of the time for redemption, no redemption having been made.

(3) Or did the defendant, without possessing a power of attorney and filing the same before the day of sale, act as the agent of the mortgagee in said foreclosure, publishing a notice of sale therein, and doing all other acts which were done by him in the foreclosure of said mortgage, all without the knowledge, consent, or acquiescence of the mortgagee, and without him accepting any benefits from such foreclosure sale, or the acts of such agent.

If the agent proceeded as stated in the third proposition above, the foreclosure proceedings would be void, and he would come within the provisions of §§ 8075 and 8076, Comp. Laws 1913, which specifies

that it is unlawful for an agent or an attorney of a mortgagee, etc., to foreclose a mortgage until he shall have received a power of attorney from such mortgagee; that no sale of real estate upon the foreclosure made by the agent or attorney shall be valid for any purpose, unless such power of attorney shall be procured and filed in the office of register of deeds in the county where the real estate is located, before the day of sale.

The defendant in this case had received from the mortgagee no written power of attorney. This does not necessarily prove that the foreclosure is invalid, as we shall see when we consider the first and second propositions above stated. They may be considered together as the same reasoning will apply to either proposition.

The notice appears to be one by the mortgagee. His name was affixed to it. No other name appears upon it as mortgagee or agent. The notice was authorized by the mortgagee according to the testimony of the defendant; that is, he agreed that the mortgage should be foreclosed. He knew the kind of a notice that was to be prepared; he assisted in finding the amount which would be due upon the note on the day of sale, and that amount was to be inserted in the notice of foreclosure, and, through these and other acts of the mortgagee, it may be assumed that he authorized the defendant to sign the mortgagee's name to the notice of foreclosure, and in fact to do any other act necessary to prepare and publish a sufficient notice of foreclosure. If the mortgagee, in fact, knew of the foreclosure sale and notice of sale, he is in no position to maintain that the mortgage foreclosure and sale is invalid upon the ground that the defendant did not possess, or receive from the mortgagee, a power of attorney to act as such agent. If he agreed that the foreclosure sale might be made, and if it were made in accordance with the agreement and understanding had with him; and if the land was sold upon the foreclosure sale pursuant to such notice, and a sheriff's certificate was duly issued by the sheriff and delivered to the mortgagee, he retaining it until the time for redemption had expired, thus receiving title to the land thereunder, thus ratifying the acts of defendant and affirming the mortgage foreclosure sale, and not in any manner repudiated the sale, but on the contrary accepting and retaining the benefits derived thereunder,—he cannot question the

validity of such foreclosure sale, on the ground that the defendant possessed no written power of attorney to conduct such foreclosure proceedings.

It would appear that exhibits "C" and "D" were competent and material evidence, which uncontradicted would tend to prove that the mortgagee had full notice and knowledge of the entire mortgage foreclosure. The notice of mortgage foreclosure sale and the sheriff's certificate were fair on their face, and purported to show a foreclosure regular in form. The sheriff's certificate of foreclosure sale, the contents of which were wholly undisputed, was at least prima facie evidence of the facts in it recited. On its face it showed that, pursuant to the notice of sale in question, the land described in the mortgage was sold by the sheriff on the day fixed for the sale by the notice; that the land was sold to the mortgagee for the amount specified in the notice plus the cost of the foreclosure proceedings. Hence, we are of the opinion that it was reversible error to exclude as evidence those exhibits; if they were not material, if they were false, if they were no authority for the publication of the notice or of the execution of the sheriff's certificate, the plaintiff would have opportunity to prove that by the introduction of competent evidence, if he were in a position to furnish such proof. If the plaintiff received from the sheriff the sheriff's certificate in question, he received knowledge of the foreclosure proceedings. If he retained the sheriff's certificate after having acquired such knowledge, and accepted benefits of the foreclosure sale; that is, retained the sheriff's certificate until the time of the expiration of redemption, thus becoming the owner of the title to the land, and had at no time repudiated the proceedings or the foreclosure sale of the land pursuant thereto, his acts in this regard were equivalent to a ratification of the acts of the defendant in and about making such foreclosure, and, as no other person appears to complain, it would appear that the plaintiff is not in a position to do so. It would seem unnecessary to discuss the law as laid down in §§ 8075 and 8076, Comp. Laws 1913. A full discussion of those sections as they appear in the 1905 Code is contained in a decision by this court in the case of Hocksprung v. Young, reported in 27 N. D. 322, 146 N. W. 547. In the opinion in that case, the court fully set forth the reasons and necessity of such

statutes; that case was one in which the mortgage was being foreclosed by action. In such case the statutes require that the possession of such a power of attorney shall be alleged in the complaint. In that case there was an attempt but not a full compliance with this requirement, and the foreclosure was sought to be invalidated by reason of the defect above mentioned. The plaintiff, the mortgagee, appeared and testified in that action. This court in deciding the case used the following language: "It must be clear that where the holder of the mortgage, who is the plaintiff, appears in person at the trial and testifies in support of the foreclosure proceeding, the trial court has before it the most convincing and conclusive evidence that a foreclosure by the attorneys conducting the proceeding in court has been authorized by the holder of the mortgage, and thereby all the essential elements intended to be met by literal compliance with the provisions of the statute have been met; that the reason for the requirement is fulfilled; that in fact even though the holder of the mortgage gives no direct evidence of the subject of the execution and delivery of the power of attorney, the fact of his testifying in support of the action is as full and adequate proof of his authorizing the attorneys to foreclose as would be his direct testimony that he gave them a power of attorney so authorizing them. . . . The plaintiff was present in person during the trial and testified that he sold the defendant's land on which the mortgage was given for the purchase price, and as to the execution of the mortgage, nonpayment of the first instalment and of taxes, and as to other matters in issue."

The defendant admitted the execution and delivery of the notes and mortgage involved and the nonpayment. It will thus be seen that the reason for the rule contended for has been entirely met. The defendant, by appearing and participating in the trial without calling attention to the absence of direct proof on the subject, has waived it, and the plaintiff has ratified the act of his attorneys, even though there has been no formal power of attorney executed and delivered. Inasmuch as the judgment for the defendants in this case denying a foreclosure of the mortgage and dismissing the action rests solely upon the points we have considered, it must be reversed and the court directed to enter a decree of foreclosure.

It will be noticed that the case from which we have quoted in effect holds that where the mortgagee participated in the foreclosure in the manner above set forth, that it amounts to a compliance with the statutes under consideration. In other words, the requirements of the statutes were met. One of the main reasons for requiring an attorney who is foreclosing a mortgage to have a power of attorney from the mortgagee authorizing such attorney to make such foreclosure is to prevent attorneys from making foreclosure without the knowledge of the mortgagees.

If in this case the mortgagee had knowledge that the mortgage in question was being foreclosed, it appearing from the testimony that it was agreed between the plaintiff and defendant that such foreclosure should be made in the manner in which it was made, it would seem that the purposes of the power of attorney had been fully met.

The third assignment of error relates to the exclusion of evidence of the deputy sheriff as to what was done with the sheriff's certificate after it had been completed and acknowledged. We are of the opinion it was proper for the defendant to show by the deputy sheriff what was done with the sheriff's certificate after its completion; if he could show by him that the sheriff's certificate at or after its completion was delivered to the plaintiff, it would be material testimony to show that plaintiff had knowledge of the foreclosure proceedings, and if plaintiff retained the sheriff's certificate after its delivery to him, and took no steps whatever to manifest his disapproval of the foreclosure proceedings, and acquired title to the land by reason of the time of expiration of redemption, such acts would greatly tend to establish knowledge and ratification of the foreclosure proceedings by the mortgagee. We are of the opinion that it was reversible error to exclude such testimony, and further that it was a material and reversible error to strike out all of the testimony of witness Houge as to the foreclosure proceedings.

If the foreclosure proceedings were valid, and the plaintiff authorized the sheriff to bid in the premises at the foreclosure sale for the full amount of the mortgage indebtedness, and the sheriff did so and duly executed and delivered to plaintiff a sheriff's certificate, we are of the opinion this would operate to pay the indebtedness. If this be true, the plaintiff would have no cause of action on the promissory note

in question, for the indebtedness represented by such note was paid by such foreclosure and sale of the premises in the manner we have above stated. The plaintiff cannot require double payment of the indebtedness. If the foreclosure sale were valid, the debt is paid; if it were not, the debt is not paid. This can be determined only by the admission in evidence of the exhibits sought to be introduced by defendant, and any other material testimony which will show or tend to show the full proceedings had with reference to the foreclosure of the mortgage. The judgment appealed from is reversed, and the case is remanded to the lower court for a new trial.

Defendant is entitled to his statutory costs on appeal.

ROBINSON, J., concurs.

CHRISTIANSON, Ch. J. (concurring specially). The defendant, Houge, was the owner of a certain promissory note, secured by a real estate mortgage upon certain land situated in Williams county in this state. He sold and transferred the note and mortgage to the plaintiff. The makers of the note failed to pay it, and the plaintiff thereupon brought action against the defendant Houge as an indorser. The defendant, by way of defense, asserted that the note had been paid. In that connection it is averred that the mortgage securing the note was foreclosed and the property bid in by the plaintiff at the foreclosure sale for the full amount due upon the note, together with the costs and disbursements of the sale. If the foreclosure sale was valid the note has been paid. The plaintiff, however, contends that the foreclosure sale was a nullity for the reason that the defendant, who acted as plaintiff's agent in conducting the foreclosure, had no power of attorney authorizing him to do so, as required by §§ 8075 and 8076, Comp. Laws 1913.

The sole question presented on this appeal is whether the note sued upon was paid by plaintiff's purchase of the land upon the foreclosure proceeding. The evidence offered and introduced by the defendant tended to show that he prepared the notice of foreclosure sale at the request of the plaintiff; that the plaintiff's name was signed thereto as assignee of the mortgagee; that the defendant took the notice of sale

to a newspaper designated by the plaintiff for publication; that such notice was duly published in the manner provided by law, and that at the time and place advertised the real property was bid in in the name of the plaintiff for the full amount due upon the note involved in this suit, together with the costs and disbursements of the sale.

If the sale was valid, then concededly the note is paid. It seems to me that the evidence offered by the defendant tends to show that the foreclosure was in fact made and conducted by the plaintiff himself, and that defendant merely performed certain clerical work under plaintiff's directions. I do not believe that §§ 8075 and 8076, Comp. Laws 1913, have any application to or forbid a transaction of that kind. Manifestly if the plaintiff, instead of directing the defendant to do this work, had requested a stenographer in his office to do the same things which the defendant did, no power of attorney would have been necessary. I do not, however, agree with what is said, or rather implied, in the majority opinion to the effect that a foreclosure made in violation of §§ 8075 and 8076, Comp. Laws 1913, may be validated by the ratification thereof by the owner of the mortgage. These provisions were not enacted for the benefit of the owner of the mortgage alone. The owner of the land, and the owners of subsequent encumbrances, are also interested. Section 8075 says: "It shall be unlawful for any agent or attorney of any mortgage, assignee, person, or persons . . . owning or controlling any real estate mortgage to foreclose the same until he shall receive a power of attorney . . . authorizing such foreclosure." And § 8076 declares that "no sale of real estate upon the foreclosure made by an agent or attorney shall be valid for any purpose, unless such power of attorney shall be procured as herein provided and filed for record in the office of the register of deeds of the county wherein said real estate is located, before the day fixed or appointed to make the same." Comp. Laws 1913, § 8076.

Where a foreclosure has been made by an agent or attorney in violation of these provisions, I do not believe that it can be validated by the actions of the owner of the mortgage. But the foreclosure involved in this action did not purport to be made by an agent or attorney. It purported to be made by the plaintiff personally as assignee of the mortgagee and owner of the mortgage. Plaintiff's name was so sub-

scribed to the notice of sale. The defendant's name did not appear on the notice as agent or attorney, nor did the name of anyone else so appear.

BIRDZELL, ROBINSON, and BRONSON, JJ., concur.

STATE OF NORTH DAKOTA EX REL. TREADWELL TWICHELL, and Treadwell Twichell, Individually, Plaintiffs, v. THOMAS HALL, Secretary of State, and Thomas Hall, Individually, Defendants.

(171 N. W. 213.)

Constitutional law — constitutional amendment — journal entry — sufficiency.

1. Under § 202 of the Constitution requiring a proposed amendment to the Constitution to be entered on the journal of the house with the yeas and nays taken thereon, such entry is sufficient if it refer to the proposed amendment by an identifying reference such as the title and number of a bill containing the resolution, accompanied by the entry of the yea and nay vote.

Constitutional law — constitutional amendment — legislative construction.

2. Where a practice has been uniformly followed by the legislature for more than twenty years, which carries out the spirit of a constitutional requirement, such a legislative construction is entitled to weight in construing the Constitution.

Constitutional law — self-executing amendment — self-executing provision.

3. The 16th Amendment is examined and held to be self-executing. The rights to be enjoyed are fully set forth therein, and steps necessary to be taken to effect the enjoyment thereof are contained therein.

NOTE.—On effect of noncompliance with prescribed method of amending Constitution, see note in 10 L.R.A.(N.S.) 149.

For authorities passing on the question of necessity of entering constitutional amendments in journals of legislature, see note in 1 Am. St. Rep. 21.

Constitutional law — constitutional amendment — "publication."

4. The publication of a proposed constitutional amendment in pursuance of the provisions of chapter 41, Compiled Laws 1913, constitutes and is a legal and sufficient publication thereof.

Constitutional law — constitutional amendment — percentage of voters.

5. Under the 16th Amendment, when a petition has been signed by twenty-five per cent of the voters in not less than one half of the counties of the state proposing an amendment to the Constitution with reference to any subject-matter, such petition is sufficient, and the legislature has no power or authority to increase the minimum percentage required. If the legislative assembly should enact such a law it would obviously be in conflict with the percentage requirement of the 16th Amendment.

Constitutional law — constitutional amendment — construction.

6. In construing a constitutional amendment adopted in the manner prescribed by § 202 of the Constitution, great weight should attach to the fact that it was proposed to and passed by two successive legislative assemblies, and was thereafter properly and legally submitted to and ratified by a majority of the electors at a general election.

Constitutional law — proposed costitutional amendment — action of secretary of state — injunction.

7. Where a petition for a proposed constitutional amendment has been properly and legally signed and prepared as required by the Constitution and filed with the secretary of state, it is his executive duty to proceed with the same as required by § 979, Compiled Laws 1913, and he should not be restrained or interfered with in the performance of his duties.

Opinion filed October 5, 1918.

Application to the Supreme Court of the State of North Dakota for the issuance by it of an original writ of injunction.

Application for the issuance of such writ denied.

Engerud, Divet, Holts & Frame, for plaintiffs.

William Langer, Attorney General, and *H. A. Bronson,* Assistant Attorney General, for defendants.

GRACE, J. This is an order to show cause issued by the supreme

court upon the application of plaintiff and directed to the defendant, commanding the defendant to show cause before the supreme court why the prerogative writ of injunction should not issue from this court restraining the defendant from publishing certain proposed constitutional amendments, or from taking any further action with reference to submitting such proposed constitutional amendments to a vote of the electors of this state at the general election to be held in November, 1918. There is involved in this proceeding the interpretation of § 202 of our Constitution as originally adopted therein, and also the interpretation of said section as amended. Section 202, as originally adopted in the Constitution, provided the manner in which the Constitution may be amended. Such section reads thus:

"Any amendment or amendments to this Constitution may be proposed in either house of the legislative assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on the journal of the house with the yeas and nays taken thereon, and referred to the legislative assembly to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice, and if in the legislative assembly so next chosen as aforesaid such proposed amendment or amendments shall be agreed to by a majority of all members elected to each house, then it shall be the duty of the legislative assembly to submit such proposed amendment or amendments to the people in such manner and at such time as the legislative assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the legislative assembly voting thereon, such amendment or amendments shall become a part of the Constitution of this state. 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."

In the manner prescribed by the above section, proceedings were had to amend the above section. Such proceedings are the 16th Amend-

ment to the Constitution which provides two ways in which the Constitution may be amended instead of one as was formerly provided by the original § 202. The first way set forth in the 16th Amendment is identical with that contained in § 202 of the original Constitution. The second way provided by the 16th Amendment is as follows:

"Any amendment or amendments to this Constitution may also be proposed by the people by the filing with the secretary of state, at least six months previous to a general election, of an initiative petition containing the signatures of at least twenty-five per cent of the legal voters in each of not less than one half of the counties of the state. When such petition has been properly filed the proposed amendment or amendments shall be published as the legislature may provide, for three months previous to the general election, and shall be placed upon the ballot to be voted upon by the people at the next general election. Should any such amendment or amendments proposed by initiative petition and submitted to the people receive a majority of all the legal votes cast at such general election, such amendment or amendments shall be referred to the next legislative assembly and should such proposed amendment or amendments be agreed upon by a majority of all the members elected to each house, such amendment or amendments shall become a part of the Constitution of this state. Should any amendment or amendments proposed by initiative petition and receiving a majority of all the votes cast at the general election as herein provided, but failing to receive approval by the following legislative assembly to which it has been referred, such amendment or amendments shall again be submitted to the people at the next general election for their approval or rejection as at the previous general election. Should such amendment or amendments receive a majority of all the legal votes cast at such succeeding general election such amendment or amendments at once become a part of the Constitution of this state. Any amendment or amendments proposed by initiative petition and failing of adoption, as herein provided, shall not be again considered until the expiration of six years."

The plaintiff challenges the legality of the adoption of the 16th Amendment, maintaining, in short, it had never been legally adopted

and therefore is ineffective as an amendment to the Constitution and is inoperative. We will give thorough consideration and analysis to each objection to the legality of Amendment 16, and incidentally Amendment 15, relative to the power of the people to initiate laws. Before doing so, we wish to direct attention to § 2 of our Constitution which is as follows:

"All political power in 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 rquire."

The words of § 2 have the deepest significance; the words have such a profound meaning, and are such a lucid revealment of the place where political power is lodged for the benefit of the people as should make a vivid impression on the minds of all. Each generation of people inherit this great and far-reaching political power from the preceding generation. As an inheriting generation, it is part of their birthright to receive such power; to protect it with all their intelligence; to preserve it; to enjoy it, and hand it down to the future generation, to posterity, unimpaired. In this connection it would be well for all who, for a time, are invested with authority and commissioned by the will of the people to exercise for the people and for their benefit, some of the inherent power of the people, to comprehend that all such persons, so briefly commissioned with such authority, are but the agents and instrumentalities selected by the people to perform certain duties for the people. In this sense, governors of states, legislatures and courts, and each and every other person engaged in performing a public duty prescribed by the people, is, at all times, the agent only of the people, to exercise for the people such delegated political power as the people, in their sovereign capacity, may determine shall be exercised by such agents or any of them. All political power being in the people, they may delegate what powers they deem best; they may also repossess themselves, wholly or partially, of a delegated power by a consent of the majority of all the people in whom is inherent all political power, such consent to be expressed in the manner provided by law.

The plaintiff assigns and relies upon two distinct and separate reasons, either of which, it is contended, is sufficient to demonstrate the unconstitutionality of the 16th Amendment. If he fail in them, he must fail in all minor questions which may, to some extent, have some relevancy to the subjects under consideration. The first main reason upon which plaintiff relies to establish the unconstitutionality of the 16th Amendment is, that the amendment is not entered on the house journal properly by reason of not having been spread at length thereon, and was entered on the house journal only by means of its number or title as an identifying reference. It is conceded the journal shows the aye and nay vote required by the Constitution. The second main reason relied upon to establish the unconstitutionality of the 16th Amendment is that the same is not self-executing, in that, it is claimed, that resort to the legislature must be had to give it effect. We will analyze each of these in the order above set forth.

Directing our attention to the first, we find that § 202 of the Constitution requires that the proposed amendment "shall be entered on the journal of the house." The 16th Amendment was entered on the house journal by an identifying reference and the aye and nay vote taken thereon. The plaintiff claims this is not sufficient but that the proposed amendment must be spread at length upon the house journal. In some states it is held the full text of the proposed amendment must be entered on the journal, while, in others, the proposed amendment is sufficiently entered in the journal if it contains identifying reference such as the title, number, etc. It is conceded that the 16th Amendment was entered in the house journal by an identifying reference only, and that the aye and nay vote was taken and entered on the journal as required by the Constitution. Is it not sufficient entry, under article 202 of the Constitution of North Dakota, to enter the proposed constitutional amendment on the house journal by an identifying reference such as the title and number? Counsel for the plaintiff contends very strenuously that such entry is not sufficient and that the 16th Amendment is unconstitutional by reason of no proper entry, same having not been spread on the record thereof. He contends also that that section of our Constitution was, in all probability, adopted from the Constitution of Iowa; that the supreme court of Iowa in the case of

Koehler v. Hill, 60 Iowa, 543, 14 N. W. 758, 15 N. W. 609, held "entered on the journal" meant "spread at length," and that a failure to enter at length was fatal to the amendment. We are not entirely clear that said provision was adopted from the Iowa Constitution, but even assuming that it was and conceding that the Koehler case supports plaintiff's contention that "entered on the journal" means "spread at length" thereon, that would not necessarily be conclusive upon this court. It is useful in disclosing the viewpoint of the supreme court of Iowa and affords this court the benefit of their views, but we are convinced there is stronger reason to the contrary of the Iowa court in the opinion of the supreme court of the state of California in the case of Oakland Paving Co. v. Tompkins, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801, and in Worman v. Hagan, 78 Md. 152, 21 L.R.A. 716, 27 Atl. 616.

The question has never heretofore been passed upon by this court. In passing upon this question, it is not only proper for the court to examine all the decisions upon the subject, but eminently proper to consider other matters and circumstances, such as the passage of other amendments to the Constitution since its adoption; the general method followed in passing other amendments; what construction has been given to the language of § 202 which is in controversy by the executive, legislative and judicial departments, or other governmental agency. Of the amendments to the Constitution, the greater part, with the exception of three or four, were adopted in the same manner as the 16th Amendment. That is, the entry on the house journal was by an identifying reference, and not by spreading at length. It would necessarily follow that if the 16th Amendment is unconstitutional by reason of the method of its entry on the journal, every constitutional amendment entered in like manner would also be unconstitutional. Since 1897, a period of more than twenty years, practically every amendment to the Constitution was entered on the journal of the house in the same manner as the 16th Amendment. These amendments affect a great variety of very important subjects, such as school for the deaf and dumb, hospitals for the insane; taxation of grain in elevators; investment of school funds and other educational funds; minimum price of state lands; the permanent location of various state institutions, such as the

soldiers' home, the asylum for the blind, industrial school and school of forestry, scientific and normal schools; and so on with many other subjects of great importance. This being true, if the 16th Amendment should be held to be unconstitutional and inoperative, so might each and every other amendment to the Constitution adopted in the same manner, this would mean almost all of the constitutional amendments. What might finally be the result of such a determination would be difficult to know. In the adoption of all the amendments to the Constitution since 1897, the procedure prescribed by § 202 of the Constitution has been substantially followed in the following manner: The resolution was introduced either in the house or the senate and the majority of each house concurred in its passage. In the course of the adoption of the resolution, it would be presented to the filing clerk, engrossed and would be printed the same as an ordinary bill which might be presented in either house. It would be entered on the house journal by identifying reference only, and the aye and nay vote taken and the aye and nay vote would be shown on the journal. Almost all of the amendments to the Constitution have been thus introduced and passed. This manner of entry has been a constant practice of legislative assemblies, especially since 1897. All legislative assemblies which have had before them constitutional amendments since 1897 have uniformly followed this method of making the entry. All of the legislative assemblies since that time have construed such entry to be a sufficient compliance with article 202 of the Constitution as to entry upon the house journal. Their construction should have great weight. For more than twenty years the various legislative assemblies have treated the entry thus made by identifying references as sufficient. They have been, apparently, perfectly satisfied that the entry thus made was correct and proper and in accord with the provisions of the Constitution relative thereto, and for more than twenty years there seems to have been no difficulty experienced by the legislative assemblies by reason of the manner of the entry thereof; no difficulty seems to have been experienced in introducing a resolution at a given session of the legislature which was introduced and favorably acted upon at a preceding legislature and referred to the succeeding legislative assembly.

In this connection it may be well to notice that the secretary of

state is not only the custodian of the enrolled copy of the Constitution but of all the acts and resolutions passed by the legislative assembly and of the journals of the legislative assembly, and it is his duty to attend every session of the legislative assembly for the purpose of receiving bills and resolutions therefrom, and to perform such other duties as may devolve upon him by resolution of the two houses or either of them (§ 121 of the Political Code, Comp. Laws 1913).

All other branches of the state government and all the governmental agencies have given the same construction to the manner of the entry of the proposed constitutional amendment on the house journal as the legislative assembly. The judiciary of the state have under consideration, no doubt, many laws which were enacted in pursuance of some or many of the constitutional amendments passed since 1897. The question has never been raised before them all these years to consider the invalidity of any constitutional amendment by reason of the manner of entry of the proposed constitutional amendment in the house journal. The judiciary have acquiesced in the legislative construction of the manner of making such entry on the house journal; likewise has the executive department recognized the legislative construction of the entry in question.

We are fully convinced the method of making the entry by identifying references by title or number and the entry of ayes and nays, is a full compliance with the requirements of § 202 of the Constitution. The construction placed thereon by the legislative assembly is proper and reasonable, and it complies with the requirements of the section not only in spirit but in letter, and it is so held.

The second reason relied upon to prove the unconstitutionality of the 16th Amendment is the claim that it is not self-executing and therefore unconstitutional. The claim is that there is no provision made for the publication of the proposed amendment for three months previous to the time of the general election at which the vote is to be taken upon the same; that by the language of the amendment there was a necessity of legislative action before the proposed amendment could be voted upon. The words in the proposed amendment which, it is claimed, show the necessity of legislative action before the pro-

posed amendment can be submitted to a vote or become operative are as follows:

"Shall be published as the legislature may provide for three months previous to the general election."

Before entering upon the discussion of this branch of the proceeding, it may be well to observe that during the last fifty years or more state Constitutions have been usually drafted upon a different principle than in the earlier part of our history. Vol. 6, R. C. L. § 53, has the following to say with reference to this:

"When the Federal Constitution and the first state Constitutions were formed a Constitution was treated as establishing a mere outline of government providing for the different departments of the governmental machinery and securing certain fundamental and inalienable rights of citizens, but leaving all matters of administration and policy to the departments created by the Constitution. This form of the organic instrument gave rise to a general presumption that legislation was necessary in order to give effect to the provisions of the Constitution, and that its terms operated primarily as commands to the officers and departments of the government. During the last fifty years state Constitutions have been generally drafted upon a different principle, and have often become in effect extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments. *Accordingly the presumption now is that all provisions of the Constitution are self-executing.*" Winchester v. Howard, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

It may be observed that the Constitution of the state of North Dakota comes largely within the meaning of this language; that our Constitution is really, to a large extent, a code of constitutional law and this applies generally to the amendments thereto. Upon a close examination of our Constitution it will be found that it largely supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duties which it imposes may be enforced without aid of legislative enactment, and is thus self-executing. Such rule finds support in the following authority: Davis v. Burke, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; Winchester v. Howard, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77;

State v. Kyle, 166 Mo. 287, 56 L.R.A. 115, 65 S. W. 763; State ex rel. Delgado v. Romero, 17 N. M. 81, 124 Pac. 649, Ann. Cas. 1914C, 1114; Cooley, Const. Lim. p. 121.

Applying this rule to the 16th Amendment, it will be seen that the right which is granted may be enjoyed without the necessity of additional legislation. The rights to be enjoyed are fully set forth in the 16th Amendment. It is also clearly set forth what steps are to be taken to effect the enjoyment of such right. Both the first and second clause of the amendment make complete provision as to what shall be done to enjoy the right granted. It is only necessary to read each of them to understand that in the amendment itself is incorporated every step necessary to be taken to enjoy the right granted. The plaintiff claims there is an exception to this in one regard. That is, that there remains to be specified by the legislature how the amendment shall be published and on this ground claims there is something for the legislature yet to do before the amendment becomes operative and claims, therefore, it is not self-executing. In this contention, we think the plaintiff is mistaken. We are of the opinion that it is perfectly proper to make publication of the proposed amendment under § 3188 of the Political Code, Compiled Laws 1913. This chapter is 41; the title to it is "Amendments to Constitution;" the title of § 3188 is "Amendments to be Published." The section reads thus:

"Whenever any amendment to the Constitution of this state is referred to the legislative assembly to be chosen at the next general election after the session in which such amendment is first proposed, the same shall be published for three months previous to the time of making such choice in one weekly paper in each county in which a weekly paper is published, once in the first month, once in the second month and four times in the third month."

Section 3189 provides that the secretary of state shall designate the papers in which such publications shall be made. Section 3190 provides for fees for publications. This is a complete law providing for the publication of amendments to the Constitution, and is, in our opinion, a sufficient law under which to publish the 16th Amendment. It has been on the statute books since 1899. It is not inconsistent with any provision of our Constitution nor the provision of any amendment

thereto, and is therefore in full force and effect. Where a new Constitution is established, statutes then in force, not inconsistent with the new Constitution, continue until amended or repealed by the legislature. State ex rel. Toledo v. Lynch, 88 Ohio St. 71, 48 L.R.A.(N.S.) 720, 102 N. E. 670, Ann. Cas. 1914D, 949. The same principle is recognized in § 2 of the schedule to our Constitution. The same rule would apply to amendments to the Constitution. The 16th Amendment provides for the time of publication, to wit, three months. This is the same time as specified in § 3188. Section 3189 also provides in what papers the publications shall be made and how such papers are designated. The entire chapter 41 is devoted to the matter of publication of amendments to the Constitution. There is therefore provided a complete statute which has not been repealed and is in full force, in short, the complete legal machinery for the publication of the 16th Amendment. We think § 3188, in fact the whole of chapter 41, meets every requirement for publication, and if a constitutional amendment is published in accordance with the provisions of chapter 41 the publication would be sufficient. The object of publication is to familiarize the voter with the provision of the proposed constitutional amendment. This would be entirely met by following the provisions of chapter 41. It is not necessary to say whether we think a publication under § 979 would be sufficient. In it there is a different time of publication specified and, in this respect, it does not meet the requirements of the 16th Amendment which provides its publication to be a period of three months. Section 979 relates largely to the duties of the secretary of state, where a proposed constitutional amendment or other question is to be submitted to the people of the state for popular vote, and in certifying such questions to the county auditors as provided in said section, a matter we will discuss later in this opinion in connection with the duties of the secretary of state.

We are of the opinion that there is a sufficient publication of any proposed constitutional amendment, including the 16th Amendment, if published in accordance with the provisions of chapter 41 of the Political Code, Compiled Laws 1913. We hold, therefore, that the 16th Amendment is self-executing, and is a part of the Constitution of the state. There are other major reasons why the 16th Amendment has

become a part of the Constitution. These reasons are that it was properly and legally submitted to two successive legislatures and then it was, in due and legal form, submitted to the people for a vote at a general election and who, by a majority vote, stamp their approval thereon.

The will of the legislative assembly before which the 16th Amendment was first proposed and by it passed and of the succeeding legislative assembly to which it was lawfully presented and by it passed should not be lightly disregarded, and the will of the people in favor of the adoption of it as expressed at the general election when it was submitted to them, and approved by a majority of their voters, is a matter of the greatest importance and must be taken into consideration; for the determination of the people by giving a favorable and majority vote to the 16th Amendment together with the will of the legislature, as above shown to have been lawfully expressed, is the substance of the requirements to the complied with to constitute the 16th Amendment a part of the Constitution, and, as we view it, there being a valid statute in force for the publication of amendments to the Constitution and as as we have seen a sufficient entry of the proposed amendment on the house journal accompanied by the aye and nay vote, the legislative will having been lawfully expressed and a majority vote of the electors at a general election being in favor of the 16th Amendment, the same became a part of the Constitution at the time of its adoption by a majority of the electors voting at the general election and was, in all respects, self-executing.

There is a rule of construction applicable to changes in statutory law which is that in considering the amended statute, inquiry may be directed to the old law to determine what defects, weakness, or evils existed under the old law which the new is designed to correct, and the same rule has been frequently applied in the interpretation of constitutional provisions. Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Washington v. State, 75 Ala. 582, 51 Am. Rep. 479; Shohoney v. Quincy, O. & K. C. R. Co. 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143; State ex rel. Board of Education v. Brown, 97 Minn. 405, 5 L.R.A.(N.S.) 327, 106 N. W. 477.

There is much other authority along the same line. The particular

object of the second paragraph of the 16th Amendment is to place it in the power of the sovereign people to propose a constitutional amendment independent of the legislature. In other words, to some extent to decrease the difficulty of amending the Constitution. The constitutional provision, therefore, should not be construed so as to defeat its evident purpose, but should be construed so as to make it operative and effective and to overcome the difficulty which it was intended to obviate. Jarrolt v. Moberly, 103 U. S. 580, 26 L. ed. 492; State ex rel. Board of Education v. Brown, 97 Minn. 402, 5 L.R.A.(N.S.) 327, 106 N. W. 477.

Again, in construing the 16th Amendment, the contemporaneous history should be taken into consideration; the insistent demand of the people to be allowed the right to propose amendments to the Constitution; the history of the resolutions proposing the amendments in the legislative assembly; the fact that campaigns were waged partly on the issue of adopting the proposed amendment, are all matters which may receive consideration in the construction of a constitutional amendment.

We will now examine another reason relied upon by plaintiff to show that the 16th Amendment is not self-executing; it was one of the reasons given by this court to demonstrate that the 16th Amendment was not self-executing in the case of State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281. We quote the language of the court in that case as follows:

"And this leads to another and probably all-sufficient reason in itself to declare this provision not self-executing, strongly evidencing the legislative intent that future legislation was necessary to make it effective. We refer to the percentage required, and which is uncertain. A petition must contain signatures 'of at least twenty-five per cent.' This is merely declaratory of a minimum leaving to subsequent legislation to fix the minimum which must be 'at least twenty-five per cent,' and to classify and vary accordingly, if necessary, any required percentage to initiate different amendments to the Constitution as legislative wisdom may regard necessary in view of widely different constitutional subject-matter. To illustrate, it is probably within the grant of legislative authority by subd. 2 for the legislature to declare

necessary a higher percentage to initiate a constitutional amendment to operate to change the seat of government of this state or the state university," etc.

The court in that case was discussing subdivision 2. The only requirement under subdivision 2 is that an "initiative petition be filed containing signatures of at least twenty-five per cent of the legal voters in each of not less than one half of the counties of the state."

It is plain to see that such petition could relate to any subject-matter, and if the Constitution is sought to be amended under the provisions of subdivision 2, the rule therein laid down as to the petition must be followed. We do not agree with the language in state ex rel. Linde v. Hall that the percentage is uncertain. The percentage is stated in no equivocal terms. The petition must contain not less than twenty-five per cent. When such petition does contain twenty-five per cent, it is a proper and legal petition under the 16th Amendment. Nothing more is required, nothing less is legal. A petition might contain more than twenty-five per cent, but it must not contain less. Neither can the minimum per cent required be increased by the legislature. For instance, if the legislature should pass a law providing that where under subdivision 2, a constitutional amendment is submitted to remove the state university from Grand Forks to some other city of the state, such petition should contain at least fifty per cent of the legal voters in each of not less than one half of the counties of the state, it is easily seen that such provision would increase the minimum of petitioners provided in the 16th Amendment by one hundred per cent. Under such a law passed by the legislature, the minimum would not be twenty-five per cent but fifty per cent of the voters. If such a law were passed, it is plain that it would directly contravene the terms of the 16th Amendment which declares twenty-five per cent the minimum required. The legislature cannot, by any act, change the minimum of percentage of the voters required as fixed by subdivision 2 of the 16th Amendment. Whenever twenty-five per cent of the legal voters in each of not less than one half of the counties of the state sign a petition to amend the Constitution in regard to any subject-matter, they have complied with the constitutional requirement of the 16th Amendment which is a part of the Constitution, and are

entitled to enjoy the benefit of such constitutional amendment according to its terms and provisions, and the legislature cannot defeat that right by increasing the minimum of the percentage of voters in contravention of the constitutional minimum provision of twenty-five per cent prescribed in the 16th Amendment. If the legislature should attempt to do so, its act, measured by the 16th Amendment, would be unconstitutional. In the case of State ex rel. Linde v. Hall, supra, the court laid some stress upon what it claimed to be the indefiniteness as to the time of filing the same with the secretary of state, the amendment requiring the filing of the petition with the secretary of state "at least six months previous to the general election." There certainly is nothing indefinite about such provision. Every person knows, or must be held to know, at what time the general election is held. Every person also knows, or should know, what period of time six months before election is. No discussion of the matter can add any clearness to the language. A petition must be filed at least which means not less than six months prior to the time of the general election. If it is filed not less than six months before the election it is in time. If it is filed seven or eight months or ten months, it certainly is in time, or at any time since the last general election and not less than six months prior to the general election upon which such petition is to be voted. In the case of State ex rel. Torreyson v. Grey, 21 Nev. 378, 19 L.R.A. 134, 32 Pac. 190, where the question was the time of the publication of the proposed constitutional amendment, it was held that where the publication was required to be made for three months before election, the publication made sixteen to eighteen months prior thereto was good. In that case, it was also held that the publication of the proposed constitutional amendment with the statutes of the year was a continuous publication and was a sufficient publication of the constitutional amendment, this mode of the publication of the proposed amendments having been uniformly followed in numerous cases. The only requirement of our constitutional amendment is that a petition be filed at least six months prior to the time of the general election, there can be no misunderstanding such language. It is sufficient if it were filed not less than six months before the general election, and no legislation could make the point of time of filing it any more definite or certain.

The 16th Amendment having been legally adopted and being, as we view it, self-executing, there was by it facilities provided for legislative action in a different manner than had theretofore prevailed. In other words, legislation was not, as it had been in the past, left entirely to the legislature, but was in part to be enacted directly by the people if they saw fit. The people also had power to initiate amendments to their Constitution which is also a legislative power of the highest degree. The power of initiating legislation, which is reserved to the people by the amendment, is a legislative power of as high order as that possessed by the members of the legislature in preparing bills and doing the work preparatory to the enactment thereof. The preparing of the petition to initiate a constitutional amendment or law by securing the signers thereto as required by law, delivering the petition in the custody of the secretary of state, thus filing the same, are steps necessary, under subdivision 2, in the preparation of a law or constitutional amendment on its way to be voted upon by the electors. All such steps and acts are legislative in their character, and though it might appear that a law proposed to be enacted by the people in this manner might be clearly unconstitutional, yet the court, at such time, would and could not interfere because the act being done is a legislative one and the courts have no authority or power to interfere in the enactment or steps leading to the enactment of the law. If a member of the legislative assembly should introduce a law which is clearly unconstitutional and such law is before each branch of the legislature, no court could interfere to restrain the passage of such law on the ground that it was unconstitutional. The reason is that the court has no power to interfere with the will of the legislature in the passage of the law, or to restrain acts of legislation. In the case at bar, there are no facts in dispute. The petition is sufficient; it has the requisite number of signatures in each of not less than one half of the counties of the state. There is no objection presented that there is not twenty-five per cent of the legal voters in not less than one half of the counties of the state. We think it is conceded the requirements of the 16th Amendment as to the percentage of signers required is, in no manner, challenged. The petition contains at least twenty-five per cent of the legal voters in not less than one half of the counties of the state and has, as it is

claimed by the defendant, approximately forty-eight thousand signers. Some forty-eight thousand petitioners therefore have and are participating in a legislative act by signing the petition and handing it to the secretary of state to file.

When twenty-five per cent of the legal voters in not less than one half of the counties of the state had signed the petition in question and delivered it to and placed it in the custody of the secretary of state, there is much respectable authority that such paper or petition became filed even if the officer whose duty it is to file such paper or petition did not place his filing mark or indorsement upon the instrument, such marking or indorsement being considered merely a memorandum or evidence that the filing had been made. Covington v. Fisher, 22 Okla. 207, 97 Pac. 615; State v. Heth, 60 Kan. 560, 57 Pac. 108; Rathburn v. Hamilton, 53 Kan. 470, 37 Pac. 20; Wilkinson v. Elliott, 43 Kan. 590, 19 Am. St. Rep. 158, 23 Pac. 614; Jacksonville Street R. Co. v. Walton, 42 Fla. 54, 28 So. 59; Oats v. State, 153 Ind. 436, 55 N. E. 226; Bettison v. Budd, 21 Ark. 578.

The secretary of state, according to this authority, would add nothing to the validity of the filing of the petition by placing his filing mark or memorandum or evidence that the filing was made upon such petition. Every act of the petitioners in singing the petition or procuring it to be signed and the delivery of the same into the custody of the secretary of state, which, according to above authority, constituted filing, was the legislative act of the petitioners with which, as we view it, the court could not interfere by injunction or otherwise. As we understand the matter, the secretary of state did place his filing mark or indorsement upon the petition, but, according to the authority we have cited, that would add nothing to it except that it is evidence that the petition was filed. The 16th Amendment to the Constitution provides that the petition should be filed with the secretary of state. The petition is thus on file with an executive officer of the state and the Constitution and law of the state provide his duties with reference thereto. The Constitution of the state of North Dakota declares that the powers and duties of the secretary of state shall be as prescribed by law. It is a duty imposed by the laws of the state of North Dakota upon the secretary of state to certify to the county

auditors any proposed constitutional amendment or other questions to be submitted to the people for their vote thereon. It is part of the executive duties of the secretary of state to do this. The secretary of state is ready and willing and is performing his duty under the statute and laws of the state, and is contending before the supreme court of this state and demanding that there be no interference with him in the performance of his duty as prescribed by § 979, Compiled Laws, 1913. The secretary of state being in the performance of the duty prescribed by law, namely, his certification to the county auditor of certain proposed constitutional amendments, such certification being made under and by virtue of the requirements of § 979, he should not be interfered with or restrained in any manner from the performance of his duties. It has also been held that the court will not enjoin the submission of constitutional amendments. State ex rel. Cranmer v. Thorson, 9 S. D. 149, 33 L.R.A. 582, 68 N. W. 202.

The reasoning which we have applied to the 16th Amendment to the Constitution applies with equal force to the 15th Amendment to the Constitution which is known as the initiative and referendum power reserved to the people, or the power to initiate laws independent of the legislature and to exercise the power of initiative and referendum in the manner provided in the 15th Amendment. The conclusion with reference to the 15th Amendment must be the same as that at which we have arrived with reference to the 16th Amendment to the Constitution and each of such amendments are held to be an effective part of the Constitution and operative and self-executing.

An enacting clause, as we view it, is neither necessary nor proper in adopting a constitutional amendment under subdivision 2 of the 16th Amendment. An enacting clause is necessary and proper in initiative bills, and is provided for in the 15th Amendment, or bills introduced in the legislative assembly, but have no application to constitutional amendments. The general rule is that constitutional provisions are mandatory. Section 202 of our Constitution is to that effect, though in the case of Kermott v. Bagley, 19 N. D. 345, 124 N. W. 397, § 109 of the Constitution was construed to be permissive rather than mandatory. As we view it, the 16th and 15th Amendments are effective and operative and self-executing and a part of the Constitution. Each

fully defines the rights to be enjoyed and provides means whereby the rights granted may be enjoyed, each has been properly, and in the manner prescribed by law, approved by the legislative assembly and a majority of the electors of the state voting thereon at the general election at which they were submitted. This being true, they must be so recognized and given effect by every department of the government, including the judiciary. This being true, the people of the state are entitled to enjoy all the rights, powers, and privileges secured to them under and by virtue of the 15th and 16th Amendments in the manner therein fully set forth.

Neither the plaintiff himself nor anyone on whose behalf he seeks to maintain this proceeding has any personal or pecuniary interest involved. The application for injunction is in all things denied and this proceeding is dismissed.

ROBINSON, J., concurs.

BIRDZELL, J: This case arises upon an original petition filed in this court entitled "The State of North Dakota ex rel. Treadwell Twichell, and Treadwell Twichell, Individually, Plaintiffs, versus Thomas Hall, Secretary of State and Thomas Hall, Individually, Defendants." In response to the prayer of the petition an order to show cause was issued directed to the defendant requiring that cause be shown why he should not be enjoined from further publishing certain proposed constitutional amendments, from putting the same upon the ballots and submitting them to the voters to be voted upon at the next general election, and from taking any action whatsoever under certain petitions looking toward the submission of the amendments. Upon the return day the defendant appeared, represented by the attorney general of the state, and moved to dismiss the petition on the ground of the lack of jurisdiction of the court to grant the relief prayed for and of the lack of jurisdiction of the subject-matter and the parties upon the cause of action alleged. In order that there might be a complete hearing, a demurrer and answer were also filed; the demurrer being upon the ground that the petition does not state facts sufficient to constitute a cause of action; that the court has no jurisdiction over

the subject-matter or over the person of the defendant upon the allegations of the petition; and that the plaintiff has no legal capacity to maintain the action. The answer takes issue upon no material allegations in the complaint and it is alleged that the defendant intends to proceed as an officer of the law in submitting the amendments embraced in the petitions to the voters of the state.

The allegations of the petition, in so far as they are material, show that the plaintiff is a citizen, a taxpayer, and elector; that he had appealed to the attorney general for permission to institute this proceeding in his name as a representative of the state, but that the attorney general had refused; that during the year 1918 certain initiative petitions looking toward the amendment of the Constitution in various particulars were circulated and signed by voters exceeding in number twenty-five per cent of the legal voters of the state in more than one half of the counties of the state; that it is the intention of the defendant to submit the amendments embraced in said petitions to the people to be voted upon at the ensuing general election; that the matters involved affect the legislative franchise of the people of the whole state and the validity of the amendments to the Constitution which were adopted in 1914, authorizing the initiative and referendum as to laws and constitutional amendments, and which are designated as articles 15 and 16 of the Amendments to the Constitution.

The first question for consideration under the issues is that of the jurisdiction of the court to entertain the proceeding and grant the relief prayed for. This question was fully discussed in the case of State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, and it was there held that the court had jurisdiction to determine such a matter in a proceeding brought before the election was held. While the correctness of this ruling is seriously questioned by the defendant, it will not be necessary, in view of the conclusion of the majority upon the merits, to re-examine the authorities bearing upon this phase of the case, or to pass again upon the question. We shall therefore refrain from expressing an opinion thereon.

Upon the merits, two main questions are presented by the petitioner. He urges first, that articles 15 and 16 of the Amendments to the Constitution were not legally adopted, in that they were not entered in

full on the journal of the house in which they originated. It is under these amendments—more particularly the latter, if at all—that the authority exists to circulate the petitions in question and to refer to amendments therein proposed to the people at the ensuing election.

Second, it is contended that article 16 is not self-executing, and that, inasmuch as no legislation has been enacted putting it into effect or facilitating its operation, no proceedings can be had thereunder. If this contention were sustained it would follow that any attempt to exercise the rights sought to be conferred upon the people to initiate the constitutional amendments in question would be necessarily void and of no effect.

Section 202 of the Constitution provides that any proposed amendment which shall be agreed to by a majority of the members elected to each of the two houses "shall be entered on the journal of the house with the yeas and nays taken thereon, and referred to the legislative assembly to be chosen at the next general election . . . ." As this language is interpreted by plaintiff's counsel, it requires entry upon the journal of only one house. We will not stop to inquire whether this is the correct interpretation of the language used, but will pass immediately to the main question, which is the meaning of the expression "shall be entered on the journal." It appears that the resolutions providing for the amendments in question were not spread at length upon the journals of either house of the legislative assembly, but that, during their pendency and upon their passage in both houses, they were treated as bills and referred to by entries such as the following: "Senate Bill No. 153. A Concurrent Resolution Amending the Constitution of the State of North Dakota, Providing for the Future Amendment Thereof." The contention is that this identifying reference is not a sufficient entry upon the journal to satisfy the requirements of § 202 of the Constitution. The literal interpretation of the section, it must be admitted, supports the contention of the plaintiff but the decided weight of judicial authority as well as reason appears to us to be contrary to the literal interpretation. Though courts are generally concerned with ascertaining the actual intention of the framers of constitutions in order that effect may be given thereto, it will sometimes happen that too strict an adherence to a literal inter-

pretation and to a demonstrable, actual intention is apt to defeat the real purpose of a given provision. Thus, under constitutions requiring the electors to express their choice at elections by written ballot, it has been held that the legislature may provide for a printed ballot; though doubtless it could be demonstrated that the framers of the provision did not contemplate the use of the printed ballot at all; but, on the contrary, they intended to require the exercise by the voter of the deliberate act of writing the name of the person of his choice upon a ballot. See Opinion of Justices, 7 Me. 492; Henshaw v. Foster, 9 Pick. 312; Temple v. Mead, 4 Vt. 535. Doubtless when the expression in question was first used, those who employed it had in mind the actual writing of the resolution in full upon the journals. (See Dodd on the Revision and Amendment of State Constitutions, page 145.) We do not know when the expression was first employed, but it is to be found in the Constitution of Pennsylvania as early as 1838. Pa. Const. 1838, art. 10. It is also found in the Constitution of Wisconsin of 1848. (Wis. Const. 1848, art. 12,), and in the Constitution of Iowa of 1857 (Iowa Const. 1857, art. 10). When this requirement came into use it was expressive of the most convenient way of making a permanent record of the resolution and of the proceedings thereon. Such a resolution might or might not be printed as bills were printed, and the legislative procedure for its adoption might differ so widely from that required by the Constitution in adopting legislation that the entry upon the journal would be practically the only means by which the legislator could know upon what he was asked to vote. It also afforded a reliable source of public information. The journals were kept in longhand and it was not required that there should be successive readings of a resolution or that any period of time should elapse between the first proposal and final adoption. Hence the importance of the entry in the journal. When the legislature, however, conducts its proceedings with the use of modern conveniences, such as the stenographer and the typewriter, if they are so conducted as to insure that degree of accuracy and publicity which would flow from the exact compliance with the language found in the Constitutions, courts should, and do, hesitate to impose a strict compliance with the literal meaning of such provisions. Such is the holding in California,

Colorado, Florida, Kansas, Maryland, South Dakota and Washington. See Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615; Nesbit v. People, 19 Colo. 441, 36 Pac. 221; West v. State, 50 Fla. 154, 39 So. 412; Constitutional Prohibitory Amendment, 24 Kan. 700; Worman v. Hagan, 78 Md. 152, 21 L.R.A. 716, 27 Atl. 616; State ex rel. Adams v. Herried, 10 S. D. 109, 72 N. W. 93; Cudihee v. Phelps, 76 Wash. 314, 136 Pac. 367; Gottstein v. Lister, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008; State ex rel. Postel v. Marcus, 160 Wis. 354, 152 N. W. 419. See contra; Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; State ex rel. Bailey v. Brookhart, 113 Iowa, 250, 84 N. W. 1064; People ex rel. Kent County v. Loomis, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751; Re Senate File 31, 25 Neb. 864, 41 N. W. 981; State ex rel. Thompson v. Winnett, 78 Neb. 379, 10 L.R.A.(N.S.) 149, 110 N. W. 1113, 15 Ann. Cas. 781; State ex rel. Stevenson v. Tufly, 19 Nev. 391, 3 Am. St. Rep. 895, 12 Pac. 835; State ex rel. Owen v. Donald, 160 Wis. 21, 151 N. W. 331, See also 12 C. J. 692, 702. In view of the practical construction by the legislature in support of the practice which was followed in the submission of the amendments in question, which counsel for the plaintiff concedes has been followed for twenty years in this state; of the constantly increasing volume of business customarily transacted by the legislatures; of the adoption by them of modern inventions to facilitate the handling of their business and the keeping of their records; and of the degree of publicity that is given to all of their proceedings through a more widely circulated press and greater facilities for communication, we are of the opinion that the rule adhered to by the majority of the courts which have passed upon this question is more consonant with reason and one which gives full effect to the spirit and purpose of the requirement of § 202. We therefore hold that the constitutional amendment in question was legally adopted.

Counsel for the plaintiff insists, however, that the provision above interpreted was taken from the Constitution of Iowa where it had previously been interpreted as requiring the entry in full upon the journal (Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609), and that this court is consequently bound by the previous construction placed thereon by the Iowa court. In view of the fact, however, that

a similar requirement was to be found in the Constitutions of Pennsylvania and Wisconsin (if not other states) prior to its adoption in the Constitution of Iowa, we feel that it cannot be said that the provision was necessarily taken from Iowa and that this court is bound by any previous construction of the Iowa court.

Passing now to a consideration of the second question presented; namely, as to whether or not article 16 of the Amendments to the Constitution is self-executing, it must first be noted that this branch of the case involves the main question decided by this court in the case of State ex rel. Linde v. Hall. 35 N. D. 34, 159 N. W. 281. That case involved the validity of a petition for an amendment to the Constitution locating the capitol at New Rockford instead of Bismarck. It was there held that the amendment, article 16, under which the petition had been circulated, was not self-executing and that the petition was consequently void. The doctrine of *stare decisis* is earnestly invoked by the petitioner in the instant case and it is contended that, if the question can be regarded as fairly doubtful, the court should follow the decision in the case referred to. We agree with the general reasons advanced by counsel for an adherence to the rule of *stare decisis;* but, with due respect for the opinions of the members of this court participating in that decision, we cannot conscientiously reach a like result, and, inasmuch as there is involved in the general question the meaning and effect of an important portion of the fundamental law of the state, we feel called upon to re-examine the question and to state anew what we consider to be the meaning and fair import of that portion of the Constitution referred to. As was said by the supreme court of Wisconsin in the case of Pratt v. Brown, 3 Wis. 603: "But when a question arises involving important private or public rights, extending through all coming time, has been passed upon on a single occasion, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny. We are by no means unmindful of the salutary tendency of the rule *stare decisis,* but at the same time, we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error, and the ad-

vantages of review." The Supreme Court of the United States has likewise felt called upon to examine and re-examine constitutional questions vitally affecting the general welfare, and particularly in interpreting the grant of powers to the Federal government. Perhaps the most notable occasion of its doing so is in the Legal Tender Cases. See Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513, holding the Legal Tender Acts invalid, and the later decisions: Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Juilliard v. Greenman, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122. See also Rhodes's History of the United States, vol. 6, pages 256 et seq. "It will of course sometimes happen," says Cooley, Const. Lim. p. 65, "that a court will find a former decision so unfounded in law, so unreasonable in its deductions, or so mischievous in its consequences, as to feel compelled to disregard it. Before doing so, however, it will be well to consider whether the point involved is such as to have become a rule of property so that titles have been acquired in reliance upon it, and vested rights will be disturbed by any change; for in such a case it may be better that the correction of the error be left to the legislature, which can control its action so as to make it prospective only, and thus prevent unjust consequences." It is clear that, in the instant case, no rule of property has been declared and that no titles are dependent upon the former decision.

A careful study of the opinion of this court in State ex rel. Linde v. Hall, supra, leads us to the conclusion that the interpretation of the amendment in question was so extreme in the direction of nullifying its force that it ought not to stand as the final expression of this court. Before calling attention, however, to those portions of the main opinion in that case which have the effect stated, it might be well to state the rules for the construction and interpretation of constitutional provisions and amendments to which, it seems to us, proper attention was not given in the decision referred to.

It is elementary that the fundamental purpose of all judicial construction is to ascertain and give effect to the intention of the framers and of the people who have adopted the particular instrument or amendment. 8 Cyc. 730; Cooley, Const. Lim. 5th ed. p. 68; Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23. The

established rules of construction applicable to statutes apply in determining the meaning of Constitutions. 8 Cyc. 729. Amendments, particularly, should be construed in the light of the changes sought to be effected thereby, and where they are in conflict with any pre-existing provision of the Constitution they must be given effect notwithstanding such former provisions. See People ex rel. Killeen v. Angle, 109 N. Y. 564, 17 N. E. 413; 12 C. J. 24. "A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on legislative will." 12 C. J. 730. In construing the Constitution the whole instrument should be read together so that every portion may be given effect, and if various portions thereof are *in pari materia,* they should be construed together in order that the given subject-matter may be dealt with as intended. 2 Lewis's Sutherland, Stat. Constr. § 443; Cooley, Const. Lim. 5th ed. p. 70. And this rule of construction is particularly applicable to portions that are adopted at the same time. Lewis's Sutherland, supra. As between opposing possible constructions, one of which will render a given provision operative and the other tend to defeat its purpose, the former should be adopted.

Initiative and referendum provisions contained in the Constitutions of the various states have generally been held to be self-executing. See Arkansas Tax Commission v. Moore, 103 Ark. 48, 145 S. W. 199; Thompson v. Vaughan, 192 Mich. 512, 159 N. W. 65; Stevens v. Benson, 50 Or. 269, 91 Pac. 577; State v. Langworthy, 55 Or. 303, 104 Pac. 424, 106 Pac. 336.

The seemingly contrary decision in Oklahoma in the case of Ex parte Wagner, 21 Okla. 33, 95 Pac. 435, 18 Ann. Cas. 197, is stated by the court to be due to the action of the constitutional convention which, upon being reassembled, modified the initiative and referendum feature of the Constitution by striking therefrom the provision expressly declaring it to be self-executing and substituting, in lieu thereof, the following: "The legislature shall make suitable provisions for *carrying into effect* the provisions of this article." (Okla. Const. art. 5, § 2. It is stated in the opinion that this was done as a concession to the views which were, at the time, being presented to the Department of Justice of the Federal government in an effort to convince that

department that a Constitution in which legislative powers were to be exercised directly did not provide for a republican form of government. To obviate possible objection on this score, it was thought best to give to the legislature the power to *carry out* this provision so as not to embarrass the admission of the state into the union. Similarly, the recall provision of the Oregon Constitution has been held self-executing (State ex rel. Clark v. Harris, 74 Or. 573, 144 Pac. 109, Ann. Cas. 1916A, 1156) though it is not expressly declared to be so.

The provisions contained in some of the Constitutions reserving initiative and referendum powers to the voters of municipalities and districts as to local matters are usually held to be not self-executing for the reason that the manner of exercising the powers is directed to be prescribed by general laws. See Schubel v. Olcott, 60 Or. 503, 120 Pac. 375; State ex rel. Bradford v. Portland R. Light & P. Co. 56 Or. 32, 107 Pac. 958; Long v. Portland, 53 Or. 92, 98 Pac. 149, 1111; State ex rel. Dotta v. Brodigan, 37 Nev. 37, 138 Pac. 914. The holding in the last case was inadvertently misstated in the opinion of Mr. Justice Goss in State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281. It was not held, as there stated, that the entire initiative and referendum amendment was not self-executing.

Where constitutional provisions are held to be self-executing, it is in response to the apparent intention of the framers and the people who adopted them "to put it beyond the power of the legislature, to render them nugatory by refusing to enact legislation to carry them into effect." Mitchell, J., in Willis v. Mabon (Willis v. St. Paul Sanitation Co.) 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110. Though a particular provision is self-executing, the legislature has ample power to pass such legislation as may be needed to simplify the procedure, to safeguard the right from abuse, and to render the various steps definite (Cooley, Const. Lim. 5th ed. p. 122; Willis v. Mabon, supra; Stevens v. Benson, 50 Or. 269–274, 91 Pac. 577, but not to limit, defeat, or nullify the right.

Reading article 16 of the amendments to the Constitution of North Dakota in the light of the foregoing elementary principles, and the authorities dealing with like questions, it becomes clear that the intention and purpose was to secure to the voters a right which had not

previously been enjoyed by them because of the broad delegation of exclusive power to the legislature. It is also apparent that such right is in derogation of, or at least in competition with, the similar right or power which remains vested in the legislature. Note the language of the amendment: "*Any* amendment or amendments to this Constitution *may also be proposed by the people* by the filing with the secretary of state, at least six months previous to a general election, of an initiative petition containing the signatures of at least twenty-five per cent of the legal voters in each of not less than one half of the counties of the state." (N. D. Const. article 16 of the Amendments, § 202). Nothing could be more clear than that the *amendment itself* was intended to secure to the legal voters the right to propose amendments. Unless such an intention is necessarily qualified by other language it should be given effect if possible to do so. Had it been the primary purpose of the framers of the amendment in question to vest in the legislature the right to say upon what terms the voters should have the right to initiate a constitutional amendment, we believe that they would have frankly vested the power in the legislature as was done in the Constitution of Idaho. In the Constitution of the latter state, it was provided that "the power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation, etc." Idaho Const. art. 3, § 1. Is there any language following the reservation of the power in the people to propose amendments which signifies an intention on the part of the framers and of the people who adopted it to postpone its operations until such time as the legislature would see fit to make it operative? The amendment is as follows: "Subd. 2. Any amendment or amendments to this Constitution may also be proposed by the people by the filing with the secretary of state, *at least six months previous to a general election,* of an initiative petition containing the signatures of *at least twenty-five per cent of the legal voters* in each of *not less than one half the counties of the state.* When such petition has been *properly filed* the proposed amendment or amendments *shall be published as the legislature may provide, for three months previous to the general election,* and shall be placed upon the ballot to be voted upon by the people at the next general

election. Should any such amendment or amendments proposed by initiative petition and submitted to the people receive a majority of all the legal votes cast at such general election, such amendment or amendments shall be referred to the next legislative assembly and should such proposed amendment or amendments be agreed upon by a majority of all the members elected to each house, such amendment or amendments shall become a part of the Constitution of this state. Should any amendment or amendments proposed by initiative petition and receiving a majority of all the votes cast at the general election as herein provided, but failing to receive approval by the following legislative assembly to which it has been referred, such amendment or amendments shall again be submitted to the people at the next general election for their approval or rejection as at the previous general election. Should such amendment or amendments receive a majority of all the legal votes cast at such succeeding general election such amendment or amendments at once become a part of the Constitution of this state. Any amendment or amendments proposed by initiative petition and failing of adoption, as herein provided, shall not be again considered until the expiration of six years." In our judgment there is no language in the above amendment from which it can reasonably be inferred that the power granted, or to speak more correctly, reserved, was to be held in abeyance until there would be future legislation upon the subject. We have underscored those portions of the amendment which were thought by this court, in the case of State ex rel. Linde v. Hall, supra, to be indicative of an intention to make the operation of the amendment dependent on the legislative will, and in order that there may be a clear understanding of the points concerning which different opinions exist, we will refer particularly to those portions of the main opinion in the former case with which we disagree.

Concerning the above underscored portions, the court, in the case of state ex rel. Linde v. Hall, supra, found first: That inasmuch as no definite date or period of time was set forth for the filing of petitions, the legislature might require a petition to be filed at any period of time before the election, not shorter, however, than six months. The statement in the opinion is (page 51): "It is doubtful if it was in-

tended to be left as indefinite for operative purposes as declared by the words of subdivision 2, the only requirement as to time being 'at least six months previous to a general election.' Would the filing of a petition one year and six months or two years before a general election be sufficient compliance with this provision?" The obvious implication of this statement and query is that it was intended to give to the legislature power to determine the date for filing initiative petitions. It seems clear, however, that under the amendment it would be the duty of the secretary of state to submit to the voters at a general election any initiative amendment, regular in form and signed by the necessary number of voters, which had been filed with him prior to a date six months before the election. There is absolutely no language in the amendment that would authorize the legislature to direct the secretary of state to ignore a legal petition that had been filed with him for the requisite period of time, and to imply such a power in the legislature is to imply a power in derogation of the right granted. The time for filing could be so fixed as to make the exercise of the right more difficult, if not impossible. Practically all, if not all, of the self-executing constitutional provisions, providing for amendment by the initiative process, contain similar requirements with respect to the time of filing the petition, as a reading of them will disclose. See Michigan Constitution, article 17, § 2, "at least four months before the election;" Constitution of Arkansas, article 5, § 1, "not less than four months before the election;" Constitution of Arizona, article 4, § 1, "not less than four months preceding the date of the election;" Constitution of Missouri, article 4, § 57, "not less than four months before the election;" and Constitution of Oregon, article 4, § 1, "not less than four months before the election." This surely is not an indication that such language is evidence of an intention to make the operation of the amendment dependent upon future legislation.

Again it was said the requirement that the petition should contain the signatures of "at least twenty-five per cent of the legal voters in each of not less than one half the counties of the state" evinced an intention to give to the legislature power to prescribe a larger number of signers than twenty-five per cent and to increase the number of counties requisite to more than one half. The statement in the opinion

is (pages 50, 51): *"This is merely declartory of a minimum,* leaving to subsequent legislation to fix the minimum, which must be 'at least twenty-five per cent' *and to classify and vary accordingly, if necessary, any required percentage to initiate different amendments to the Constitution as legislative wisdom may regard necessary in view of widely different constitutional subject-matter."* Here, again, they say that the legislature might prescribe a higher minimum than that fixed in the amendment itself is to give to it power to encroach upon the right granted. Suppose, for instance, the legislature should place the minimum at thirty per cent, or suppose it should place the number of counties within which thirty per cent of the legal voters signing the petition should come at three fifths instead of one half, the petition could not be filed until it had the required number of signers in the required number of counties. But, the Constitution says that "any amendment . . . may also be proposed by the people by the filing with the secretary of state . . . an initiative petition containing the signatures of at least twenty-five per cent of the legal voters in each of not less than one half of the counties of the state." This language clearly indicates what is required in order to exercise the constitutional right, and any legislation that would purport to require more would be an invalid attempt to curtail the right secured by the amendment.

The former decision of this court gives the legislature a free hand to prescribe a percentage so high as to make the right entirely unavailing. It in effect reads into the amendment the alternative clause "or such higher precentage as the legislature may require" and thereby implants within it the seeds of its own destruction. We are aware of no rule of constitutional construction that authorizes such a light consideration of the security of rights clearly intended to be protected by the plain language of the Constitution; and we are completely unable to justify the result in the light of the first rule of construction which regards, above all else, the purpose of those who adopted the amendment. Would similar reasoning be adopted in construing a suffrage provision where the minimum qualifications as to age and residence are expressed in like manner? If so, the legislature would be free to disfranchise electors at will. If the logical requirements of

the former decision demanded the extreme construction placed upon th amendment,—one which left the right dependent for its very existence upon the will of the legislature,—such would be a strong reason for the very opposite conclusion;—viz.: That the amendment was intended to be self-executing. If, in construing an amendment or a constitutional provision, the court is confronted with an alternative which requires it to give effect to the predominating purpose on the one hand or, on the other, to set the entire structure out of plumb by following a strained construction, it would seem that its duty is plainly evident.

But aside from the objection that the construction is in derogation of the right, we believe that the language itself is not fairly susceptible of the meaning previously placed thereon by this court. In the Constitutions of the various states providing for the initiative and referendum there are three main forms of expression used to fix the number of petitioners: (1) Not more than———per cent shall be required, etc. (See Constitutions of Arkansas, Oregon, South Dakota and Missouri.); (2) The people shall have the right upon a petition signed by not less than ——— per cent, etc. (See Constitutions of North Dakota, Colorado and Michigan.); and (3) Upon a petition signed by ——— per cent, etc.,—i. e., the percentage is absolute, (See Constitutions of Oklahoma, Nebraska, California, Arizona, Washington and Ohio.) In the group in which North Dakota falls in the classification according to form of expression, there are but two additional states, and in both of them the provisions are self-executing, —one, Colorado, by express declaration, and the other, Michigan, by unmistakable intent. See Thompson v. Vaughan, 192 Mich. 512, 159 N. W. 65, where it was held self-executing. Whatever may be thought to be the best and most appropriate form of expression, it would seem that the only reasonable conclusion is that it was intended by the clause in question to fix the constitutional requirements of a valid petition, and not to delegate to the legislature the power to make them. The first form of expression referred to doubtless gives to the legislature the right to lower the percentage, but not to raise it; but research will disclose that the provisions containing this form of expression are nevertheless generally self-executing.

We should not conclude this branch of the discussion without pointing out that the same form of expression (not less than ——— per cent) is used in article 15 of the amendments to the Constitution of North Dakota which grants the initiative as to legislation, and this is expressly declared to be self-executing. If the language there used has been correctly interpreted by this court in its prior decision, may not the legislature require a higher percentage upon an initiative petition under article 15, acting under the power to "facilitate its operation?" How, in the face of such a universal use of the language in question, can it be said with reason to mean something different when employed in the Constitution of North Dakota, in the particular place where it is used, than that meaning which is everywhere else attached to it? Surely the employment of a term of such well-recognized meaning, gathered from the Constitution of states whose provisions are self-executing, does not signify an intention to make the provision in question dependent for its operation upon the legislative will!

Still another expression was thought to evidence an intention to postpone the operation of the right until the legislature should see fit to pass laws to facilitate its exercise. It is said that it is required that the petition shall have been "properly filed." As will be demonstrated later in the course of this opinion, the term "properly" is to be read in connection with other constitutional provisions governing the exercise of the initiative right and only means filing with the secretary of state.

Then comes the provision concerning which there is clearly room for construction. "The proposed amendment or amendments shall be published *as the legislature may provide* for three months previous to the general election, and shall be placed upon the ballot to be voted upon by the people at the next general election." It was doubtless intended here to require publication of the initiative amendment and it is also clear that the legislature was authorized to determine the manner of publication, the time only being fixed by the Constitution. In this respect, the amendment corresponds exactly with the similar provision in § 202 of the pre-existing Constitution, the same being § 1 of the amendment in question. The term "may," however, which usually imports privilege or duty as applied to those to whom it is addressed, or which generally imports the future when used to signify tense, is

not found in § 202. The expression there used is "as provided by law." It is somewhat anomalous that the *latter* expression when originally used in the Constitution imported the future tense; because, at the time it was adopted as a part of the first Constitution there was, of course, no statutory provision for the publication of constitutional amendments. So, while the language there used would be appropriate as referring to existing legislation, it was in effect a mandate to the legislature, requiring it to legislate in the future upon the subject. So far as tense is concerned, if the two expressions were exchanged they would apparently be more appropriately employed; that is, if the initiative amendment was intended to be self-executing.

The inquiry arises: Why was the expression used "as the legislature may provide?" Obviously, had it been said "as provided by law" the amendment would have incorporated the existing law on the subject of publishing constitutional amendments prior to the legislative session to which they referred. To have done so would have been to adopt by reference for all time the existing provisions of law relative to publication. 36 Cyc. 1152; 2 Lewis's Sutherland, Stat. Constr. 2d ed. § 405. It was probably thought desirable to avoid doing this; for, as will be noted, the wisdom of continuing the present manner of publication has been gravely doubted by the legislature. See House Bill 312 of the 13th Legislative Assembly, which passed both houses. It reduced the number of publications from six to three and substituted one daily paper in the state in lieu of one weekly paper in each county. If the term "may" may be used, however, as it was used, it would indicate that any change that might later be made in the manner of publication of amendments under § 1 could also be made applicable to amendments under § 2 of the amendment. In short, it would seem to be the correct interpretation of § 2 of the amendment in this respect that the publication shall be for three months previous to the general election, and in such manner as the legislature shall from time to time provide. This construction leaves the legislature as free in providing the manner of publication under § 2, as it has been from the beginning under § 1.

While it was suggested in the opinion of State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, that constitutional provisions operate

prospectively, it is extremely difficult to see wherein this observation has any force in determining whether the amendment in question was to be self-executing. Surely it was not thought or contended that it should operate upon any petition that had been circulated previous to its adoption, and nothing could be more safely emphatic than the assertion that it could operate only as to future amendments. This seems axiomatic. An amendment may go into immediate operation and yet there may be matters involved in it concerning which the legislature is expected to legislate in the future. The serious question is, Is there any legislation applicable to the publication of the amendments in question?

Chapter 41 of the Political Code provides for the publication of constitutional amendments prior to the election of the legislative assembly to which they are referred in accordance with § 202 of the Constitution. The statute was adopted in 1891 and is as follows: *"Whenever any amendment to the Constitution of this state is referred to the legislative assembly to be chosen at the next general election* after the session in which such amendment is first proposed, *the same shall be published for three months previous to the time of making such choice in one weekly paper in each county in which a weekly paper is published, once in the first month, once in the second month, and four times in the third month."* If the surplus clause (not italicized above), which is merely descriptive of the "general election" prior to which the publication is to be made, be omitted, the statute would be applicable to the publication of amendments proposed by initiative petition and by the legislature as well. The qualifying clause, "after the session in which such amendment is first proposed," is only descriptive of the term, "general election," and at the time it was inserted there was no way to initiate an amendment except by resolution in the legislative assembly. At that time the only way a constitutional amendment could be "referred to the legislative assembly to be chosen at the next general election" was by the preceding legislative assembly. So, for this reason, the descriptive expression is, in reality, surplusage and the statute would always have had exactly the same meaning if it had been omitted. It is certain that it was never used in the statute to distinguish an amendment referred to the legislative assembly by a pre-

ceding legislative assembly from one referred to it in some other way. The purpose of the statute was, of course, to provide for three months' publication of constitutional amendments previous to the election of the members of the legislative assembly as required by the Constitution, and when the initiative amendment was adopted the requirement and practice of such publication must have been well known to the legislature. The amendment merely provided another method whereby a proposed amendment might be "referred to the legislative assembly," and it even continued the requirement as to the time of publication as it previously existed. It seems to us that it is more reasonable to assume that the framers of the amendment and the people who adopted it contemplated the continuance of the existing law as to publication, than it is to assume that it was intended by them that the amendment should remain inoperative pending the passage of a new law upon this narrow subject. But little was left for the legislature to decide with reference to the policy of publication. It could only determine the manner of publication, not the time. The real question is whether a sufficient rule exists by means of which the right given may be enjoyed. Cooley, Const. Lim. 7th ed. p. 121. We are of the opinion that the constitutional provision requiring three months' publication and the statute providing for a like publication previous to the election of the legislative assembly to which a constitutional amendment is referred afford a sufficient rule so far as publication is concerned.

In view of the publicity that necessarily results from the general circulation of petitions, and the similarity in other respects between the requirements for publishing proposed amendments originating in the legislature and those initiated by petition, the argument that attempts to prove diverse intention as to the publication of the two kinds of amendments is altogether too technical to be considered meritorious. In the Ployhar-Blakemore resolution which failed of passage in 1913, and which the minority members seem to regard as self-executing, the existing statute as to publication was certainly in contemplation. It was there required that proposed amendments should be "published *as provided by law,* for three months," etc. There is no ground for assuming that the legislature was interested in dis-

tinguishing, with regard to publication, between the two classes of amendments.

In the case of Cudihee v. Phelps, 76 Wash. 314, 136 Pac. 367, an act of the legislature of Washington, submitting a proposed amendment to the Constitution required the secretary of state to publish notice of the submission for "three weeks next preceding the election." The Constitution, however, required the publication "for at least three months next preceding election" and it was held that the publication by the secretary of state for three months as required by the Constitution was a valid publication, notwithstanding that the law directed publication for but three weeks.

We believe that much of the difficulty with which the court was confronted in its previous construction of the amendment in question was due to an apparent inclination to regard the amendment as but an isolated portion of the Constitution, having no relation to anything else therein contained. This difficulty, it seems, would largely be avoided if the amendment in question were read in connection with the other kindred provisions of the Constitution which was adopted at the same time. Both provisions have, at their foundation, the same political principle, that of retaining in the voters a portion of the governmental power which had previously been vested in the legislature alone. The reserved powers are expressed in separate amendments mainly, if not solely, for the purposes of securing separate expressions of the voters on the advisability of the reservation as applied to legislation and to constitutional amendments, and to make more rigid requirements as to the latter. It was doubtless thought that there might be many who would favor the reservation as to the legislative power, but not as to constitutional amendments. An examination of similar reservations expressed in the Constitutions of our sister states shows that in several of them the power to propose legislation and constitutional amendments has been reserved in a single section corresponding to article 15 of the amendments to our Constitution. The entire procedure requisite for the exercise of the power for either purpose is outlined in the one amendment. See Cal. Const. art. 4, § 1; Mo. Const. art. 2, § 57; Or. Const. art. 4, § 1; Okla. Const. art. 5, § 1. The procedural machinery of article 15 is adequate for initiative petitions of either sort; but, in

our Constitution, the *power* to initiate constitutional amendments is elsewhere conferred and additional limitations prescribed. There would be no occasion to repeat that procedure in detail in an amendment which was designed merely to secure the extension of the same power to constitutional amendments, where it had been restricted in the first instance to legislation. The power is the same in both instances, and is to be exercised in the same manner, except that more rigid requirements must be met where it is desired to use it for amending the Constitution. Reading the amendments together, in order that fuller effect may be given, certain of the provisions of article 15 supply the details of the procedure that is only indicated in article 16, and the procedural deficiencies of the latter are largely supplied by the former. As has been seen, these articles are *in pari materia,* their subject-matter being so closely related that they are frequently dealt with in one section of a Constitution. The separate articles then were adopted in the light of each other and, in our judgment, it is much more reasonable to construe them together so that full effect may be given to the Constitution as it stands, then it is to isolate one from the other and then examine it in the light of omitted details governing matters of procedure merely. When these two amendments are read together, they will be found to provide an adequate machinery for the direct exercise of the reserved powers secured.

A constitutional provision must not be permitted to fail for the sole reason that *every* detail of procedure has not been provided for. It was conceded in the opinion of State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, that had article 16 been expressly declared to be self-executing, all of the defects mentioned in the opinion would have been overlooked by the court. As we regard the matter, there is no particular magic in words, and, according to the most eminent authority upon the subject, constitutional provisions are self-executing or not self-executing, depending upon whether or not they incorporate adequate rules for the security and protection of the rights granted or reserved. Cooley, Const. Lim. supra. The addition of the expression referred to would have supplied no deficiency of operative procedure. It must be remembered that all provisions of a Constitution are self-executing in so far as they may be given effect through ordinary legal

processes; and if it is intended to make the realization of certain constitutional principles, such as equality of taxation, for instance, dependent upon legislation, language is generally employed which is appropriate to that end. It is only when a constitutional provision "merely indicates principles without laying down rules" (Cooley, Const. Lim. 5th ed. p. 100) that it is not self-executing. If a mere principle was being enunciated, which the legislature would be expected to carry out, it is difficult to see why the framers of the amendment supplied so many rules for the application of the principle; and if the legislature had been expected to make the principle effective, it would seem that it would have been clearly directed so to do by appropriate language.

Mere difficulties of operation do not afford sufficient reason for the failure to carry out constitutional provisions. In the case of State ex rel. Hunt v. Hildebrandt, 93 Ohio St. 1, 112 N. E. 138, the supreme court of Ohio issued a peremptory writ of mandamus directing the secretary of state to cause to be printed and distributed arguments pro and con on proposed amendments to the Constitution, though the Constitution which imposed the duty upon him had not provided in detail for the procedure or even for the source from which the arguments should come or be selected. On the general question the court uses language that quite effectively disposes of much of the argument in this case which has been thought to demonstrate the unworkable character of the amendment in question without the aid of legislation. The court says: "That it may be difficult of operation is not a sufficient reason for refusing to obey the mandate of the Constitution of the state. Language could not have been used by the members of the constitutional convention or by the electors of the state that would give clearer expression to their intention and purpose in reference to this subject-matter. They undoubtedly had in mind the practical impossibility of covering every detail of the operation of the provisions of the organic law of the state; that some difficulties might arise in relation thereto that could be obviated by laws that would facilitate, but not limit or restrict, their application, and for that reason and to this extent, but no further, the general assembly is authorized to act. *This constitutional provision is a limitation upon the power of the general assembly, and for that reason, if for no other, its framers and the electors of the*

state who adopted it did not propose or intend that its operation should be left to the pleasure of the general assembly, for, in that case, the failure of that body to act would defeat the will of the people as expressed in the Constitution of the state. Nor should the intent and purpose of any provisions of the state Constitution be defeated by any technical construction of its terms. On the contrary, if the language is sufficiently plain to disclose that intent and purpose, then such construction must obtain as will give full force and effect thereto, even though it be attended with some difficulties."

The foregoing language was used, it is true, with reference to a constitutional provision that was expressly declared to be self-executing, but it none the less expresses the principle which should govern in the construction of amendments of the general character of the one under consideration in that case. The amendment before us is of that character and the expression of the Ohio court meets our approval.

We think it proper to observe that, in the previous discussion of this general question, too much emphasis has been placed upon the presence or absence of an expression to the effect that a given amendment shall be self-executing. Until amendments were adopted providing for the initiative and referendum, it was very seldom that express language would be employed to indicate the self-executing character of a particular constitutional provision; but it would seem with the advent of the initiative and referendum, it was feared that unless some such provision were contained in the Constitution there was danger that the legislature, whose powers were directly involved and possibly the courts, would make inroads upon the right secured, and it was out of an abundance of caution that such express provisions came to be inserted. We think that the absence of such a provision is not in the least indicative of an intention that the amendment should not be self-executing.

This opinion has extended beyond the bounds of length within which we had hoped to be able to express the principles deemed decisive of this litigation, but a due respect for the opinions of the members of this court participating in the former decision requires an ample statement of the reasons which have led to the overruling of that decision

in its main conclusions. No reason sufficient in law having been assigned for the granting of the relief prayed for, the writ is denied.

ROBINSON, J., concurs.

Addenda, filed February 20, 1919.

BIRDZELL, J. The foregoing opinion contains all that I had expected to say upon this important subject. Since it was written, however, additional dissenting views have been expressed that were not in anticipation when the original opinions were prepared and filed. These seem to call for an additional word in the interests both of clarity and of historical accuracy. This I believe to be ample reason for departing from the rule, which should be observed generally, of refraining from referring directly to a dissenting opinion when expressing the views of the majority.

When the foregoing opinions were filed,—now almost four months ago, my brother Christianson, now Chief Justice, reserved the privilege of extending his dissenting remarks which were filed at the time; to which request, of course, there was no objection. His extended dissent appearing below has just been filed; hence these addenda.

In the dissenting opinion just filed, there is an implied criticism of the legislature for not having provided adequate machinery for soldiers voting. It is intimated that, had the legislature anticipated a vote upon so important a matter as constitutional amendments, it would have provided such machinery. The legislature did pass a law upon this subject (chapter 6, Laws of Special Session of 1918), and there were three amendments to be voted upon which were submitted by the legislature and which were in no way dependent upon this decision. I take no part in this criticism and think it groundless.

There is an omission from the dissents which seems to me to be inconsistent with proper procedure in such cases as this, but this is a matter for the individual judge to consider for himself. I am consequently not disposed to do more than state the fact. While many authorities are cited which seem to me to have no bearing whatever on the case—one opinion even drawing upon sources wholly nonlegal and unofficial for authority in a matter concerning which it is not proper

to go beyond official legislative records—no attention is paid to the rather numerous legal authorities bearing upon one of the principal questions in the case. This I regard as distinctly unfortunate. I refer to the question as to whether the amendment itself, which provides for the initiative and referendum as to constitutional amendments, ever became a part of the Constitution. This question was fully and ably presented by counsel upon the argument and is manifestly the first to be decided. It matters little whether the amendment will be operative, if, as a matter of law, it does not exist, and yet in all that is said by our learned associate, not one sentence is devoted to this important question. The only authority cited by the learned Chief Justice is one which concerns itself wholly with the question of jurisdiction, a matter which is not at all considered in the majority opinions and which must therefore be taken to be conceded.

There is still another significant omission. I call attention to the fact that, notwithstanding the earnest consideration and the deliberate thought which have been directed to the questions presented in this case by our dissenting associates, they have not renewed their expression of assent to the interpretation placed upon the amendment in question in the main opinion in the capital removal case, unless it be by the general statement of adherence to the former opinion. Whether or not they are still of the opinion that the legislature can legally require an initiative petition to be signed by seventy-five per cent of the voters before it can be considered a legal petition in the face of the language of the amendment which clearly provides for a twenty-five per cent petition, may be left to the reader to infer.

It is said that no one has ever contended that the constitutional provision in this case is meaningless and inoperative as a constitutional provision and that this court, in State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, had expressly recognized it as a law of the state and as such operative as a basis for legislation. Perhaps it was not contended by the court, in State ex rel. Linde v. Hall, supra, that the provision was meaningless or inoperative, but this court nevertheless did hold, not only that power was given to the legislature to control the manner of publication, but that power was also given to require a higher percentage of the voters upon the petition than required by the

Constitution itself. I do not know of any more effective manner of rendering a provision of the Constitution meaningless and inoperative.

It is further stated that it is well to remember that the primary purpose of such amendment is to reserve to the people certain governmental powers. With this statement I am wholly in accord. My objection to the previous decision of this court is that it ignores this primary purpose.

One other reference to the dissenting opinions and I shall conclude this uninviting chapter. Resort is frequently had in all the discussion of the question under consideration to a peculiar and wholly inadmissible form of logic. The various bills or resolutions looking toward the adoption of the initiative and referendum are marshalled forth and it is discovered that the Gibbens Bill (the one under consideration) differs from all the others in that it does not contain these or similar words: "This amendment shall be self-executing." Ergo, it was chosen from the lot for that reason. Then the conclusion is hastily drawn that the legislature must have intended to tie a string to its operation. Before this argument can be validated, those who use it must eliminate all other substantial differences (and there are many) between the various bills considered, and, furthermore, they must demonstrate that the others were all self-executing with regard to the constitutional amendment feature. This is probably as doubtful with respect to the rejected Blakemore Bill, for reasons which I will not take space to enumerate here, as in regard to the one in question.

When this case is stripped of all redundancy, it resolves to the simple proposition as to whether or not there exists a law under which the amendments could be published for three months previous to the election. It is not primarily a question, even, of self-execution, but of execution under the existing laws governing the particular subject of amendments. When the court originally passed upon the question in the capital removal case every argument that tended in the remotest degree to evidence an intention to postpone the operation of the amendment was advanced and tenaciously adhered to, but now those who express views opposed to the majority seem to draw their main, if not their sole, argument, from the expression "shall be published as the legislature may provide for three months previous to the general elec-

tion." The majority adheres to the view that the existing law is applicable, but subject to any change that may later be made. This view makes the express reservation of the right of initiative effective, and seems to the majority to be more consistent with the intention of th framers of the amendment and of the people who adopted it. The original decision in the capital removal case, to which the minority adheres, not only denied the existence of sufficient legislative authority for publication, but it invited the legislature to formulate the whole policy with respect to the right itself,—even to increase the number of voters required to petition, and to differentiate on the basis of amendatory subject-matter. These are matters vital to the meaning of the Constitution itself, and for the correction of such a readily demonstrable, erroneous interpretation no justification is necessary. A conscientious adherence to the judicial oath demands as much. To shrink from such a responsibility under the protecting mantle of the doctrine of *stare decisis* would be to use the doctrine for a purpose which all of the authorities on the question regard as illegitimate. See 26 Am. & Eng. Enc. Law, 2d ed. pp. 189 et seq. See also Kimball v. Grantsville City, 19 Utah, 368, 45 L.R.A. 628, 57 Pac. 1; and Montgomery County Fiscal Ct. v. Trimble, 104 Ky. 629, 42 L.R.A. 738, 47 S. W. 773. In the latter case, the Kentucky court, by a vote of three to two, overruled three prior decisions on a question of the proper construction of a provision of the Constitution. See also Oliver Co. v. Louisville Realty Co. 156 Ky. 628, 51 L.R.A.(N.S.) 293, 161 S. W. 570, Ann. Cas. 1915C, 565. For other cases where courts have corrected what seemed to them to be previous erroneous constructions of Constitutions, see Greencastle Southern Turnp. v. State, 28 Ind. 382; State ex rel. George v. Aiken, 42 S. C. 222, 26 L.R.A. 345, 20 S. E. 221; Willis v. Owen, 43 Tex. 41. For an appropriate expression of the guiding principle applicable in determining the effect to be given the former decision, I am tempted to borrow from the distinguished Judge Bleckley of the supreme court of Georgia, when he said: "When an error of this magnitude and which moves in so wide an orbit competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is

not *stare decisis,* but *fiat justitia ruat cœlum."* Ellison v. Georgia R. Co. 87 Ga. 696, 13 S. E. 809, 14 Am. Neg. Cas. 167.

The holding of the majority that a constitutional provision may be given effect under pre-existing general legislation, even where authority is vested in the legislature to legislate concerning the same subject-matter, is fully substantiated by the following authorities (in some of these it will be noted that the mandate for future legislation was much stronger than in the instant case): State ex rel. Goodin v. Thoman, 10 Kan. 191; Logan v. Ouachita Parish, 105 La. 499, 29 So. 975; State ex rel. Gordon v. Moores, 70 Neb. 48, 96 N. W. 1011, 99 N. W. 504; People ex rel. McClelland v. Roberts, 148 N. Y. 360, 31 L.R.A. 399, 42 N. E. 1082; Rodwell v. Rowland, 137 N. C. 617, 50 S. E. 319.

The holding of the majority gives force and vitality to an important portion of the fundamental law of the state, and, in my judgment, it but carries out the manifest intention of the Constitution.

BRUCE, Ch. J. (dissenting). This is an application for a writ of injunction to restrain the secretary of state from submitting to a vote of the people various proposed constitutional amendments which have been sought to be instituted by a popular initiative and by popular petitions. The applicant invokes the original jurisdiction of this court, and an order to show cause has been issued.

The respondent moves to dismiss the proceedings upon the ground "that this court has no jurisdiction to grant the relief prayed for herein or over the subject-matter of the action or the parties herein, upon the alleged cause of action as stated in the petition."

He also, and in case his original challenge to the jurisdiction of this court is denied, demurs to the petition on the grounds:

"(1) That the plaintiff herein does not state facts sufficient to constitute a cause of action or grounds for relief herein.

"(2) That the court has no jurisdiction over the subject-matter of this action or over the person of the defendant as such upon the allegations of the petition herein.

"(3) That the said plaintiff has no legal capacity to institute or maintain this action."

All of these matters were thoroughly discussed in the exhaustive

opinions which were filed by this court in the case of State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, and were unanimously decided against the contention of the respondent. It is, indeed, difficult to understand why, in the light of this decision, the secretary of state should ever have contemplated the action which is threatened by him.

It is true that the petitions which have been filed with him contain the signatures of many thousands of voters. It is no doubt true, as has been publicly stated by my associate, Mr. Justice Robinson, that he, the said justice, made a pre-election promise to overrule the decision in the case of State ex rel. Linde v. Hall, supra, and that he would not have been elected if he had not done so, and it may be true, as asserted by Mr. Justice Robinson, that the secretary of state was conversant with this fact. I have yet to learn, however, that the making of any such pre-election promises were ever contemplated by the framers of our government or that a show of force in the shape of a numerously signed petition should serve as a proper justification for a violation of my oath of office and a reason why I should hold that to be the law which I do not believe to be the law. It may also be true that the secretary of state has already gone to a great expense in printing the proposed constitutional amendments, but it is not shown that the petitioner was a party thereto, or before he brought his present action had any knowledge that such secretary would take upon himself the interpretation of the law and consider a seriously considered opinion of the supreme court of this state a mere scrap of paper. If, indeed, wanton and unnecessary expense has been incurred it has been by the secretary of state, and not by the voters of this state or by the petitioner, all of whom were justified in believing that the reign of law was still among us.

I am fully satisfied with the correctness of the decision of this court in the case of State ex rel. Linde v. Hall, supra, and of that of the supreme court of Indiana in the case of Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, and I believe that we have long since passed the time when it is expedient or wise for the courts to administer the law on the basis of their own individual opinions and to change the established law with every temporary wave of popular opinion.

There was, it is true, a time when the "conscience" of a court of equity was presumed to be the personal conscience of the judge, and when there were no established rules and there was no such thing as *res judicata* or *stare decisis*. This time has long since passed. Its death knell was perhaps rung when Selden in his Table Talk and in referring to the law as so administered said:

"Equity is a roguish thing. For law we have a measure, and know what we trust to. Equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard for the measure we call chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in Chancellor's conscience."

I may, perhaps, be justified in using as my own the language of the great English chancellor, Lord Eldon, when in 1818 and in the case of Gee v. Pritchard, 2 Swanst. 402, 36 Eng. Reprint, 670, he said: "Nothing would inflict on me greater pain in quitting this place than recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot."

For the reasons above advanced I am of the opinion that the writ should issue and that the prayer of the petitioner should be granted. I do not believe that the constitutional provision is self-executing. I express no opinion upon the question whether the amendment itself was legally adopted, as I do not consider that the decision of this point is necessary at this time.

ROBINSON, J.(concurring). In this case I fully concur in the well-considered opinions by Justice Grace and Justice Birdzell. This matter presents a petition by a private citizen to restrain the secretary of state from publishing certain proposed constitutional amendments and submitting the same to the voters at the next general election.

The petition for the submission of the amendments was duly filed March 3, 1918. It is signed by a majority of all the voters. It was given to one newspaper in each county to be published six times as provided by law during three months prior to the election.

The proposed amendments were filed in the office of the secretary of

state pursuant to subdivision 2 of § 202 of the Constitution. That section was adopted in 1914 by a vote of 43,000 to 22,000. It provides that when there is filed with the secretary of state a certain petition for an amendment of the Constitution, it shall be published as the legislature may provide for three months next preceding the general election and shall be placed on the ballot to be voted for at the next general election.

The section consists of two paragraphs. The first relates to the submission of constitutional amendments by the legislative assembly; the second, to the submission of amendments on a petition. The objections are:

(1) That the amended § 202 is void because it was not entered on the journal of the house in accordance with the original § 202.

(2) That § 202 as amended consists of two subjects and two amendments which should have been submitted to a separate vote.

(3) That § 202 is not self-executing because it does not provide the manner of advertising amendments.

(4) The additional reasons stated in the Capitol Removal Case, 35 N. D. 34–78, 159 N. W. 281.

In the senate journal for 1911, the amendment is everywhere entered as, "Senate Bill No. 153. A Concurrent Resolution Amending the Constitution of the State of North Dakota Providing for Future Amendments Thereof." In the house journal for 1911, the resolution is everywhere entered in the same identical manner, and the resolution is entered at large in the Session Laws of 1911 as chapter 89. In 1913, the journals show similar entries and so it appears the concurrent resolution was adopted by two successive legislative assemblies without the changing of even a punctuation mark. And its place in the session laws gave it a publicity and permanence far greater than any entry that might have been made in the journals.

Now as the law neither does nor requires idle acts, it is manifest that the entries in the journals and in the session laws was entirely sufficient.

1. It is not true that § 202 contains two subjects or two amendments. Its subject is the future amendment of the Constitution. It provides that an amendment may be submitted either in accordance

with a concurrent resolution of two successive legislative assemblies, or a petition signed by at least twenty-five per cent of the voters in each of not less than half the counties of the state. Manifestly it does not contain two amendments.

2. In regard to the advertisement of proposed amendments the words of § 202 are that amendments shall be published as the legislature may provide. That is in manner provided by law. As the people well knew all the amendments to the Constitution were advertised as provided by law and there was no reason for one method of advertising amendments submitted by the legislative assembly and a different method of advertising amendments submitted by petition. In voting for § 202 the people acted as a legislative body and it must be conceded that they never thought of voting for a deceptive or delusive measure that could have no force or effect until some future legislature should see fit to provide for a special system of advertising. And we must presume the legislature did not intend to submit to the people any tricky or delusive measure. However, if some lawmakers had such a nefarious design it should have no effect.

The judges are bound to give force to the manifest intention of the people—the legislative body that adopted the amendment. When the people act as lawmakers their action is governed by the accepted maxims of legislation. Like reasons doth make like laws. The law neither does nor requires idle acts. The law respects form less than substance. The interpretation which gives effect is to be preferred to that which makes void. In the construction of a statute where any uncertainty exists, the question is: What was the intention of the lawmakers? In the language of Justice Field, instances without number exist where the meaning of words of a statute has been enlarged or restricted to carry out the intention of the lawmakers. Thus, in the Oregon Donation Statute, the term "a single man" was held to include an unmarried woman. The purpose of a Constitution is to give formal and authentic expression to the will of the people. Hence, Constitutions are to be construed as the people construed them in their adoption.

It is true that in the Capitol Removal Case, 35 N. D. 34, 159 N. W. 281, the court held against that part of § 202 which relates to the submission of amendments on petition. It was held to be a dead letter

until such time as a legislative body should see fit to breathe into its nostrils the breath of life—to prescribe and fix the percentage of voters, the time of filing a petition, the manner of advertising it and the form of its enacting clause. But § 202 was framed for submission to the common people who had asked for bread and did not expect to be given a stone. For years they had made a strenuous and determined fight for the initiative and referendum, and they did not look for their public servants to offer them for approval a thing in the form of a snare, a trap, or a delusion. They had never read or heard of a constitutional amendment having an enacting clause, and they knew no reason for such a nicety. They knew that all the amendments had been advertised as provided by law, and, of course, they never thought that there should be a special law for the advertisement of an amendment submitted by petition. They knew that § 202 provided that a petition for an amendment must contain the signatures of at least twenty-five per cent of the legal voters, and, of course, it never occurred to them that a legislature should have any right or authority to change the percentage.

Hence, it behooves the courts to give to § 202 a broad and liberal construction so as to advance and secure the purposes and intentions of those who adopted the amendment.

Finally, on the initiative and referendum question, the people have fought a good fight; they have kept the faith; they have spoken with coherence and emphasis; their intention cannot be mistaken; hence, they have, and may exercise, the right to control their own affairs and to make their own laws and constitutions.

Petition denied and dismissed.

CHRISTIANSON, J. (dissenting). Under the Constitution of this state as originally adopted an amendment to the Constitution might be proposed in either house of the legislative assembly; and if the same was agreed to by a majority of the members elected to each of the two houses, such proposed amendment was entered on the journal of the house with the yeas and nays taken thereon, and referred to the legislative assembly chosen at the next general election, and if a majority of all the members elected to each house of the next legislative assem-

bly agreed to the proposed amendment it was then submitted to the people for ratification or rejection. And if it was approved and ratified by a majority of the electors voting thereon it became a part of the Constitution. N. D. Const. § 202. This was the only method provided. And, of course, no one will deny that the method so provided in the Constitution was exclusive. The question presented in this case is whether another method has in fact been provided and put into operation, i. e. a method whereby an amendment to the Constitution may also be proposed by initiative petition.

The relator contends that the latter method is not available:

(1) Because the amendment to the Constitution, which provided such method, was not adopted in the manner prescribed by the Constitution, and, hence, is not in fact a part of the Constitution; and,

(2) Because such amendment, if legally adopted, is not self-executing; and that the amendment has never become operative for the reason that no legislation has been enacted to put it into effect.

The precise question raised by the second contention was presented to and decided by this court in State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281. The decision in that case was unanimous. It was promulgated after the most careful deliberation. No case decided since I became a member of this court has received more careful consideration. The then members of the court approached the questions presented with a deep sense of the grave responsibility, as well as the solemn duty, resting upon them. My own feelings were reflected in the following statement in the opinion which I filed in the case: "The members of this court have given to this matter their most anxious thoughts and labor, and have arrived at the best conclusions honest convictions can reach. The intent of the framers and the people who adopted the constitutional provision seems too plain to admit of doubt. This being so, our duty, however unpleasant and embarrassing it may be, is equally plain. We must declare the fundamental law to be what it is. To do otherwise would be a breach of the duties we have sworn to discharge, and a violation of the Constitution we have sworn to support." 35 N. D. 77. The judgment of the court as pronounced in that case was not an expression of the personal will of the then judges, but the deliberate declaration by this court of the will of the

law. The duty imposed upon and performed by the members of this court in State ex rel. Linde v. Hall was not a pleasant one, and if they had been free to give effect to their own wills, there would have been no hesitancy on their part in reaching the same ultimate conclusions reached by the majority members in the instant case. The conclusions in State ex rel. Linde v. Hall were reached with reluctance, but no member of the court had any question as to their correctness. Now that decision is reversed by a majority of the court, three to two, and this reversal has been produced by no change in the opinion of those who concurred in that decision. On the contrary the two members of this court who participated in that decision are firmly convinced that that decision is right, and that the conclusion reached by the present majority is erroneous.

The majority members refuse to apply the doctrine *stare decisis,* and attention is called to the decision of the supreme court of Wisconsin in Pratt v. Brown, 3 Wis. 603, and the decisions of the United States Supreme Court in the Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287, to justify the position taken. The decision of the Wisconsin court involved the constitutionality of a statute. The situation involved in the Wisconsin case could not be remedied except by an amendment of the Constitution. It did not present a situation like the the case at bar, where the whole trouble could be taken care of by legislative enactment. In fact the Wisconsin court expressly pointed out that the questions involved affected "not merely the routine of practice, nor rights determined by the lapse of time, or *palpable legislative enactment.*" And the court stated that for these reasons, "we do not feel at liberty as we would wish, to throw ourselves back upon that decision, and thus evade further responsibility." 3 Wis. 609.

The reasons advanced by the Wisconsin court speak for themselves. This was not, however, the last expression of the Wisconsin court upon the subject. In the subsequent case of Fisher v. Horicon Iron & Mfg. Co. 10 Wis. 351, the court expressly repudiated the ruling in Pratt v. Brown, on the ground that that case "did not call for an adjudication" upon the question, and hence "none was had." After making such statement, the court said: "We are free to confess that if the question as to the constitutionality of the mill-dam law were now for the first

time presented to this court, and we were not embarrassed by former adjudications upon it, we should doubtless come to a different conclusion upon the question, from that arrived at by the majority of the court in Newcomb v. Smith." In adhering to the rule *stare decisis,* the court said: "We are now asked to depart from that decision. Ought we to do it? I think not. It is the duty of this branch of the government to pass finally upon the construction of a law . . . *and the community has a right to expect, with confidence, we will adhere to decisions made after full argument and upon due consideration. The members of the court may change totally every six years, and if each change in the organization produces a change in the decisions, and a different construction of laws,* under which important rights and interests have become vested, it is easy to see that the consequences will be most pernicious. For these and other reasons which might be given, we decline to reconsider the constitutionality of the mill-dam law."

The action of the United States Supreme Court in the Legal Tender Cases, is one which furnishes little or no support for the action of the majority members in the case at bar. The decision in the first Legal Tender Case held the so-called Legal Tender Act to be unconstitutional, not for any technical defect, but on the ground that it was beyond congressional power to enact such legislation. There was no chance to obviate the result of that decision by congressional action, and surely no one would ever assert that the court would have reversed the former decision if the effect thereof could have been obviated by an act of Congress. The first decision was by a divided court. There were in fact only four members of the court who concurred in the decision in its entirety. The fifth member (Judge Grier) stated "his judgment to be that the legal tender clause, properly construed, has no application to debts contracted prior to its enactment; but that upon the construction given to the act by the other judges he concurred in the opinion that the clause, so far as it makes United States notes a legal tender for such debts, is not warranted by the Constitution." Hepburn v. Griswold, 8 Wall. 628, 19 L. ed. 527. Judge Grier afterwards resigned, and was not a member of the court at the time the decision was read and filed. So when the decision was in fact promulgated, there were only four of the then members who concurred in it, and three who dissented,

and there were two vacancies in the court. Not only was that the situation, but the constitutionality of the Legal Tender Act was, or at least became, a political question. Chief Justice Chase who had written the first opinion was an avowed candidate for the office of President. Charges and counter-charges were made. The dissenting justices, and subsequent appointees, issued a statement with regard to the matter. Joseph P. Bradley, Miscellaneous Writings, p. 73. The Chief Justice indirectly charged that the court had been packed in order to obtain a reversal of the first decision. Schuckers, chap. 18. While the consensus of opinion is that the charge was wholly unfounded, it goes without saying that the actions of the Supreme Court of the United States and its members in connection with the Legal Tender Cases were not such as to increase public respect for that great tribunal. I am indeed sorry that it should ever have become necessary for the supreme court of North Dakota to cite the action of the Federal Supreme Court in the Legal Tender Cases in justification of one of its acts. But, at that, the facts in the Legal Tender Case distinguish them from the instant case. In those cases the first decision was by a divided court. Strictly speaking, the decision when promulgated did not have the support, or represent the opinion, of a constitutional quorum of the court. The decision in State ex rel. Linde v. Hall was by a unanimous court. The sole effect of the decision was to require legislative action. So far as I can ascertain the reversal in this case is unprecedented in judicial history. I have searched the books in vain for another instance where a court has overruled a former decision upon the question whether a constitutional provision was, or was not, self-executing.

Not only is the doctrine *stare decisis* generally recognized by the courts of this country, but it is recognized by the laws of this state. The Constitution requires this court to prepare and file its decisions. Const. § 101. The legislature has provided for the publication and distribution of such decisions, and, has also, expressly declared that they shall be deemed an expression of the sovereign will, i. e. the law of the state. Comp. Laws 1913, § 4328. A distinguished legal writer (Fearne, Contingent Remainders) in pointing out the worng which must result to society from a shifting judicial interpretation, says:

"If results and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape which in his fancy best becomes the times; if the decisions of one case were not to be ruled by, or depend at all upon further determinations in other cases of like nature, I should be glad to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title which he means to purchase? No reliance could be had upon precedents; former resolutions upon titles of the same kind could afford him no assurance at all. Nay, even a decision of a court of justice upon the very identical title might be again drawn into dispute; the taste and fashion of the times might be improved, and on that ground a future judge might hold himself at liberty (if not consider it his duty) to pay as little regard to the maxims and decisions of his predecessor as that predecessor did to the maxims and decisions of those who went before him."

In discussing the same subject the present Chief Justice of the United States Supreme Court, said: "The conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. In the discharge of its function of interpreting the Constitution, this court exercises an august power. It sits removed from the contentions of political parties and the animosities of factions. It seems to me that the accomplishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them. If the permanency of its conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theater of political strife, and its action will be without coherence or consistency. . . . The wisdom of our forefathers in adopting a written Constitution has often been impeached upon the theory that the interpretation of a written instrument did not afford as complete protection to liberty as would be enjoyed under a Constitution made up of the traditions of a free people. Writing, it has been said, does not insure greater stability than tradition does, while it destroys flexibility. The answer has always been that by the fore-

sight of the fathers the construction of our written Constitution was ultimately confided to this body, which, from the nature of its judicial structure, could always be relied upon to act with perfect freedom from the influence of faction and to preserve the benefits of consistent interpretation. The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people."

It is probably true, as stated by one of the majority members, that the decision in State ex rel. Linde v. Hall, cannot be said to have established any rule of property. But there are rights more valuable than rights of property. In fact property rights are themselves bottomed upon constitutional provisions. The decision in State ex rel. Linde v. Hall, was filed in September, 1916. The legislative assembly convened the following January. The members of that assembly were familiar with the decision, and recognized its effect. Three different bills were introduced in the house and two in the senate, relating to the procedure in proposing constitutional amendments by initiative petition, and the publication of such proposed amendments. See House Journal, pp. 640, 642, and Senate Journal, p. 228. There was no difference of opinion among the lawmakers as to the necessity of such legislation,—some of the measures even carried emergency provisions,—but the difference of opinion arose over the provisions of the proposed laws, i.e., as to the form of the procedure to be adopted. The senate majority adopted certain amendments tending to provide a stricter procedure than that proposed in the various bills as introduced (See Senate Journal 541, 613), and this was the rock upon which the proposed legislation stranded. The legislation failed simply because the legislators were unable to agree upon the terms of the proposed law. Not only was the matter considered by the legislative assembly at its regular session convened in January, 1917, but the

legislature was convened in special session in January, 1918, for the purpose of considering measures requiring immediate consideration. Among the measures proposed and enacted were some intended to protect the rights of citizens engaged in military service. No one can reasonably doubt that the legislators at this time were of the opinion that no amendment to the Constitution could be proposed by initiative petition until the legislature had enacted suitable legislation to put this method into operation. There are in all more than 25,000 citizens of this state engaged in military service. The overwhelming majority of these men will be denied any opportunity to vote upon the proposed changes in the fundamental law. It goes without saying that the proposed changes in the Constitution are of far greater importance than the choice of public officers. And inasmuch as petitions for proposed constitutional amendments must be filed at least six months prior to the general election, provision could readily have been made whereby North Dakota electors engaged in military service would have been given an opportunity to vote upon such amendments. In fact it would be a lasting reproach to the legislative assembly to assume that its members supposed that fundamental changes such as those now proposed might be made in the Constitution, and yet failed to make adequate provision whereby these men would be given an opportunity to cast their votes upon the propositions. And yet that is the situation here today. There is no adequate provision in our laws whereby any considerable portion of the men engaged in military service will have any opportunity whatever to express their choice as to whether any of the proposed constitutional amendments involved in this litigation shall be adopted or rejected. The men who are offering their lives to make possible the establishment and maintenance of government of the people, by the people, and for the people throughout the civilized world have been and are being denied the right to express their choice upon the proposed changes in the fundamental law of the state.

It is interesting to note that while the majority members reject a unanimous decision of this court, they invoke the doctrine of legislative construction in support of their determination of the first question raised by the relator. The legislative practice relied upon was by no means uniform. For the first eight years after the adoption of

the Constitution, the practice was to enter all proposed constitutional amendments in full upon the journal of the house in which the amendment originated. Even as late as 1913 this practice was followed in some instances. See House Journal, 1913, p. 929. Are the fluctuating practices of the legislature of greater force and value as a precedent than a determination by the highest court in the state? An examination of Oakland Paving Co. v. Tompkins, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801 (cited by the majority members) will also disclose that in that case the supreme court of California invoked the doctrine *stare decisis* in support of its decision.

I have no intention, however, of resting this dissent solely upon the doctrine *stare decisis*. For while I am of the opinion that the decision in State ex rel. Linde v. Hall, should be deemed decisive of this case, I am even more strongly of the opinion that the conclusion reached by the majority in this case is erroneous, even though it be considered as an original proposition.

There had been considerable discussion of the initiative and referendum in this state for some years prior to the adoption of the constitutional amendments relating thereto. There were many divergent views upon the subject. Some were opposed to the initiative and referendum as a whole. Others favored it as to statutes, but opposed it as to constitutional amendments. Chief among the latter were those who feared that the initiative might be utilized by those opposed to prohibition to secure a resubmission of the prohibition provision in the state Constitution. And it is a well-known fact that certain temperance organizations in the state actively opposed the initiative as applied to constitutional amendments for this reason. This seems to have been the history of similar measures in other prohibition states. See The Initiative, Referendum, and Recall, American Academy of Political and Social Science, p. 165.

In view of the different opinions with respect to the matter, it is not strange that the legislature in 1911 passed four different concurrent resolutions proposing constitutional amendments relating to the proposal of statutes, or constitutional amendments, or both, by initiative petition. The different amendments proposed themselves

indicate the widely divergent views of the different framers upon the subject.

Senate Bill No. 84, introduced by Senator Plain (Sess. Laws 1911, chap. 88), embraced both constitutional amendments and statutes. This bill expressly provided: "The secretary of state and all other officers shall be guided by the general laws and this act in filing and submitting initiative and referendum petitions until legislation shall be especially enacted therefor. This amendment shall be self-executing, but laws may be enacted for the purpose of facilitating its operation." House Bill No. 237, introduced by Representatives Doyle of Foster County, and Ployhar of Barnes County (Sess. Laws 1911, chap. 94), provided for the proposal of laws, resolutions, and constitutional amendments, and the recall of officers. This bill contained full and explicit provisions for putting the same into action, and contained this proviso: "This amendment shall be self-executing, but legislation may be enacted especially to facilitate its operation." Under the provisions of both the Plain bill and the Dolye-Ployhar bill, initiative petitions proposing constitutional amendments required the signatures of only fifteen per cent of the legal voters in each county of at least one half of the counties of the state.

Senate Bill No. 5 (Sess. Laws 1911, chap. 93), introduced by Senator Bessesen of Wells county, provided for the initiative and referendum of statutes, and had no application to constitutional amendments. This bill expressly provided that the secretary of state and all other officers, in submitting initiated or referred measures to the people, "shall be guided by the general laws and the act submitting this amendment until legislation shall be specially provided therefor." It further provided: "This amendment shall be self-executing, but legislation may be enacted to facilitate its operation."

The amendment which is involved in this controversy was introduced as Senate Bill No. 153 (Sess. Laws 1911, chap. 89), by Senator Gibbens of Towner county. This bill related to initiation of constitutional amendments only, and had no reference to the initiation of statutes. It provided that "any amendment or amendments to this Constitution may also be proposed by the people by the filing with the secretary of state, at least six months previous to a general election, of an initiative

petition containing the signatures of at least twenty-five per cent of the legal voters in each of not less than one half of the counties of the state. When such petition has been properly filed the proposed amendment or amendments shall be published as the legislature may provide for three months previous to the general election, and shall be placed upon the ballot to be voted upon by the people at the next general election. Should any such amendment or amendments proposed by initiative petition and submitted to the people receive a majority of all the legal votes cast at such general election, such amendment or amendments shall be referred to the next legislative assembly and should such proposed amendment or amendments be agreed upon by a majority of all the members elected to each house, such amendment or amendents shall become a part of the Constitution of this state. Should any amendment or amendments proposed by initiative petition and receiving a majority of all the votes cast at the general election as herein provided, but failing to receive approval by the following legislative assembly to which it has been referred, such amendment or amendments shall again be submitted to the people at the next general election for their approval or rejection as at the previous general election. Should such amendment or amendments receive a majority of all the legal votes cast at such succeeding general election, such amendment or amendments at once become a part of the Constitution of this state. Any amendment or amendments proposed by initiative petition and failing of adoption as herein provided, shall not be again considered until the expiration of six years."

It will be noted therefore that the twelfth legislative assembly passed, and referred to the thirteenth legislative assembly, three different measures, relating in whole or in part to, and providing for the proposal of, constitutional amendments by initiative petition. The Plain and the Doyle-Ployhar bills in express terms providing that the proposed amendments were to be self-executing, and permitting constitutional amendments to be initiated by petitions signed by fifteen per cent of the legal voters of one half of the counties of the state; and the Gibbens bill, which contained no provision, in express terms, declaring the proposed amendment to be self-executing; and which required initiative

petitions to be signed by at least twenty-five per cent of the legal voters in not less than one half of the counties in the state.

These several measures were again introduced in the thirteenth legislative assembly (1913 session). The Plain bill was introduced by Senator Plain on January 29, 1913, as Senate Bill No. 153 (See Senate Journal, p. 210), and when placed on its third reading and final passage on March 3, 1913, was defeated by a vote of thirty-three ayes to twenty-five nays, two senators being absent and not voting. Senate Journal, p. 1041.

The Doyle-Ployhar bill was introduced in the house of representatives on January 22, 1913, as House Bill No. 133, by Representative Ployhar of Barnes county and Blakemore of Cass county (House Journal, p. 317), and was passed by the house of representatives, on February 6, 1913 (House Journal, p. 537). It was made a special order in the senate for March 6, 1913, and passed by a vote of twenty-six ayes to twenty-three nays, one being absent and not voting. A motion to reconsider the vote, by which the bill was passed, and that the motion to reconsider be laid on the table, resulted in a tie vote, twenty-four ayes to twenty-four nays, two being absent and not voting, and the motion was defeated by the vote of Lieutenant Governor Kraabel, who voted against it. Senate Journal, p. 1347. A motion to reconsider the vote by which the bill was passed was thereupon adopted by a vote of twenty-five ayes to twenty-four nays, one being absent and not voting (Senate Journal, p. 1400), and the bill, being placed upon its third reading and final passage was defeated by a vote of twenty-four affirmative to twenty-five negative votes, one absent and not voting. Senate Journal, p. 1404.

The Bessesen bill was introduced in the senate on January 14, 1913, as Senate Bill No. 32, (Sess. Laws 1913, chap. 101, by Senator Overson of Williams county (Senate Journal, p. 51). It was passed by the senate on March 3, 1913 (Senate Journal, p. 1076). On March 7, 1913, (the last day of the legislative session), it, together with the Gibbens bill, was referred to a conference committee, and finally passed by both the house and the senate. Senate Journal, 1076, 1576, 1602, 1619; House Journal, 2005, 2066.

The Gibbens bill was introduced by Senator Gibbens as Senate Bill

No. 73 (Sess. Laws 1913, chap. 98), on January 18, 1913. (Senate Journal, p. 98.) It was received in the house on the same day, and afterwards passed with certain amendments, in which the senate refused to concur. On March 7, 1913 (the last day of the session), as already stated, it, together with the Bessesen bill, was referred to a conference committee, and finally passed by both the house and the senate. Senate Journal, 1078, 1586, 1596, 1602, 1619; House Journal, 2006, 2064.

A self-executing constitutional provision is said to be "one which supplies the rule or means by which the right given may be enforced or protected or by which a duty may be performed." 8 Cyc. 753. It is a provision which is complete in itself and needs no further legislation to put it into force. Davis v. Burke, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210. But a constitutional provision which merely indicates "a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect," is not self-executing "and will remain inoperative until rendered effective by supplemental legislation." 8 Cyc. 759.

The constitutional provision under consideration in the case at bar provides that "the proposed amendment shall be published as the legislature may provide for three months previous to the general election." This language is prospective. "And constitutional provisions, like statutes, always operate prospectively, and not retrospectively, unless the words used or the objects to be accomplished clearly indicate that a retrospective operation is intended." 8 Cyc. 745; Cooley, Const. Lim. 7th ed. 97. See also 6 R. C. L. 33; Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210. The legislature has enacted no legislation providing for publication of proposed constitutional amendments, nor has it enacted any legislation whatever, for the purpose of putting the constitutional provision involved in this case into effect.

In the opinion prepared by Mr. Justice Birdzell, it is said: "Where constitutional provisions are held to be self-executing, it is in response to the apparent intention of the framers and the people who adopted them "to put it beyond the power of the legislature, to render them nugatory by refusing to enact legislation to carry them into effect."

I have no quarrel with this statement. It is doubtless correct. It is further said: "Until amendments were adopted providing for the initiative and referendum, it was very seldom that express language would be employed to indicate the self-executing character of a particular constitutional provision; but, it would seem, with the advent of the initiative and referendum, it was feared that unless some such provision were contained in the Constitution there was danger that the legislature whose powers were directly involved, and possibly the courts, would make inroads upon the right secured, and it was out of an abundance of caution that such express provisions came to be inserted."

Let us apply this reasoning to the case at bar, and see where it leads. The members of the legislature who considered the constitutional provision involved in this case, also, considered three other measures realting to the initiative and referendum. The other three measues expressly provided that they should be self-executing. One of the three,—relating to initiative and referendum of statutes,—was passed simultaneously with the provision under consideration in this case. The latter measure, as already indicated, not only provided that the secretary of state and other officers should "be guided by the general laws and the act submitting the amendment until legislation shall be specifically provided therefor;" but further expressly declared the amendment to be self-executing. Hence, it is clearly apparent that the legislators of this state were well aware of the fact that by inserting a specific declaration to the effect that a constitutional provision is self-executing they would "put beyond the power of the legislature, to render it nugatory by refusing to enact legislation to carry it into effect." It is also apparent that the framers of three of the measures "feared that unless some such provision were contained in the Constitution there was danger," that some obstacle might be thrown in the way by legislative nonaction or judicial interference. The legislators were not groping in the dark. They were fully alive to the situation. And, being so, they saw fit to exclude from the provision under consideration a declaration to the effect that it was self-executing. They also refrained from providing that the general laws should be applicable to the submission of measures thereunder; but, on the contrary,

expressly provided that *"the proposed amendment shall be published as the legislature may provide for three months previous to the general election."*

It seems to me that the language of the provision under consideration, when construed in light of the history of the enactment thereof, clearly shows that the amendment was not intended to be self-executing.

And the courts have uniformly held that language similar to that just quoted evidences an intention that the provision, in which it is contained, shall not be self-executing.

In State ex rel. Barker v. Duncan, 265 Mo. 26, 175 S. W. 940, Ann. Cas. 1916D, 1, the supreme court of Missouri was called upon to construe the following provision in the Missouri Constitution: "In any county which shall have adopted 'township organization,' *the question of continuing the same may be submitted to a vote of the electors of such county at a general election, in the manner that shall be provided by law;* and if a majority of all the votes cast upon that question shall be against township organization, it shall cease in said county; and all laws in force in relation to counties not having township organization shall immediately take effect and be in force in such county."

The court said: *"It is fairly plain that so much of this section as says* that 'in any county which shall have adopted "township organization" the question of continuing the same may be submitted to a vote of the electors of such county at a general election, *in the manner that shall be provided by law,' is by no possible view, or by any recognized canon of construction, self-executing.* It is equally clear, on the other hand, that so much of this section as provides that, 'if a majority of all the votes cast upon that question shall be against township organization, it shall cease in said county; and all laws in force in relation to counties not having township organization shall immediately take effect and be in force in said county,' is self-executing. *This view is held upon the first proposition, viz., that the portion of this section first above quoted is not self-executing, for reasons that are plain and conclusive. The clause first above quoted does not purport to be self-executing; on the contrary, upon its face and by its very words it specifically relegates to the legislature the duty of providing by law* for the manner of submitting the question of discontinuance of town-

ship organization to the electors of a county having theretofore adopted it. *It would be a contradiction in terms to hold it self-executing and the citation of authority could add neither weight nor clarity to this view.* . . . As stated above, neither authority nor argument can make clearer the patent conclusion that the first clause of § 9 of art. 9, supra, of the Constitution down to the first semicolon is not self-executing, but that it requires legislation to carry it into effect, and that the remainder of this section is self-executing. . . . *The said first clause gave authority to the legislature to provide by a written law for the manner in which the question of continuing township organization should be submitted to the voters; and, since so much of it is not, as we have seen, self-executing, therefore, unless the legislature has by a constitutional statute provided some manner of submitting the question to the voters, it cannot be submitted nor voted on till the legislature does provide a valid law therefor,* and the election held in Butler county would be invalid." The language quoted is directly applicable to the instant case. See also State ex rel. McGee v. Gardner, 3 S. D. 553, 54 N. W. 606.

The supreme courts of California, Ohio and Tennessee, (and, also, the Federal courts), have construed the following constitutional provision: "All courts shall be open and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered thereon without denial or delay. Suits may be brought against the state in such courts and in such manner, as may be provided by law." They all ruled that the provision was not self-executing, so as to authorize suits against the state, but that legislation must first be enacted authorizing such suits to be brought. See People v. Miles, 56 Cal. 401; Melvin v. State, 121 Cal. 16, 53 Pac. 416; Galbes v. Girard, 46 Fed. 500; General Oil Co. v. Crain, 117 Tenn. 82, 121 Am. St. Rep. 967, 95 S. W. 824; Memphis & C. R. Co. v. Tennessee, 101 U. S. 337, 25 L. ed. 960; Raudabaugh v. State, 96 Ohio St. 513, 118 N. E. 102.

The supreme courts of Alabama, Arkansas, Kentucky, Washington and Wisconsin, have all ruled that a constitutional provision, that "the legislature shall direct by law in what manner and in what courts suits may be brought against the state," is not self-executing. Chicago, M.

& St. P. R. Co. v. State, 53 Wis. 509, 10 N. W. 560; Turner v. State, 27 Ark. 337; Ex parte Greene, 29 Ala. 53; Northwestern & P. Hypotheek Bank v. State, 16 Wash. 73, 42 L.R.A. 33, 50 Pac. 586; Tate v. Salmon, 79 Ky. 540. See also Beers v. Arkansas, 20 How. 527, 15 L. ed. 991; Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 94. And this court has held the provision in our state Constitution prohibiting the manufacture and sale of intoxicating liquors as a beverage (State ex rel. Ohlquist v. Swan, 1 N. D. 5, 44 N. W. 492) to be not self-executing. It also has held the provision in § 176 of the Constitution, that "the legislative assembly shall by general law exempt from taxation property used exclusively for school, religious, cemetery, or charitable purposes," not self-executing. Engstad v. Grand Forks County, 10 N. D. 54, 84 N. W. 577.

The majority members invoke the rule that "as between opposing possible constructions one of which will render a given provision operative, and the other of which might tend to defeat its purpose, the former should be adopted. The rule is predicated in turn upon the fundamental rule that the purpose of all judicial construction is to ascertain and give effect to the intent of the lawmakers. If the language used is plain, the lawmakers must be presumed to have intended what they said, and in such case there is no room for construction. But if the language is doubtful, or ambiguous, it becomes the province of the court to ascertain and give effect to the intention of the lawmakers. And, of course, it must be assumed that the lawmakers had some object in view in enacting or proposing a law. Hence, if a situation arises where two constructions are possible, one of which makes the act absurd or meaningless, and another which makes it reasonable and enforceable, it will be presumed that the latter expresses the intention of the lawmakers. This is merely common sense, and no one has denied the correctness of the rule, when properly invoked. But it manifestly has no application in the instant case. For no one has ever contended that the constitutional provision involved in this case is meaningless or inoperative as a constitutional provision. On the contrary, this court in State ex rel. Linde v. Hall, expressly recognized it to be a part of the fundamental law of the state, and as such operative as a basis for appropriate legislation. The rule invoked does not mean that the court

may in any case invade the province of the legislature, and under guise of construction, substitute the ideas of the judges for the ideas of the lawmakers, or speak upon a subject upon which the lawmakers have not spoken. For at the very basis of our governmental existence lies the rule that the courts may construe and interpret, but may never make, laws.

It is suggested that the constitutional amendment involved in this case should be read in connection with and in effect considered a part of the one relating to the initiative and referendum of statutes. Can anyone believe that the legislators who proposed the two amendments had any such intent? It seems to me that the answer is obvious. It is true the initiative, referendum, and recall have frequently been embraced in one constitutional amendment. It is well to remmber that the primary purpose of such amendments is to reserve to the people certain governmental powers. The fact still remains that the enactment of a statute is one thing, and the amendment of the Constitution quite another. In this state the framers of the Constitution clearly indicated that they considered the two matters essentially different. So did the man who framed, and the legislators who proposed, the two amendments. Not only did they refrain from including both propositions in one amendment, but they clearly indicated that the procedure in the two matters should be different. Thus, they provided that statutes may be initiated upon a petition signed by ten per cent of the legal voters in a majority of the counties; but that no constitutional amendment can be initiated except upon a petition signed by at least twenty-five per cent of the legal voters in not less than one half of the counties in the state; they placed no restriction upon the time during which notice of the submission of an initiated statute must be published, but they expressly provided that notice of the submission of an initiative constitutional amendment must be published at least three months prior to the general election at which it is submitted to the electors.

But even though the procedural matters in the amendment relative to the initiative of statutes be deemed applicable to the initiation of constitutional amendments, the result is not changed. For the fact remains that the only portion of the machinery therein specifically pro-

vided for which is at all applicable is that prescribing the form of the enacting clause of initiated measures. And in the case at bar, (as stated in the opinion of Mr. Justice Grace), the petitions contain there is no enacting clause whatever.

It is stated that constitutional provisions relating to the initiative and referendum have generally been held to be self-executing. In support of this statement reference is made to the decisions of the supreme courts of Arkansas, Michigan, and Oregon. An examination of the cases cited and the constitutional provisions construed therein will disclose not only that the cases are distinguishable from the instant case, but that the reasoning adopted by the courts therein tends to support the conclusions reached by this court in State ex rel. Linde v. Hall rather than the conclusions reached by the majority in the instant case. The constitutional provisions of Arkansas and Oregon were similar. They both contained the express declaration that the secretary of state and other officers, in submitting initiated or referred measures to the electors, "shall be guided by the general laws and the acts submitting this amendment until legislation shall be specially provided therefor." Not only is this language absent from the provision involved in this case, but in place thereof it is stated that "the proposed amendment shall be published as the legislature may provide for three months previous to the general election." It will also be noted that our legislature used the very language contained in the Arkansas and Oregon Constitutions in the provision relating to initiating statutes,—which latter provision was intended to be self-executing.

The section of the Michigan Constitution which was held to be self-executing is one of the most complete on the subject which I have found. It prescribed the procedure in detail. It even provided that "each signer thereto shall add to his signature, his place of residence, street, and number in cities having street numbers, and his election precinct." It further prescribed the qualifications of those entitled to circulate petitions, and the form of the affidavit to be attached to the petitions. It is unnecessary to enter into any further discussion of the Arkansas, Michigan and Oregon decisions. What has been said demonstrates the radical difference between the constitutional provisions construed in these decisions, and the provision involved in the case at bar.

I have referred to some of the language in, and the legislative history of, the provision before us. There are other features of the provision which tend to show that the legislature had no intention that the provision should be self-executing. These were all considered in the opinions filed in State ex rel. Linde v. Hall, and I shall not again refer to them here. And while the majority members have no hesitancy in holding all these considerations to be without merit and find that the legislators intended the provision to be self-executing, it is at least interesting to note that Mr. Blakemore, one of the legislators who took an active part in the proceedings which led to the enactment of the provision before us, and who participated in the discussion of the various measures in the house of representatives, has denied that the legislators had any such intent as the majority attribute to them. In an interview published on the Fargo Forum, April 11, 1916, Mr. Blakemore, expressed the following views:

"Intent of legislature clear.

"That the legislature intended, when it passed the two separate initiative and referendum acts—one applicable to statutes and the other applicable to the Constitution—that the legislature should provide machinery to govern an initiative movement, is clearly indicated by a comparison of the two measures.

"The initiative and referendum as applied to statutes carried the following provision.

" 'This amendment shall be self-executing, but legislation may be enacted to facilitate its operation.'

"No such provision is made in the amendment to the Constitution governing the initiative of future amendments to the Constitution.

"Up to the legislature.

"Not only does the constitutional initiative amendment fail to provide for the self-operative feature—but it expressly provides that the legislature shall provide the machinery to make it operative.

"Such provision is made in the second article of § 202, of the Constitution, as amended, as follows:

" 'When such petition had been properly filed the proposed amendment or amendments shall be published as the legislature may provide.'

"The 1915 legislature made no provision for such publication.

"Percentage a mere restriction.

"Again, the Constitution, as amended, says:

" 'Any amendment or amendments to this Constitution may also be proposed by the people by the filing with the secretary of state, at least six months previous to the general election, of an initiative petition of at least twenty-five per cent of the legal voters in each of not less than one half of the counties of the state.'

"The amendment does not give the secretary of state or anybody else, authority to submit to a vote, any measure that may be initiated on a twenty-five per cent vote.

"The Constitution simply fixes twenty-five per cent as the minimum petition that may be required by the legislature in any measure that it might have passed to govern an initiative constitutional amendment election.

"That the legislature did not intend to make the twenty-five per cent feature operative through the amendment only is illustrated by comparison with the provision for the referendum of statutes—a portion of the amendment relating to the statutes, and which is self-operative, as expressly provided, being as follows: 'Any measure or any parts, items or section of any measure passed by the legislative assembly either by a petition signed by 10 per cent of the legal voters of the state from a majority of the counties. . . .'

"The express provision is made in this instance for the ten per cent feature.

"The constitutional initiative clause says 'at least twenty-five per cent,' but leaves it open for the legislature to say just what percentage of voters shall be required."

(In the concluding part of the interview comparison was drawn between the constitutional amendment providing for initiation of constitutional amendments, and the one adopted by the same legislature

authorizing the legislature to erect, purchase, or lease terminal grain elevators, "to be maintained and operated in such manner as the legislative assembly shall prescribe," which latter amendment, concededly, was not self-operative.)

But while the majority members hold that the provision was self-executing, this holding is in effect repudiated by them. For they proceed to apply certain statutes which were in existence at the time the constitutional provision was adopted. Of course, if the provision was self-executing it would be possible to put it into operation without any legislation whatever. But the majority members in effect admit that the provision standing alone furnishes no method by which the policy therein declared may be carried into effect. The statutes which the majority members may furnish the proper machinery for putting the provision under consideration into operation are §§ 3188 and 979, Comp. Laws 1913. Section 3188, reads: "Whenever any amendment to the Constitution of this state is referred to the legislative assembly to be chosen at the next general election after the session in which such amendment is first proposed, the same shall be published for three months previous to the time of making such choice in one weekly paper in each county in which a weekly paper is published, once in the first month, once in the second month, and four times in the third month."

Section 979, reads: "Whenever a proposed constitutional amendment or other question is to be submitted to the people of the state for popular vote the secretary of state shall, not less than thirty days before election, certify the same to the auditor of each county in the state and the auditor of each county shall include the same in the publication provided for in § 975. Questions to be submitted to the people of the county shall be advertised as provided for nominees for office in such section."

Section 975 referred to in § 979, requires that ten days before an election, notice thereof shall be given by the county auditor, by publishing in one or more newspapers in the county, or if there is no newspaper published, then by posting notices thereof at three public places in each precinct. All of these sections were enacted in 1891. They were enacted to furnish the necessary machinery for the submission of constitutional amendments proposed by the legislature. At the time

they were quoted, the initiative and referendum were strangers to the legislative and constitutional annals of this state. These sections are now applied for a purpose which the legislators who adopted them never contemplated. These laws related to the following constitutional provision only: "Any amendment or amendments to this Constitution may be proposed in either house of the legislative assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on the journal of the house with the yeas and nays taken thereon, and referred to the legislative assembly to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice, and if in the legislative assembly so next chosen as aforesaid such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislative assembly to submit such proposed amendment or amendments to the people in such manner and at such time as the legislative assembly shall provide. . . ." Const. § 202. It will be noted that while this constitutional provision directs that a proposed constitutional amendment "shall be published, as provided by law, for three months previous" to the election at which the members of the legislative assembly to whom the proposed amendment has been referred are chosen it prescribes no length of time for the publication thereof prior to the time of its submission to the people for approval but this is left solely for legislative determination. The legislature directed that such notice be published at least ten days previous to the election. On the other hand, the constitutional provision relating to publication of constitutional amendments proposed by initiative petition states in positive terms that such amendment "shall be published as the legislature may provide for three months previous to the general election. The only authority given to the legislature is to provide the manner of publication. The necessity of publication, as well as the minimum length of time during which publication must be made, is determined by the constitutional provision. The legislature is given no right, either to dispense with publication or permit publication for a lesser time than that prescribed, but such amendment must be published for a period of at least three months

previous to the election. The requirement that a proposed amendment "shall be published as the legislature may provide for three months previous to the general election" is a command addressed to the legislature, and a limitation upon its authority with respect to such publication; i. e., the framers of the constitutional provision and the people who adopted it said to the law-making body: "We authorize you to prescribe the mode and manner in which proposed amendments shall be published, and to designate a proper administrative officer, or officers, to cause such publication to be made, but you must in all events cause the same to be published for at least three months previous to the election." Where a constitutional amendment is proposed by the legislature, it is proposed by representatives of the people and is printed in the proceedings of the legislative assembly, as well as among the legislative acts of that body. This takes place over a year and a half before the next legislative assembly is chosen. The proposed constitutional amendment is then published as required by law for three months previous to the election at which the members of the next legislative assembly are chosen, in order that the people may have further notice before choosing the members of such assembly that the proposed amendment has been referred to and will be voted upon by the legislators so chosen. The proceedings with reference to the amendment will appear in the house and senate journals. And, if passed, the amendment is again printed in full among the acts of the legislative assembly. And the legislature has further provided that notice of its submission must be given by publication in each county in the state for at least ten days previous to the election at which it is submitted to the electors for adoption. An amendment proposed under this method remains pending for a considerable length of time, and necessarily is afforded a great deal of publicity. But when an amendment is proposed by initiative petition, it emanates not from any chosen representatives of the people, but from those who prepare, circulate, or sign such petitions. Such amendment is not only submitted to the people at the following general election, but if adopted, is referred to the legislative assembly chosen at that same election. In order that intelligent action may be taken by the voters, they must be informed in regard to the proposed amendment, and so it is provided that an amendment proposed by initiative

petition "shall be published for three months previous to the general election." Under these circumstances, can it be said that the laws adopted by the legislature in 1891 providing for publication of constitutional amendments proposed by the legislature constitute an expression of the legislative intent as to the method and manner in which constitutional amendments proposed by initiative petition under a constitutional provision proposed in 1911, and adopted by the people in 1914, ought to be published? The answer seems obvious.

The assertion that certain portions of § 3188, Comp. Laws 1913, may be rejected as surplusage is so manifestly unsound that it answers itself. The fundamental differences between the two methods of proposing constitutional amendments cannot be reconciled by the elimination of words. And no number, or use, of words can conceal or alter the fact that the publication prescribed by § 3188 had reference only to a publication to be made interim the proposal of a constitutional amendment by one legislative assembly and the election of the members of the legislative assembly to which the proposed amendment was referred. This was the situation which the legislative mind contemplated at the time of its enactment, and that situation has existed at all times since it became part of the laws of this state. If the portions of the statute making it applicable to this situation are rejected "as surplusage," its very framework is removed. As was pointed out by this court in Wyldes v. Patterson, 31 N. D. 282, 323, 153 N. W. 630, the adoption of such method in construing laws would indeed lead to startling results. It is somewhat similar to the method utilized by the atheist who invoked the aid of the Bible in proving that there was no God. He quoted the clause, "There is no God," from the 14th Psalm, when the complete sentence reads: "The fool hath said in his heart, there is no God." Wyldes v. Patterson, 31 N. D. 323, 153 N. W. 630.

Let us compare the conclusion reached by the majority members in this case with the conclusions reached by the different courts, which have construed the constitutional provisions to the effect that "suits may be brought against the state, in such courts and in such manner as may be provided by law." Such provisions were doubtless the announcement of a constitutional policy, and evinced an intent that the state should be subject to suit. In all of the states, there were, of

course, statutes defining rights, and prescribing remedies as between private parties. These different statutes evidenced the legislative intent as to in what courts and in what manner persons might vindicate their legal rights. If the deductions of the majority members in the instant case are sound, it would seem that existing statutes relative to the manner of maintaining civil actions as between private persons should also have been deemed applicable to an action against the state.

And so in State ex rel. Barker v. Duncan, 265 Mo. 26, 175 S. W. 940, Ann. Cas. 1916D, 1, there were of course statutes in Missouri providing for elections. And if the reasoning of the majority members in the instant case is sound, the Missouri court should have held such statutes applicable to an election to be held on the question of township organization.

It, also, seems to me that the reasoning of the majority members is directly in conflict with the reasoning adopted by this court in Cahill v. McDowell, 40 N. D. 625, 169 N. W. 499. That case involved a primary election for the location of a county seat. Under the statute nominating petitions are filed, and the names of the towns contending for the location of the county seat are placed upon a ballot to be voted at the primary election and the two receiving the highest number of votes are placed upon the official ballot at the general election. The legislature failed to make any specific provision for the contest of such primary election. There were, however, statutes already in existence providing for the contest of nominations of candidates for office at primary elections. There were also statutes providing for contesting general elections for removal of county seats. But this court in a unanimous decision (concurred in by all the majority members) held those latter statutes inapplicable to a primary election held under the first mentioned statute. It seems to me that the reasoning in the case cited is directly contrary to the reasoning on which the majority members base their conclusion in the case at bar.

Here I close my opinion. Inasmuch as I believe that the relator is entitled to the relief sought upon the authority of State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281. I express no opinion upon the question whether the failure to enter a proposed constitutional amend-

ment in full upon the journal of the house of its origin renders it invalid.

This opinion has become more extended than I intended it to be. But I could hardly say less in view of the gravity of the questions involved. With all due regard to the opinions of the majority members, I regard their decision as a step backward. I regard it as an invasion by the judiciary of the legislative department of the government. It is needless to say that I fully agree with the majority members that the people have the right to alter and reform their government. No one who believes in the American principles of government has ever denied this. Let all admit what none deny, that the collected will of the people, expressed in the manner they have designated in the fundamental law, is supreme. But our government was, and is, founded upon a written Constitution, which contained and contains within itself a provision for its own amendment. Its provisions are declared to be "mandatory and prohibitory unless, by express words, they are declared to be otherwise." N. D. Const. § 21. Ours is a government by law, and not by man. It is based upon principles of right, and not of might. Our Constitution is a compact among all the people. It is equally binding upon all,—the majority as well as the minority. No man is so high as to be above the Constitution, and no one so low as to be beneath its protection. The minority, nay every individual citizen, has a right to insist that its provisions shall not be altered except in the manner agreed upon in the Constitution itself. These principles have been recognized not only by our courts, but have been voiced by the men who "made and preserved us a nation."

The following words of Washington and of Lincoln are as true to-day, as when they were uttered: "The basis of our political systems is the right of the people to make and alter their Constitutions of government. But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."

STATE OF NORTH DAKOTA EX REL. WILLIAM LANGER, Attorney General, Petitioner, v. THOMAS HALL, as Secretary of State, Respondent.

(173 N. W. 763.)

States — bond issues — limit of indebtedness — constitutional provisions.

1. Section 182 of the Constitution as amended construed, and *held* to authorize the issue of $2,000,000 of bonded indebtedness, unsecured except by the faith and credit of the state of North Dakota, in addition to $412,000 of existing bonded indebtedness.

Mandamus — grounds — certification of bond as within debt limit.

2. Thomas Hall, as secretary of state having refused to attest and certify that certain bonds in the sum of $2,000,000, issued pursuant to law by the governor and treasurer of the state of North Dakota, were within the debt limit, a petition was presented to this court on behalf of the state that a writ of mandamus issue out of this court requiring and commanding him to do so. *Held*, that it is proper that the writ of mandamus should issue in this case.

(Opinion filed June 14, 1919.)

Wm. Langer, Attorney General, *Geo. K. Foster,* Assistant Attorney General, and *Albert E. Sheets, Jr.* Assistant Attorney General, for petitioner.

W. H. Stutsman, for respondent.

GRACE, J. This is an application to this court for an alternative writ of mandamus against Thomas Hall as secretary of state of the state of North Dakota, demanding and directing him to attest and certify to certain bonds. A preliminary statement of the matters involved in the petition will aid in understanding the issues involved.

It is provided by § 187 of the Constitution of the state of North Dakota that no bond nor evidence of indebtedness of the state shall be valid unless the same shall have indorsed thereon a certificate which shall be signed by the auditor and secretary of state, which shall show that the bond or evidence of debt is issued pursuant to law and is with-

NOTE.—The question of mandamus to compel issuance of bonds of municipality or other public corporation is discussed in a note in L.R.A.1916C, 414.

in the debt limit. Section 182 of the Constitution of the state of North Dakota as it originally was enacted and before its amendment was as follows:

"The state may, to meet casual deficits or failure in the revenue or in case of extraordinary emergencies, contract debts, but such debts shall never in the aggregate exceed the sum of $200,000 exclusive of what may be the debt of North Dakota at the time of the adoption of this Constitution. Every such debt shall be authorized by law for certain purposes to be definitely mentioned therein, and every such law shall provide for levying an annual tax sufficient to pay the interest semiannually, and the principal within thirty years from the passage of such law, and shall specifically appropriate the proceeds of such tax to the payment of said principal and interest and such appropriation shall not be repealed nor the tax discontinued until such debt, both principal and interest, shall have been fully paid. No debt in excess of the limit named shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for public defense in case of threatened hostilities; but the issuing of new bonds to refund existing indebtedness shall not be construed to be any part or portion of said $200,000."

Section 182 as it now stands after being amended is as follows:

"The state may issue or guarantee the payment of bonds, provided that all bonds in excess of $2,000,000 shall be secured by first mortgages upon real estate in amounts not to exceed one half of its value; or upon real and personal property of state-owned utilities, enterprises, or industries, in amounts not exceeding its value and provided further that the state shall not issue or guarantee bonds upon the property of state-owned utilities, enterprises, or industries in excess of $10,000,000. No further indebtedness shall be incurred by the state unless evidenced by bond issue which shall be authorized by law for certain purposes to be clearly defined. Every law authorizing a bond issue shall provide for levying an annual tax or make other provision sufficient to pay the interest semiannually and the principal within thirty years from the passage of such law and shall specially appropriate the proceeds of such tax or of such other provisions to the payment of said principal and interest and such appropriation shall not be repealed or the tax or

other provisions discontinued until such debt, both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for the public defense in case of threatened hostilities."

The legislature of 1919 passed House Bill No. 49, which was an act providing for the issuing of bonds of the state of North Dakota in the sum of $2,000,000 to be known as "Bonds of North Dakota Bank Series;" such acts prescribed the terms and stated the purposes of the bonds. It provided a tax and made other provisions for the payment thereof. It made appropriations for the payment of said bonds and to carry into effect the provisions of the act and declared the act to be an emergency measure. Section 1 of said act is as follows:

"The state treasurer is hereby directed forthwith to prepare for issue and the governor and the state treasurer are hereby authorized, empowered, and directed to issue negotiable bonds of the state of North Dakota in the aggregate amount of $2,000,000. They shall be issued by the governor and the state treasurer under the great seal of the state and shall be attested by the secretary of state. The auditor and secretary of state shall indorse and sign on each bond a certificate showing that it is issued pursuant to law and is within the debt limit. The bonds so issued shall be designated "Bonds of North Dakota Bank Series."

The state treasurer of the state of North Dakota prepared the bonds for issue. The governor and the state treasurer of the state of North Dakota authorized and directed that there be issued said bonds of the state of North Dakota in the aggregate amount of $2,000,000 and in pursuance of such direction and authorization the governor and state treasurer of the state of North Dakota have each executed said bonds in accordance with the provisions of said law. On the 26th day of May, 1919, in compliance with the requirements of the law, the bonds in question were presented to Thomas Hall, secretary of state, for the purpose of obtaining the attestation and certification on each bond showing that the same was issued pursuant to law and was within the debt limit as is required by § 1 of the law in question and as required by § 182 of the state of North Dakota as amended. Thomas Hall, as

secretary of state of the state of North Dakota has failed, neglected, and refused to attest and certify said bonds as required by the law in question and the Constitution as amended, and continues at this time to refuse to do so.

It is clear that it will be necessary for this court to construe § 182 of the organic law as amended or so much thereof as is material to the matters at issue herein and also necessary to construe the law known as House Bill No. 49 relating to bonds of North Dakota. The law in question is based upon said § 182 of the organic law as amended. It is conceded that prior to the passage of the act in question there was an outstanding bonded indebtedness of the state of North Dakota of approximately $412,000. The contention of Hall is that the meaning of the act and of § 182 of the Constitution as amended is that the state may issue or guarantee the payment of bonds to the extent of $2,000,000 without such bonds being secured otherwise than by the faith and credit of the state of North Dakota; that there should be deducted from said $2,000,000 the outstanding bonded indebtedness for the state of North Dakota, approximately the sum of $412,000 leaving a balance of $1,588,000 in bonds which could be issued by the state of North Dakota pursuant to the act under consideration and § 181 of the Constitution as amended and that as to such balance he conceded in oral argument before this court he is ready and willing to make the proper attestation and certification as required by the act in question. He contends in his brief, however, that the proposed issue of $2,000,000 of unsecured bonds is wholly illegal, in that the act providing for the creation of the Bank of North Dakota authorizes the Bank of North Dakota to begin doing business only when bonds to that amount are deposited with the industrial commission for that purpose; that after the deduction of $412,000 of bonded indebtedness theretofore existing which he claimed must be deducted from the proposed $2,000,000 unsecured bond issue, there will not be $2,000,000 of unsecured bonds to deposit with said bank. The state, however, contends it has the right under said act to issue bonds to the extent of $2,000,000, unsecured except by the faith and credit of the state, exclusive of or in addition to the $412,000, the present bonded indebtedness.

In so far as Hall as secretary of state declined to sign the bonds in

question in excess of $1,588,000 in the belief and conviction that the amount of bonds last mentioned was all that could legally be issued when there was added to that amount the bonded indebtedness theretofore existing of $412,000, and he further believed and had conviction in his own mind that the $1,588,000 of said bonds was all that could be issued within the debt limits above referred to, and if he acted upon such belief and conviction he was acting in good faith in refusing to sign bonds in excess of that amount. If he refused to sign any of said bonds though he might legally have signed $1,588,000 of such bonds, all of which under his own theory of the case and as he conceded in oral argument would be within the debt limit, it cannot be said he exercised good faith. If he declined to sign all the bonds on the theory advanced in his brief that the proposed issue of $2,000,000 of unsecured bonds is wholly illegal in that the Bank of North Dakota could not begin doing business until $2,000,000 had been deposited with the industrial commission for that purpose, and that there would not be $2,000,000 for that purpose after deducting $412,000 of existing bonded indebtedness, he was not then acting in good faith. It was no part of his executive duties as secretary of state to determine under what conditions the Bank of North Dakota might be legally qualified to commence business. It is true there must be $2,000,000 of bonds deposited with the industrial commission for that purpose before the Bank of North Dakota can commence business. The law does not say, however, that all of such bonds shall be deposited at one time. The limitation is that they shall be deposited before the bank commences business. The $1,588,000 of bonds that Hall concedes he is ready and willing to certify are within the debt limit, and thus were good, sufficient, and legal bonds, while not enough in amount under defendant's theory to authorize the Bank of North Dakota to commence business, were nevertheless valid bonds to be deposited with the industrial commission for that purpose, and if those bonds were within the debt limit and this, defendant concedes, he could not conscientiously and in good faith decline to attest and certify them as required by law. The fact that the amount of bonds which under his theory he could legally certify as within the debt limit was less than $2,000,000, could in no manner justify his refusal to place his certificate thereon as required

by law upon all the bonds which under his theory he concedes are within the debt limit.

Hall appears to have had two theories, viz.: that the proposed bond issue would not be wholly void, but was void only as to the bonds in excess of $1,588,000. It must be conceded, therefore, that Hall knew at all times under this theory that he could legally attest and certify to $1,588,000 of the bonds. He conceded in the argument before this court that he was willing to do so. He never did at any time sign the amount of bonds which he now claims he is willing to sign, and which under that theory he could legally sign. His other theory is that all of the proposed $2,000,000 issue of bonds was void as the bonds which could be legally issued under his theory did not amount to $2,000,000, the amount required before the Bank of North Dakota could commence business. He had refused to sign any bonds until the time the matter was presented to this court, at which time he conceded he would sign the bonds to the amount of $1,588,000.

The main question to be determined in this case is: What is the debt limit under § 182 of the Constitution as amended? The state contends it is $2,000,000 in addition to the existing bonded indebtedness. The defendant contends it is $2,000,000 less $412,000 of existing bonded indebtedness.

After careful and painstaking examination of the whole subject-matter of the controversy, we are firmly convinced that the contention of the state must be sustained. Every voter in the state who voted upon § 182 as amended must have understood and been cognizant of the existing indebtedness. There is nothing in the language of § 182 as amended to indicate that any of the then existing bonded indebtedness was to be deducted from or be considered as part of the $2,000,000. As we view the matter, the existing indebtedness was not intended to be included in § 182 as amended, there being no expressed statement to that effect included therein. In order to include existing indebtedness amended § 182 should have expressly so stated. It not having expressly so stated, we are of the opinion and so hold that the $2,000,000 of bonds which the state may issue or guarantee the payment of, are in addition to existing indebtedness. Eastern Kentucky Lunatic Asylum v. Bradley, 101 Ky. 551, 41 S. W. 556; Rhea v. Newman,

153 Ky. 604, 44 L.R.A.(N.S.) 989, 156 S. W. 154; Re Menefee, 22 Okla. 365, 97 Pac. 1014; 12 C. J. 714.

The language of the amended § 182 quite plainly indicates that the $2,000,000 bonded indebtedness in bonds which may be issued or guaranteed contemplated new contracts. The language referred to is as follows: "The state may issue or guarantee the payment of bonds provided that all bonds in excess of $2,000,000 shall be secured by first mortgages, etc."

The word "may" as used in said section indicates both permission and power to do the acts therein designated. We are impressed with the view that the meaning of that part of the section as a whole, which we have quoted, relates to future acts to be done by the state. Especially is this view convincing when contemporaneous history is taken into consideration and if resort may properly be had to contemporaneous history to aid in the construction of a law or constitutional requirement, there certainly never was a case to which it is more applicable than this. That there is a specific and well-understood economic program authorized by a large majority of the people to be carried out in this state, is well known or should be well known to every citizen of this state. Such a program has been authorized by several constitutional amendments as well as by the legislature. It is not at all necessary to state what the economic program is. It has been widely and persistently discussed in the press and from the platform by public speakers. The establishment of the Bank of North Dakota as a convenience and aid to assist in the initiating and carrying out of that program, constitutes an important element in accomplishing that result. It constitutes part of the machinery necessary to be used in the execution of the program. The execution of the program requires the use of large sums of money. The sixteenth legislature of North Dakota enacted the law providing for the creation of the Bank of North Dakota as an agency to facilitate and assist in carrying out that program. The purpose for which the bank is created is plainly stated in § 1 of the act creating it. Section 1 thereof is as follows: "For the purpose of encouraging and promoting agriculture, commerce and industry, the state of North Dakota shall engage in the business of banking and for that purpose shall and does hereby establish a system of banking

owned, controlled, and operated by it, under the name of the Bank of North Dakota." In it is required to be deposited all state, county, township, municipal, and school district funds and funds of penal, educational, and industrial institutions. It may make loans to counties, cities, or political subdivisions of the state or to state or national banks, but it may not loan or give its credit to any individual association or private corporation except that it may make loans to an individual association or private corporation secured by duly recorded first mortgage or real estate in the state of North Dakota in amounts not to exceed one half of the value of the security and it may loan upon warehouse receipts issued by the industrial commission or by any licensed warehouse within the state in amounts not to exceed 90 per cent of the value of the commodities evidenced thereby. It may not loan, however, on real estate more than 30 per cent of its capital nor 25 per cent of its deposits.

It will thus be seen that the state is establishing the Bank of North Dakota as a fiscal agency for the transaction of its own business and as a fiscal agent for other purposes. It becomes, therefore, an important agency and means of properly carrying out the economic program which has been authorized by the people, and is a means to safeguard the interest of the people and provides a safe depository for the funds in question, and one from which strict accountability may be required, as its accounts will be subject to the same examination, as any other private banking institution of this state, by public examiner.

In this view of the situation and the almost universal knowledge of the people of this state of the proposed economic program, we are convinced that the authorization of the $2,000,000 of bonds related exclusively to future acts and contracts, and did not include the existing bonded indebtedness. We are fully convinced that the people so understood and construed § 182 as amended at the time they voted for its adoption.

Another view which lends strength to the view which we have taken is found in the fact that the sixteenth legislative assembly which enacted House Bill 49 and House Bill 18, which is the bill authorizing the Bank of North Dakota, and in other legislation enacted by it which was intended to carry out the economic program in question, in effect,

construed § 182 as amended to mean that in addition to the existing bonded indebtedness, the state could issue $2,000,000 of bonds unsecured otherwise than by faith and credit of the state of North Dakota, and that $2,000,000 of bonds in excess of the existing bonded indebtedness could be issued, and they would be within the debt limit.

We are fully satisfied from the foregoing that the writ of mandamus should at once issue; that Thomas Hall as secretary of state should be required thereby to subscribe his name to each of said bonds in the manner required by law, and that he should be required to properly attest each of the bonds in question to the full amount thereof of $2,000,000; that he shall attach to each and all of said bonds his certificate that the same is issued pursuant to law and is within the debt limit of the state of Norh Dakota. It is so ordered.

BRONSON, J., concurs.

BIRDZELL, J. (concurring). In 1916–1917 the state Constitution was amended so that its provisions with respect to the public debt read as follows:

"Section 182. The state may issue or guarantee the payment of bonds provided that all bonds in excess of two million dollars shall be secured by first mortgages upon real estate in amounts not to exceed one half of its value; or upon real and personal property of state-owned utilities, enterprises or industries, in amounts not exceeding its value, and, provided further, that the state shall not issue or guarantee bonds upon property of state-owned utilities, enterprises, or industries in excess of ten million dollars.

"No future indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes, to be clearly defined. Every law authorizing a bond issue shall provide for levying an annual tax, or make other provisions, sufficient to pay the interest semiannually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax, or of such other provisions, to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt,

both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for the public defense in case of threatened hostilities.

"Section 183. The debt of any county, township, city, town, school district or any other political subdivision shall never exceed five per centum upon the assessed value of the taxable property therein; provided, that any incorporated city may, by a two-thirds vote, increase such indebtedness three per centum on such assessed value beyond said five per centum limit. In estimating the indebtedness which a city, county, township, school district or any other political subdivision may incur, *the entire amount of existing indebtedness, whether contracted prior or subsequent to the adoption of this Constitution shall be included:* provided, further, that any incorporated city may become indebted in any amount not exceeding four per centum on such assessed value without regard to the existing indebtedness of such city, for the purpose of constructing or purchasing waterworks for furnishing a supply of water to the inhabitants of such city, or for the purpose of constructing sewers and for no other purpose whatever. All bonds or obligations in excess of the amount of indebtedness permitted by this Constitution, given by any city, county, township, town, school district, or any other political subdivision shall be void."

Section 183 has been a part of the Constitution from the beginning, but the portion of the article preceding it takes the place of § 182 as it originally stood. Prior to the amendment the state was indebted on account of the assumption of territorial indebtedness and other items to the extent of $412,000. The sole question here is the constitutionality of § 1 of House Bill 49, which direct certain officers to issue negotiable bonds of the state in the aggregate amount of $2,000,000. The petitioner contends that it is the ministerial duty of the secretary of state, under the act referred to, to attest the bonds; but the respondent contends that to do so would involve a violation of the Constitution, as amended, in that it would result in the creation of an unsecured bonded indebtedness greater than that authorized by the Constitution.

The question can only be resolved by a construction of those provisions of the existing Constitution which are above set forth. These provisions constitute the fundamental law of the state on the subject of public indebtedness and they must be so construed that the purpose therein manifested may be subserved and the meaning given effect. The Constitution says that the state may issue or guarantee the payment of bonds provided that all bonds in excess of $2,000,000 shall be secured, etc. Does this language relate in any way to bonds already issued? That is the question. The language of the first clause is both permissive in form and indicative of future acts, and it would seem to be clear that the bonds referred to in the second clause are such as may be issued or guaranteed by the state under the first clause. In other words, it is as though it were stated, "The state may issue or guarantee the payment of bonds, provided that all bonds (so issued or guaranteed) in excess of $2,000,000 shall be secured," etc. Gray, in his work on Limitations of Taxing Power & Public Indebtedness, says that constitutional debt limits are not retrospective in any sense except when expressly made so. § 2156. It would seem to be clear, that the constitutional permission to issue or guarantee unsecured bonds is a permission to be exercised without regard to existing indebtedness unless the intention to qualify the authority by acts done in the past is indicated. Such an intention is not expressed in the Constitution, nor can it be clearly implied from any of its provisions.

The true implication is, in fact, contrary to the respondent's contention. It will be noted that § 183, which limits the debts of municipal subdivisions to 5 per centum upon the assessed value of the taxable property, expressly provides that in estimating the indebtedness "the entire amount of existing indebtedness, whether contracted prior or subsequent to the adoption of this Constitution, shall be included." The absence of any such language in § 182, as amended, rather implies that outstanding indebtedness was not to be considered as embraced within the $2,000,000 unsecured issues authorized.

The reasoning employed by Chief Justice Christianson in his dissenting opinion in the case of State ex rel. Byerly v. State Canvassers, ante, 126, 172 N. W. 105, with reference to the different methods of expressing the requirement of the number of votes necessary to carry

constitutional amendments is directly applicable here. It was there held that an amendment providing for future amendments to the Constitution by the process of initiative, which required a majority of all the votes cast at the general election, showed a purpose to distinguish between the number of votes required for passing such an amendment and the number required for passing an amendment proposed by the legislature as previously expressed in the Constitution, where it was provided that such amendments were passed by the favorable vote of a majority of the electors voting thereon. In other words, it was submitted in that opinion that the failure to reincorporate in the amendment providing for initiatory amendments the express statement originally contained in the Constitution, with respect to the number of votes required to pass amendments submitted by the legislature, indicated an intention to differentiate between the two. This reasoning, persuasive as it is, was not considered by the majority to be applicable to the question then in hand, for the reason that the language employed in the amendment to express the requirement had been repeatedly construed by the court previous to its adoption in the amendment. In the light, however, of the general principle that constitutional limitations upon the power to incur indebtedness are prospective in their operation, and of the further fact that where it is desired to limit authority to incur indebtedness by reducing it to the extent of outstanding indebtedness expressions to that effect are generally employed, the reasoning of the Chief Justice in the case referred to applies with peculiar force to such a situation as is here presented.

Reading §§ 182 and 183 of the Constitution, as it now stands, together, it appears to me that the failure to incorporate in § 182 any language referring to existing indebtedness of the state, such as is found in § 183 with respect to the minor municipalities, taken together with the fact that the language of § 182 is permissive and prospective and, as such, applicable only to future issues and guaranties, I am of the opinion that the authority therein conferred is not reduced by the amount of outstanding indebtedness. I am consequently of the opinion that § 1 of House Bill No. 49 is constitutional and that the writ should issue.

ROBINSON, J. (concurring specially). The purpose of this suit is to mandamus Thomas Hall, as secretary of state, to sign and certify state bonds pursuant to an act providing for the issuing of state bonds in the sum of $2,000,000, to be known as "Bonds of North Dakota, Banking Series." This act was passed with an emergency clause by two-thirds majority of the senate and house of representatives. It was passed pursuant to this amendment:

"The state may issue or guarantee the payment of bonds, provided that all bonds in excess of two million dollars shall be secured by first mortgages upon real estate in amounts not to exceed one half of its actual value, or upon real and personal property of state-owned utilities, enterprises, or industries in amounts not to exceed its value, provided, further, that the state shall not issue or guarantee its bonds upon property of state-owned utilities, enterprises, or industries in excess of ten million dollars."

On this amendment the vote was: Yeas, 46,000; nays, 34,000. On the amendment for public ownership, the yeas were 47,000, nays, 32,000. On the amendment for initiative and referendum the yeas were 50,000 and the nays 31,000. Under those amendments the state is free to issue bonds and to pursue any industry. The bonding amendment is broad and liberal, and not in any way narrow or contracted. It relates wholly to the future, and not to the past. It declares that the state may issue bonds and then it imposes the limitations, which are that all bonds in excess of $2,000,000 shall be secured, the manifest purpose of which was to authorize the several bond issues regardless of any prior indebtedness. In construing a remedial statute, we must consider the old law, the mischief, and the remedy. Under the old law the state was prohibited from engaging in any industry or enterprise, and accordingly the power to contract debts was limited to the small sum of $200,000, but under the new amendment the old limitations and hamperments are no more. Now the state and any county or city may engage in any industry, enterprise, and business. And as no limitations are placed on the manner of doing any business, of course the state may adopt the usual business methods, which include the borrowing of money and the adaptation of means to ends. The amendments which permit and invite the state, which make it the duty

of the state to engage in business and enterprises, must be liberally construed altogether, so as to impose no handicaps on the state. It must be entirely free to adopt every means and method which may be necessary to business success. The state and the several counties and cities are public corporations, with large capital and credit. Thus far they have existed as big nurslings by pursuing the feudal system of levying taxes on the people and then squandering the public money. Now the public corporations are invited to do business and to make their own expenses and a profit for the citizens or stockholders the same as all private corporations do. With all its capital and credit, if the state cannot learn to make its own expenses and a profit for its citizens, it does not deserve to exist. At the next election there should be submitted a constitutional amendment prohibiting all further taxation, except it become necessary for the payment of the bonds. It is high time for the people to throw off the yoke of bondage and feudalism. Hence we conclude that it is the duty of the secretary of state to sign and certify the state bank bonds to the amount of $2,000,000.

CHRISTIANSON, Ch. J. (dissenting). It is the duty of the secretary of state to certify that bonds issued by the state pursuant to law and within the debt limit have been so issued and are within such limit. But it is equally his duty to refrain from so certifying if the certificate would be false. The secretary of state is sworn to support the Constitution. He would violate his oath of office if he certified that bonds sought to be issued in excess of the constitutional debt limit were within such limit. The debt limit of the state was fixed in § 182 of the Constitution. The bonds involved in this proceeding are undisputably in excess of such debt limit, unless that section has been amended. The bonds involved purport to be issued by authority of an amendment to § 182. Such amendment was involved in State ex rel. Twichell v. Hall, ante, 459, 171 N. W. 213, and State ex rel. Byerly v. State Canvassers, ante, 126, 172 N. W. 80. And for the reasons stated in my dissenting opinions in those cases, I believe that § 182 has not been amended and that the debt limit remains as originally fixed therein.

STATE OF NORTH DAKOTA EX REL. HENRY OLSON, Respondent, v. ROYAL INDEMNITY COMPANY, a Corporation, Appellant.

(175 N. W. 625.)

Warehousemen — proof in suit on bond of fraud in surrender of storage tickets for notes immaterial.

In an action upon a warehouseman's bond, where it appeared that the principal was insolvent and his patrons who held storage tickets for the grain stored in the principal's elevator had surrendered them in exchange for promissory notes of the principal in order to allow him to continue in business, and the defendant bond company knew of the insolvency and of the settlement and received the storage tickets from the principal, it is *held:*

1. Where a warehouseman's bond is conditioned for the payment by the warehouseman for all grain purchased and all sums for which the principal shall become liable to holders of warehouse receipts, allegations of fraud, false representations and mistake in the surrender of storage tickets for promissory notes are nonessential and need not be proved.

Warehousemen — Warehouseman necessary party defendant as principal in suit of joint bond; judgment against surety alone on warehouseman's bond proper.

2. Where liability is based upon a joint bond of the warehouseman and a bonding company, the principal is a necessary party defendant, but where the action is brought as one in equity to determine the rights of all parties having an interest in litigating the liability of the bondsman, and where neither plaintiff nor defendants seek any relief against the warehouseman, a judgment may properly be entered against the bondsman.

Trial — court may submit issue to jury for advisory verdict.

3. Though the action be one triable to the court as a suit in equity, it was not error for the court to deny the defendant's motion that the case be tried to the court. Under § 7608, Comp. Laws 1913, the trial court, in its discretion, could properly submit to a jury issues of fact in an equity case for an advisory verdict.

Evidence — direct testimony as to intention admissible.

4. Where the actual intention with which an act is done is material, a party may give direct testimony of his intention.

Novation — payment — debtor's note not payment unless so intended.

5. A promissory note of a debtor does not operate as an absolute payment of his obligation unless it was intended to so operate.

Trial — refusal to strike out hearsay testimony admitted without objection, proper.

6. Where a party allows hearsay testimony to be elicited without objection, he cannot predicate error on the refusal of the trial judge to strike out on motion a selected portion of such testimony.

Opinion filed November 15, 1919.

Appeal from the District Court of Ward County, *Leighton,* J.
Affirmed.
W. H. Sibbald and *John C. Lowe,* for respondent.
W. H. Stutsman, for appellant.

BIRDZELL, J. This is an appeal from an order denying the defendant's motion for judgment upon a special verdict and for a judgment notwithstanding a special verdict, and also from the judgment entered. The action is upon a warehouseman's bond, conditioned, among other things, for the payment by H. T. Hogy, the warehouseman and principal on the bond, for all grain purchased and all sums for which the principal shall become liable to holders of warehouse receipts. It appears that Hogy, prior to 1916, operated two elevators, one at Burlington and one at Des Lacs, North Dakota. The defendant indemnity company furnished the bond for $10,000 now in suit, in compliance with § 3111, Comp. Laws 1913. In the fall of 1916, Hogy became insolvent and had shipped out of the Burlington elevator some $20,000 worth of grain, the storage tickets for which he was unable to redeem. About the middle of October a representative of the defendant company went to Minot for the purpose of adjusting Hogy's affairs in so far as it was interested, but Hogy had previously called the holders of the storage tickets together for the purpose of making an arrangement whereby he would be permitted to continue in business. The holders of the tickets, with some exceptions, surrendered them, taking Hogy's notes for the then market price of the grain represented, due in one year, and the latter in turn surrendered the storage tickets to the defendant who continud upon the bond. It appears that two ticket holders declined to surrender their tickets and the defendant company subsequently settled with them by paying $1,834.87. The notes not having

been paid at maturity, this action was brought upon the bond to recover the amounts represented by them.

The action is in the name of the State on the relation of Henry Olson who sues for himself and others beneficially interested. The complaint, aside from formal allegations, alleges the receipt and storage by Hogy of certain definite quantities of grain for and on behalf of ten individuals, also amounts unknown for seven others; that Hogy obtained possession of the storage receipts through fraudulent representations to the effect that it was necessary for him to have possession of the receipts to avoid criminal prosecution. That he had secured the consent of all the outstanding receipt holders to the surrender of the receipts in exchange for notes, and that certain of the receipt holders had previously agreed to surrender their receipts if all would do so. It is further alleged that the receipts were surrendered through a mistake of fact, and in reliance upon the fraudulent and false representations that all the receipt holders had consented. The seven parties, the amount of whose receipts are alleged to be unknown to the plaintiff, do not participate as plaintiffs and are made defendants. In the answer of the Indemnity Company it is denied that the storage tickets are outstanding and unpaid and it is alleged that Hogy, on or about the 15th day of October, 1916, purchased from the owners the grain represented by the receipts for full consideration agreed to be paid, and that he gave his promissory notes to the owners in payment. It is further alleged that this settlement was not fraudulent and has not been rescinded. The settlement by the defendant company with two other defendants, Byerly and Durbin, by purchasing their tickets for $1,834.87, is pleaded and the judgment allows the benefit to the defendant company.

When the action came on for trial the defendant moved that it be tried to the court on the ground that the issues were of an equitable nature. The court, however, denied the motion and the action proceeded to trial before a jury. At the conclusion of the testimony thirty-four interrogatories were submitted upon which the jury were required to return their special verdict.

The first assignment argued upon this appeal is that the court erred in denying the defendant's motion for judgment *non obstante*. The

principal argument in support of it is founded upon the lack of testimony going to establish the allegations in the complaint of fraud and mistake which would vitiate the settlement. It is contended that in the absence of proof in support of these allegations and affirmative findings in the special verdict, there is a fatal omission of proof which presumably cannot be supplied and which would therefore require the entry of a judgment for the defendant. The fallacy of this argument lies in its failure to distinguish between essential and nonessential allegations in the complaint. From the entire statement of the cause of action, it is apparent that liability is predicated upon a breach or breaches of the indemnity bond, consisting in the failure to deliver or pay for grain stored or sold. There may be liability on the bond for a breach of either character. It may well be that an action for the nondelivery of the grain represented by the storage tickets could not be brought without a rescission of the settlement represented by the notes and the surrender of the tickets. But the breach of the bond that is principally relied upon in this case is not the failure to deliver the grain but the failure to pay for it at the price arrived at in the settlement. The terms of the bond are sufficiently broad to cover a breach of this character. It is therefore immaterial, so far as liability is concerned, whether or not the settlement is rescinded. The plaintiffs are attempting only to recover the price agreed upon. Therefore, the allegations with reference to mistake and fraudulent misrepresentations may be properly disregarded.

The next assignment concerns the denial of the defendant's motion for a judgment upon the verdict. This assignment, like that first considered, is based upon the existence of a supposed necessity for a special verdict to cover the questions that might be material if liability were predicated upon a rescission of the settlement. As previously said, it is not based upon a rescission but upon the failure to carry out the settlement. It is therefore not essential that there should be any finding justifying rescission.

It is next contended that the defendant was entitled to an instructed verdict for two reasons: (1) Because the plaintiffs have failed to prove the allegations regarding fraud; and (2) because the evidence discloses that Hogy was a necessary party to the determination of the

issues presented. The first reason has already been sufficiently answered. As to the second, it does appear that the bond in suit is the joint bond of Hogy and the Indemnity Company,—not several nor joint and several. It also appears that the defendant in its answer alleges the defect of parties, claiming that Hogy was a necessary party to the complete determination of the issues presented. It seems that this objection was well taken, but it does not follow that the judgment must be reversed for that reason. While this action is primarily an action for the recovery of money, it nevertheless involves features of a suit in equity in that it binds all parties who may possibly have claims against the Indemnity Company, and amounts to a final determination as to all parties of its liability under its bond. The company, however, does not ask for a judgment against Hogy the principal, nor does it seek any other relief as against him. Neither does the plaintiff seek any relief against Hogy. Thus, the objection that Hogy was not made a party defendant resolves wholly to the technical one, available in an action at law, of requiring all joint obligors to be made parties defendant. This technical rule, however, does not obtain in suits of an equitable character and it is well settled that in such suits the joinder of parties is largely in the discretion of the court, and this discretion will not be so exercised as to preclude the entry of a judgment where one can be entered without affecting the rights or obligations as between the defendant suitor and a co-obligor. See 20 R. C. L. 703–705. It is apparent in the instant case that the rights of the plaintiff against this defendant may be fully determined in the absence of Hogy and that his presence would only become indispensable in the event some relief were sought against him by one of the parties.

It is further objected that the court erred in trying the case as a jury case. But this error is in no way prejudicial to the defendant. Considering that the action was triable to the court as a suit in equity, the court could properly take an advisory verdict under § 7608, Compiled Laws of 1913, and it could adopt the findings of the jury in the special verdict as findings of fact upon which to base the conclusions of law and judgment. See Emery v. First Nat. Bank, 32 N. D. 575, 156 N. W. 105; Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759. A review of the record discloses that all of the facts material to establish

the defendant's liability are amply supported by the evidence and would warrant the making of independent findings by the court. It was clearly not error for the court to submit the case to a jury and to adopt its findings.

Error is predicated upon admission of testimony. Some of the plaintiffs were permitted to testify that they did not intend to release the bond company when they gave up their tickets and took the notes, and that in taking the notes they did not intend to receive them as payment for the grain. It is our opinion that that evidence was properly admitted. The contention of the defendant throughout is based in substance upon a novation; that is, it is claimed that for Hogy's obligation to deliver the grain stored there had been substituted a new obligation between the same parties in the shape of a promissory note which operated to extinguish the previous obligation to deliver the grain or to pay the price. Section 5830, Compiled Laws of 1913, states that a novation is made: "(1) By the substitution of a new obligation between the same parties with *intent* to extinguish the old obligation." In so far as the circumstances in which the tickets were exchanged for the notes would go to establish a novation, they were admissible and they were in fact before the jury. But still the circumstances themselves leave the question in an equivocal state. A novation would not be effected, therefore, unless it were so intended. Whether the obligation to deliver grain be considered as extinguished by the subsequent obligation to pay a definite price incorporated in the note, or whether the note itself is to be regarded as the payment of that price, are both open questions dependent upon intention. 30 Cyc. 1194 et seq.; 22 Am. & Eng. Enc. Law, 555; 21 R. C. L. pp. 70–73. The general rule is that prima facie the giving of negotiable paper by the debtor to the creditor amounts at most to conditional payment. That is, it does not operate to extinguish the debt unless the note itself is paid. But if it is intended between the parties that it shall so operate, that intention will be given effect. Whether the action before us be considered as based upon the failure to redeliver grain stored, or the failure to pay for grain bought, the intention of the parties is material. The acts being equivocal and the intention being material, it is proper to receive direct evidence of intention from the parties to

the transaction. 7 Enc. Ev. 596. It might be added in this connection that the testimony relative to the intention not to release the bond company corresponds in every way with the legal effect of the transaction as brought out in the testimony. Section 5835, Comp. Laws 1913, expressly provides that a release of one joint debtor does not release the others. Hogy and the bond company were jointly liable on the bond.

The contention that the court erred in permitting a witness to narrate conversations that he had had with Hogy is without merit, for it appears in the transcript of the testimony that the witness had testified at some length to conversations and transactions with Hogy without any objection being made and it further appears that no objection was made or attempted to be made by the defendant's counsel until the answer of the witness, that is specifically objected to, was before the jury. In fact, no objection was made at all, but after the particular answer was in defendant's attorney moved to strike it out as hearsay. Having permitted a series of questions to be asked without objection, the answers to which could only be hearsay, it was clearly not prejudicial error to refuse to strike out on motion a particular answer incorporating hearsay testimony of the same character.

Finding no error in the record prejudicial to the defendant, the order and judgment appealed from are in all things affirmed.

CHRISTIANSON, Ch. J., and GRACE and ROBINSON, JJ., concur.

BRONSON, J., did not participate.

STATE OF NORTH DAKOTA EX REL. WILLIAM LANGER, Attorney General and Minnie J. Neilson, Relator, Plaintiffs and Appellants, v. GEORGE A. TOTTEN, Robert Muir, P. M. Casey, John N. Hagen, Commissioner of Agriculture and Labor, and Ex Officio Member of the Board of Administration, Minnie J. Neilson, State Superintendent of Public Instruction, and Ex Officio Member of the Board of Administration, Members of the Board of Administration of the State of North Dakota; and A. P. Hollis, P. S. Berg, L. M. Rockne, W. J. Bell and Minnie J. Neilson, State Superintendent of Public Instruction, and Ex Officio Chairman of the Educational Commission of the State of North Dakota, and as Such Members of the Educational Commission of the State of North Dakota, Defendants and Respondents.

(175 N. W. 563.)

Schools and school districts — constitutional power of legislature to prescribe courses of study.

1. The legislature, pursuant to constitutional authority and excepting as restricted by constitutional limitations, possesses the power to regulate the educational system and public schools of this state and to prescribe the courses of study in such schools.

Schools and school districts — validity of the board of administration to act as to courses of study.

2. The Board of Administration Act, known as S. B. No. 134, enacted by the legislature in 1919, and referred to and adopted by the people of the state, so far as the same grants the specific power to the board of administration to supervise and control the preparation of the courses of study in the common schools of the state, is not unconstitutional upon the ground that it interferes with and takes from the superintendent of public instruction prerogatives possessed as a constitutional officer.

Schools and school districts — power of superintendent of public instruction to prepare courses of study.

3. The superintendent of public instruction has no constitutional power or

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NOTE.—For authorities discussing the question of power of legislature to prescribe subjects to be taught in public schools, see note in 47 L.R.A.(N.S.) 200.

On validity of statute or other regulations as to the use, or teaching, of foreign languages in schools, see note in 7 A.L.R. 1695.

inherent right to prescribe and prepare the courses of study for the common schools of the state. This right, pursuant to direct constitutional provision, has been granted to the legislature. Ex parte Corliss distinguished and held not in point.

Statutes — construction to comply with legislative intent.

4. In applying legal rules of statutory construction the object intended to be accomplished should be considered; in considering conflicting statutory provisions the main object to be kept in view is the ascertainment of the legislative intent; this legislative intent may be determined from a general consideration of the whole act, with the established policy of the legislature as disclosed by the general course of legislation.

Schools and school districts — construction of statute granting specific power with general reservation.

5. In connection with the application of such rules of statutory construction, where a specific power has been granted, in a statute to a board of administration with which a general reservation therein concerning the duties and powers of the superintendent of public instruction is inconsistent, the specific power so granted will prevail over the general reservation stated.

Schools and school districts — power of superintendent of public instruction to prescribe courses of study.

6. In 1919, pursuant to Senate Bill No. 134, the legislative assembly enacted the board of administration bill wherein there is specifically granted to such board the power to have charge and supervision of the preparation of courses of study for the several classes of public schools; however, in section nine thereof, it is provided that the powers and duties of the superintendent of public instruction shall be subject to the supervision and control of such board only in so far as such powers and duties were by law subject to the supervision and control of the state board of education and other boards to whose powers such board of administration succeeded. Upon an original application by the superintendent of public instruction to compel such board to refrain from investigating, preparing, and prescribing courses of study for the common schools of the state, the same being a power and duty theretofore possessed by such superintendent, it is held, upon legal construction of the intent and purpose of the act in regard to the preparation and prescription of the course of study for the common schools of the state, that the superintendent of public instruction possesses the power and duty to prepare and prescribe courses of study for the common schools of the state subject to the power of supervision and control by such board of administration pursuant to the specific power therefore granted in the act.

Opinion filed October 20, 1919.

Original application for prohibition and injunction against the State Board of Administration by the Attorney General, and the Superintendent of Public Instruction.

Writ denied.

Geo. E. Wallace, and *Joseph Coghlan,* for respondents.

William Langer, Attorney General, and *E. B. Cox,* Assistant Attorney General, for relators.

BRONSON, J. This is an original application to this court to compel the board of administration and the educational commission to refrain from preparing and prescribing the courses of study for the common schools of the state. The respondents filed a return setting up that the board of administration possessed the authority so to prepare courses of study pursuant to the provisions of Senate Bill No. 134, enacted by the legislative assembly of 1919, and of the authority of the educational commission to proceed so to do under the direction of the board of administration. The relators contend that such act of the legislature does not grant, and was not intended to grant, power to the board of administration to prescribe the courses of study in the common schools of the state, and that if it should be so construed, such act is unconstitutional for the reason that it interferes with the prerogatives of the state superintendent of public instruction, a constitutional officer elected by the people. These are the only two questions presented upon the application.

In order to consider the questions propounded it is deemed proper to review in a summary way the legislative acts since statehood concerning regulation of the educational system, the public schools of the state and the duties of the superintendent of public instruction in connection therewith. The Constitution provides for the election of a superintendent of public instruction. Const. § 82. It further provides that the power and duties of such superintendent shall be as prescribed by law. Const. § 83.

The Constitution further provides that the legislative assembly shall make provision for the establishment and maintenance of a system of public schools (Const. § 147), and shall take such other steps as may be necessary to secure a reasonable degree of uniformity in

courses of study (Section 151, Const.). At the first session of the legislative assembly, after the adoption of the Constitution, chap. 63, Laws 1890, conferred upon the superintendent of public instruction all the powers and duties theretofore possessed by the territorial board of education. In the territory of Dakota prior to the adoption of the Constitution a territorial board of education, of which the territory superintendent of public instruction was a member and the president thereof, possessed the general supervision and control of public instruction in the territory of Dakota. Dak. Comp. Laws 1887, § 1688. This board possessed poyer to prescribe a course of study for the public schools of the territory including the high schools and for the territorial normal schools. At the same session of the legislature in 1890, an act was passed providing for a uniform system of public schools in the new state. The superintendent of public instruction was granted the general supervision of the public schools of the state. He was made ex officio a member of the normal school board of the state. He was granted powers to prepare and prescribe a course of study for all the public schools of the state, normal schools of the state and the course of study, training, and practice of the professional departments of schools designated and supported, wholly or in part, by the state. Laws 1890, §§ 3, 6, chap. 62. Likewise, at the same session the normal school at Mayville and Valley City were established, and a board of directors thereof created possessing, among other things, the powers to prepare a full course of study in such normal schools. Laws 1890, chaps. 162, 163.

In 1890 the legislature established the Academy of Science at Wahpeton, and made the superintendent of public instruction ex officio a member of the board of education in charge thereof; to this board there was granted the general supervision of the academy, including the right to provide the various books to be used in instruction.

At the legislative session of 1891 a normal school was established at Valley City, as well as at Mayville and a board of directors provided for each, of which the state superintendent of public instruction was made ex officio a member, and the president thereof. The act provided that the faculty of said normal school should carry out the course of study adopted by the board of directors, chap. 89, Laws 1891.

In 1895 the legislature created a high school board consisting of the governor, the superintendent of public instruction, and the president of the university, and gave to it power to classify schools as state high schools, and authority to establish necessary and suitable rules and regulations relating to examinations and courses of study. Laws 1895, chap. 53. At the same session of the legislature a specific act was enacted requiring every teacher to teach pupils a certain course of study in the schools, naming the particular subjects, including specifically instruction concerning the nature of alcoholic drinks, narcotics, stimulants, physiology, and hygiene. Laws 1895, chap. 56.

In 1897, pursuant to chap. 89, Laws 1897, the industrial school and school for manual training was established at Ellendale; upon the board of trustees the superintendent of public instruction was a member thereof.

In 1903, pursuant to chap. 83, Laws 1903, the superintendent of public instruction was granted authority concerning the examination and grading of teachers.

In 1905, pursuant to chap. 103, Laws 1905, the legislature again prescribed courses of study to be taught in the common schools, mentioning specific subjects.

In 1907, the legislature established the state library commission and made the superintendent of public instruction, ex officio a member. Laws 1907, chap. 243.

In 1909, the Legislature again prescribed a list of subjects to be taught in the common schools covering some fourteen subjects. Laws 1909, chap. 204. At the same session of the legislature it was also enacted that the president of the state normal school with the superintendent of public instruction should provide and arrange a course of study for the state normal schools of not less than ten and one half months extant, for students who have completed the eighth grade in the common and rural schools of the state, and in the cities, towns, and villages, and for such persons who may have been previously granted a certificate to teach. It provided also for certain subjects that must be included in the course of study. Laws 1909, chap. 100. Likewise, at such session of the legislature a commission to codify the school laws of the state was designated, of which the superintendent of pub-

lic instruction was made ex officio a member thereof. Laws 1909, chap. 105. This commission consisting of the attorney general, Mr. Taylor, then deputy superintendent of public instruction, subsequently superintendent of public instruction, and three others, one, Prof. Kennedy, from the State University, another, Prof. Weeks, from the State Agricultural College, and Prof. Black from the School of Science, submitted to the legislature of 1911 a codification act. It was enacted into law and known as chap. 266, Laws 1911. By the act the superintendent of public instruction was made ex officio a member of the normal school board of the state. In this act his powers to prepare and prescribe courses of study were limited to the common schools of the state. It also created a state board of examiners of which the superintendent of public instruction was made secretary, whose duties it was to prepare questions for the examinations of teachers and to prescribe rules and regulations with respect thereto, and issue certificates to teach in the state.

Likewise, the act created a state agricultural and training school board of which the superintendent of public instruction was a member thereof, upon whom the duty was imposed to prescribe courses of study to be pursued in the county agricultural and training schools and to determine the qualifications of the teachers therein.

In 1913, pursuant to chap. 143, Laws 1913, the state board of education was created of which the superintendent of public instruction was made a member. To this board were granted the duties of the state board of examiners, the state high school board and the state agricultural and training school board. To it, further, was granted the authority to make rules and regulations for establishing state rural, graded, and consolidated schools, provided by law, and to establish such rules as may be found necessary to secure uniformity and best results among the schools receiving state aid as rural, graded, and consolidated schools. At the same session of the legislature, pursuant to chap. 257, Laws 1913, the superintendent of public instruction was made ex officio, a member of the board of trustees of the teachers' insurance and retirement fund.

In 1915 the legislative assembly established the state board of regents. Laws 1915, chap. 237. This board was granted general con-

trol and administration over the University, Agricultural College, School of Science, State Normal Schools, the Normal and Industrial School and the School of Forrestry. To this board were granted the powers formerly possessed by the directing boards of such respective institutions. It was granted specific authority to make all necessary rules and regulations for the efficient management and control of the educational institutions and of their various departments. The superintendent of public instruction was not made, ex officio, or otherwise, a member of such board of regents.

Finally at the last session of the legislature, in 1919 the act now in question, known as Senate Bill No. 134, termed the Board of Administration Bill was enacted.

In § 1 thereof it is stated that such board is created for the general supervision and administration of all state penal, charitable, and educational institutions of the state and the general supervision of the public and common schools of the state. Further, in § 1 thereof, it is provided that, in the exercise of these duties of general supervision, the superintendent of public instruction and the presidents or heads of the several state institutions shall be responsible to the board. Furthermore, the superintendent of public instruction is made ex officio a member of such board.

In § 5 thereof it is provided that such board shall assume all the powers and perform all the duties of the state board of education, state board of regents, and the state board of control as now exercised by any and all of such boards.

In § 6 thereof it is provided that such board shall make all necessary rules and regulations for the general supervision of the public schools of the state, that furthermore, such board shall have the power to appoint a school commission of which the superintendent of public instruction shall be a member to investigate the kinds and costs of library books, textbooks, for use in public schools of this state and the question of the uniformity of the textbooks.

In § 7, thereof it is further provided that such board shall appoint an educational commission of which the superintendent of public instruction shall be ex officio a member and chairman of the commission to have charge and supervision of the certification of teachers, standard-

ization of schools, examinations for eighth grade and high school pupils, and preparation of courses of study for the several classes of public schools.

In § 9 thereof it is further provided that the powers and duties of the superintendent of public instruction as heretofore provided by law shall be subject to the supervision and control of the board of administration, only in so far as such powers and duties were by law subject to the supervision and control of the state board of education, the state board of regents, and the state board of control.

This board of administration was referred to the electors of the state under the referendum amendment to the Constitution and was ratified by a majority of the votes of the people at an election held in June, 1919.

A review of this legislation readily discloses that the legislature, since statehood, have assumed both the right and the duty under the constitutional provisions to regulate the system of education in this state and of public schools existing for such purpose even to the extent of prescribing courses of study in the common schools of the state and in that regard to add to or take away from the duties of the superintendent of public instruction. Apparently, no one has ever questioned the right of the legislature to so exercise this power of regulation. There is in fact, no doubt that it possesses this power not only by reason of no restrictive provision inhibiting the exercise of such power in the Constitution but by direct mandate so to do therein. There is furthermore, no question that this power of the legislature extends to the right to prescribe courses of study or subjects to be taught in the public schools. See note in 47 L.R.A.(N.S.) 200.

The relators contend, however, that the legislative attempt by statute to regulate or supervise the courses of study in the common schools of the state is unconstitutional for the reason that it takes away from the superintendent of public instruction a power and a duty theretofore imposed and always exercised by such superintendent since statehood and thereby deprives a constitutional officer of a power that is inherent in the office. In support of such contention relators rely upon Ex parte Corliss, 16 N. D. 470, 114 N. W. 962. It is evident that this contention is without merit and that the case cited is not in point.

In that case the constitutional question involved the right of the legislature to transfer from the state's attorney to an enforcement commissioner by legislative act duties that inhered in the office. With reference to the state's attorney, the Constitution simply provides for an election of such state's attorney, but makes no provision for further prescribing his duties by statute. In the present matter the Constitution specifically authorizes the legislature to prescribe the duties of the superintendent of public instruction as well as granting the power to regulate and supervise the educational system of the schools of the state. In fact, as heretofore shown in the review of the legislative acts, the power of the superintendent of public instruction to prescribe courses of study in the common schools arose by statutory provisions in 1890. If the contention of the relator in this regard is sound then, upon analogous reasoning, the legislative acts which specifically prescribe certain courses of study to be pursued in the common schools and the acts which took from the superintendent of public instruction the powers and duties theretofore possessed concerning courses of study in the high schools and higher institutions of learning in this state are, likewise, unconstitutional. Furthermore, it is to be noted that the right to prepare and prescribe courses of study for the common schools of the state is not a right inherent in the office of the superintendent of public instruction, but is a right inherent in legislative action and so specifically granted by the Constitution. We have no hesitancy in stating that the legislature of this state possesses the power to regulate or supervise the course of study in the common schools of this state, and that such feature of the act is not unconstitutional upon the ground asserted by the relators herein.

The next question concerning the power of the board of administration pursuant to the legislative act, to supervise the courses of study in the common schools of the state presents a question of statutory construction. Pursuant to the provisions of Senate Bill No. 134, in question, it is clear that the legislature has granted the specific power in § 7 thereof to have charge and supervision over the preparation of courses of study for the several classes of public schools which includes common schools. The relators do not contend that such specific power is not in terms so granted, but they assert that under the provision of

§ 9 of such act there is a particular exception made that such board of administration shall not have supervision and control over the powers and duties of such superintendent excepting as they were by law subject to the supervision and control of former state educational boards. Under the terms of said § 9 it is clear that there is such general reservation of freedom from the exercise of supervision and control by the board of administration. In this regard it will be noted that such superintendent of public instruction still possesses the power to prescribe and prepare courses of study for the common schools of the state pursuant to statutory provisions existing therefor, excepting that if such board of administration has the specific power named, the duty of such superintendent, in that regard, is subject to its supervision and control. It is also clear that if such board possesses such power, pursuant to the legislative act, it must act upon and in connection with a duty formerly exercised by the superintendent alone. The contention of the relators that this power of supervision and control concerning the preparation of courses of study in the common schools would take from such superintendent such right and duty is unfounded. If such board has such specific right, the superintendent, nevertheless, possesses the same right to prescribe and prepare courses of study for such common schools as, theretofore, except that her power and duty in that regard are subject to the supervision and control of such board of administration. The question therefore presented is whether this specific power of supervising and controlling the preparation of courses of study for the common schools granted in the legislative act is nullified and rendered nugatory by the provision of said § 9 concerning the powers and duties of such superintendent. In this regard it is recognized as elemental in statutory construction that the object intended to be accomplished should be considered; that in considering conflicting provisions the great object to be kept in view is the ascertainment of the legislative intent; that this legislative intent should be determined from a general view of the whole act along with which may be considered the established policy of the legislature as disclosed by the general course of legislation. That furthermore where there is a specific power in the statute granted it is not to be rendered nugatory and of no avail by a subsequent general reservation. 36 Cyc. 1110,

1111, 1128, 1130, 1168; Sutherland, Stat. Constr. §§ 239–246; Minot v. Amundson, 22 N. D. 236, 133 N. W. 551; State ex rel. Langer v. Kositzky, 38 N. D. 616, 166 N. W. 534; State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583; Murray Bros. v. Buttles, 32 N. D. 565, 156 N. W. 207; State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705; State ex rel. Flaherty v. Hanson, 16 N. D. 347, 113 N. W. 371; Sanford v. King, 19 S. D. 334, 103 N. W. 30.

Upon the application of these principles of statutory construction, this court has no hesitancy in arriving at the conclusion that there exists a direct legislative intent to grant to the board of administration the specific power as stated in the statute to supervise and control the courses of study in the common schools of the state and that this legislative intent is further revealed by the purpose and object of the act sought to be accomplished and by the general policy of the legislature as revealed in the course of legislation. It is therefore held that Senate Bill No. 134 granting to such board of administration the authority to supervise and control the preparation of courses of study in the common schools of this state is a valid legislative act as against the contentions of the relators and that in such respect the superintendent of public instruction possessed the power and the duty to prepare and prescribe courses of study in the common schools of this state subject to the supervision and control of the board of administration and the educational commission of which such superintendent is a member thereof.

It is ordered that the writ be in all things denied and the cause dismissed.

ROBINSON, GRACE and BIRDZELL, JJ., concur.

CHRISTIANSON, Ch. J. (dissenting). The sole questions presented for determination in this case relate to the validity and construction of chapter 71 (Senate Bill No. 134) Laws 1919. The principal provisions of the law are referred to in the majority opinion; but that opinion wholly ignores the legislative history of the enactment; and it is upon such history that the relator predicates the contention that

the lawmakers did not intend to confer upon the board of administration authority to interfere with the powers formerly possessed by the superintendent of public instruction regarding courses of study in the common schools of the state.

Chapter 71, Laws 1919, was introduced in the senate on February 1, 1919. After having been read the first and second time it was referred to the committee on state affairs. Senate Journal, p. 175. It remained with that committee until February 21, 1919, when it was reported back with certain amendments. Senate Journal, p. 527. On February 24, 1919, it was re-referred to the same committee. Senate Journal, p. 566. On February 26, 1919, it was reported back by the committee with amendments; and on the day following it was passed by the senate in its present form. Senate Journal, pp. 667, 668.

On February 7, 1919, there was also referred to the senate committee on state affairs House Bill No. 81, relating to the examination and certification of teachers. Senate Journal, p. 263. That bill remained in the hands of the committee until February 28, 1919, when it was recommended for indefinite postponement. Senate Journal, p. 718. The senate journal discloses that while these bills were in the hands of the committee petitions and protests were presented to the senate against any curtailment of the powers and duties of the superintendent of public instruction. Senate Journal, pp. 178, 278, 303, 331, 383 and 562.

Chapter 71, Laws 1919, as introduced contained no provision reserving any powers to the superintendent of public instruction from those which the bill purported to grant to the board of administration. But the senate committee on state affairs amended the bill by inserting therein § 9, which reads as follows: "The powers and duties of the state superintendent of public instruction as heretofore provided by law shall be subject to the supervision and control of the board of administration, only in so far, as such powers and duties were by law subject to the supervision and control of any or all of the boards mentioned in § 5 of this act." The boards referred to in § 5 of the act are the state board of education, state board of regents, and the state board of control. The duties of the first two boards have been mentioned in the majority opinion. The state board of control was in control of the

insane asylum, penitentiary, reform school, blind asylum, school for deaf and dumb, school for feeble minded, and the tuberculosis sanitarium, and had nothing whatever to do with any of the public schools of the state. It is undisputed that none of the boards so enumerated had any authority to supervise or in any manner interfere with the powers of the superintendent of public instruction as regards the course of study in the common schools of the state.

It is also undisputed that the superintendent of public instruction, during the entire history of the state, has been invested with power to prepare and prescribe the course of study in the common schools of the state. This power was conferred by the first legislative assembly. Laws 1890, chap. 62, § 6. And in spite of the many changes made in the school laws of the state—some of which are referred to in the majority opinion—the legislature has consistently adhered to the policy then adopted. And by the statutes in force at the time chapter 71, Laws 1919, was introduced and adopted it was made the duty of the superintendent of public instruction, and he had the power, "to prepare and prescribe a course of study for all the common schools of the state." Comp. Laws 1913, § 1109. Not only was that statute in force then, but it is in force now. Even the majority opinion conceded that § 1109, Comp. Laws 1913, has not been repealed by chapter 71, Laws 1919.

Chapter 71, was submitted to the people at a referendum election held June 26, 1919. Both the notices of election and the ballot contained a synopsis of the contents of the various measures submitted. And the notices of election and the ballot contained this statement relative to Senate Bill No. 134: "Powers and duties of the superintendent of public instruction shall not be abridged. See § 9, of the law." Section 9 was the only section in the act to which specific attention was called either in the notices of election or by the ballot.

It is true as stated in the majority opinion that the great object in construing statutes is to ascertain the legislative intent. In fact it is the sole object, for the intent of the lawmakers is the law. Where the language of the statute is plain, certain, and unambiguous there is no room for construction. The province of construction lies wholly within the domain of ambiguity and uncertainty. In construing statutes the courts are to be guided by certain rules which wisdom and ex-

perience have sanctioned. The Paulina v. United States, 7 Cranch, 52, 60, 3 L. ed. 266, 268; Cary v. Curtis, 3 How. 236, 239, 11 L. ed. 576, 578. The purpose of all rules is to aid in ascertaining the legislative intent and meaning. In cases of conflict or ambiguity, and where, after a consideration of the language of the entire statute, there remains doubt as to its meaning, resort may be had to extrinsic aids. The history of the passage of the law may be considered. The reports of committees, the introduction of amendments, petitions presented, testimony given before legislative committees, and the opposition made to the passage of a statute have all been considered by the United States Supreme Court as legitimate aids to statutory construction. Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Blake v. National City Bank, 23 Wall. 307, 23 L. ed. 119; Lincoln v. United States, 202 U. S. 484, 50 L. ed. 1117, 26 Sup. Ct. Rep. 728. See also 36 Cyc. 1136, 1138.

The question in this case is which of two conflicting provisions in the same statute expresses the legislative intent. The rule of construction applicable in such case is stated by the American & English Encyclopædia of Law thus: "Where there is a conflict between two parts of a single act, the rule is that the latest in position will be declared to be the law, as containing the latest expression of the legislative will." 26 Am. & Eng. Enc. Law, p. 734.

Cyc. says: "In the consideration of conflicting provisions in a statute, the great object to be kept in view is to ascertain the legislative intent, and all particular rules for the construction of such provisions must be regarded as subservient to this end. In accordance with the well-settled principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last enacted in point of time prevails; and on the same principle if both were enacted at the same time, the last in order of arrangement controls. As a corollary to this latter rule, a proviso in an act repugnant to the purview thereof is not void, but stands as the last expression of the legislative will." 36 Cyc. 1130. See also 11 Enc. U. S. Sup. Ct. Rep. 130; Lewis's Sutherland, Stat. Constr. 2d ed. § 280.

Section 9 was not only the last in order of arrangement, but the last

in point of time. It was formulated and inserted after the bill had been introduced. Why was it inserted? What evil in the original bill was it intended to remedy? What object did the men, who insisted upon and procured the amendment, have in mind? These questions naturally suggest themselves, and it seems to me are fully answered by the language of § 9 and the history of the passage of the law. Certainly § 9 was inserted for some purpose. The legislators did not insert it merely to increase the number of words in the law. The language of the section is plain and unequivocal. It must have been inserted to accomplish the purpose which its language indicates. The primary purpose of Senate Bill No. 134 was to create the board of administration; to abolish the board of regents, the board of control, and the board of education, and to confer upon the new board the powers possessed by the boards to be abolished. Opposition was made to the bill on the ground that it would deprive the superintendent of public instruction of powers which had been and were then being exercised by that official under the then existing laws. The senate thereupon amended the bill, and obviated the objection, by inserting the specific provision that the board of administration should have no further right of supervision and control over the powers and duties of the superintendent of public instruction, than that which had been possessed by the three boards which it succeeded. These facts are clearly established by the language of the law, and the history of its enactment.

It seems clear that in so far as there is any conflict between § 9, and the prior provisions of the bill, § 9 is expressive of the legislative intent. That was the construction placed upon the law by the officials whose duty it was to prepare election notices and ballots for the referendum election. And every elector who voted to approve or reject the law expressed his choice upon a ballot which informed him, positively and unequivocally, that Senate Bill No. 134, did not abridge any of the "powers and duties of the superintendent of public instruction;" and in confirmation of that statement his attention was directed to § 9 of the law. That section was the only one in the entire act which was specifically called to the attention of the electors. Hence, it appears that not only the legislators who enacted, but the people who

approved, Senate Bill No. 134, must have intended § 9 to be controlling upon the matters covered thereby. Any prior provision in the act in irreconcilable conflict therewith should therefore be deemed nugatory.

STATE OF NORTH DAKOTA, Respondent, v. ADOLPH LEHMAN, Appellant.

(175 N. W. 736.)

Affirmance where record presents no error.

1. The defendant was, by an information, charged with murder in the first degree, and after a fair trial was, by the jury, found guilty of murder in the second degree; it fixed his punishment at twenty years in the penitentiary. Upon this verdict, the trial court accordingly entered judgment. *Held* the record on appeal presents no error and the judgment must be and is affirmed.

Homicide — threats of deceased not admissible despite plea of self-defense.

2. Where one is charged with murder, and is duly placed upon trial therefor, and a plea of not guilty is entered, and the defense is justifiable homicide based upon a claim of self-defense, threats of the deceased made prior to the time of the homicide are not admissible, though it appear, assuming the evidence offered on behalf of defendant to be true, that, at the commencement of the final trouble resulting in the homicide, the deceased committed an overt act by threatening to take the life of defendant and engaged in physical encounter with him, though displaying no dangerous weapons, and where he later, desisting from the struggle, threatened to go to the house and get a gun and shoot the defendant, the barn being on one end of a village lot, and the

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NOTE.—As a general rule threats made by the victim against the accused, whether communicated or uncommunicated, unless accompanied by such a real or apparent demonstration of an immediate intention to execute them as would naturally induce a reasonable belief that the person threatened would lose his life or suffer serious bodily harm, are not admissible, as will be seen by an examination of the cases collated in a note in 3 L.R.A.(N.S.) 523, on evidence of antecedent threats on trial for homicide.

On admissibility of evidence of threats in prosecutions for homicide, see note in 89 Am. St. Rep. 691.

On admissibility of evidence of threats by deceased, in trial for murder, see note in 61 Am. Dec. 53.

house where the crime was committed on the other, where it further appears that defendant might have retired to a place of safety when deceased went to the house, but instead of doing so, pursued the deceased and shot at him while pursuing him, followed him into the house and through it to the bedroom, where deceased had taken refuge, and where he and his mother-in-law tried, by holding against the door, to prevent the defendant from entering, and who, after failing to push the door in, shot into and through it twice, wounding the deceased, and afterwards entering and shooting him to death.

Homicide — self-defense not available where defendant had opportunity to retire to place of safety.

3. The claim of self-defense is not maintainable where the defendant had ample and full opportunity to retire to a place of safety and thus avert the crime.

Homicide — defendant who pursued deceased after he had retreated not entitled to protection of self-defense.

4. When the deceased first assaulted and attacked the defendant, it was an overt act, initiating the right of self-defense in behalf of the defendant. Had he then acted, there possibly would be merit in his claim of self-defense, and evidence of prior threats would have properly been admissible. After the deceased retired to the house and was followed by defendant to and through the house to the bedroom, and there, with his mother-in-law, tried to hold the door thereof in an effort to protect his life, by preventing the entrance of the defendant, who persisted in trying to enter, and who, in endeavoring to enter, shot twice through the door, and afterwards gained entrance and shot his victim to death,

It is *held*, in these circumstances, the defendant was not acting in self-defense, but as a persistent aggressor, and evidence of prior threats was properly excluded and were not admissible for the purpose of establishing a claim of self-defense.

Opinion filed November 15, 1919.

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

Judgment affirmed.

L. A. Simpson and *Benj. Rigler,* for appellant.

Defendant's conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under like circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to pro-

tect himself from apprehended death or great bodily injury. State v. Hazlet, 16 N. D. 426; State v. Denny, 17 N. D. 519.

William Langer, Attorney General, *Edward B. Cox,* and *Albert E. Sheets,* Assistant Attorneys General, and *J. P. Cain,* State's Attorney, for respondent.

If such evidence is offered to prove that the defendant had a right to kill the deceased, there being no proof of hostile demonstration by deceased, then it is irrelevant. 2 Whart. Crim. Ev. pp. 1505 to 1752; 13 R. C. L. p. 922, ¶ 225; 21 Cyc. 965, ¶ C; State v. Tolla, 3 L.R.A. (N.S.) 523.

Unless at the time of the homicide the deceased did something to indicate a present intention to harm the defendant, there is nothing upon which the precedent acts can cast any light. There must be some present word or movement to be interpreted in the light of this knowledge of the disposition of the deceased. This view is supported by a great weight of authority. State v. Reed, 137 Mo. 137, 38 S. W. 574; State v. Byrd, 121 N. C. 684, 28 S. E. 353; State v. McGonigle, 14 Wash. 599, 45 Pac. 20; State v. Jackson, 33 La. Ann. 1087; State v. Janiver, 37 La. Ann. 645; Pritchett v. State, 22 Ala. 39, 58 Am. Dec. 250; Harrison v. State, 24 Ala. 71, 60 Am. Dec. 450; Hughey v. State, 47 Ala. 97; Creswell v. State, 14 Tex. App. 1; West v. State, 18 Tex. App. 644; Myers v. State, 33 Tex. 525 (and other cases cited.)

Evidence of threats by the person killed against the slayer is incompetent if the slayer was the aggressor. State v. Scott, 42 Am. Dec. 148; Levy v. State, 19 Am. St. Rep. 826; People v. Garbutt, 97 N. W. 162; Morrison v. Com. (Ky.) 67 L.R.A. 529; Robinson, Crim. Law, ¶ 240.

GRACE, J. This is an appeal from a judgment of the district court of the county of Golden Valley, entered upon the verdict of a jury, finding the defendant guilty of murder in the second degree. W. L. Nuessle, judge.

A motion for change of venue, from Stark county, where the crime was committed, was made by the defendant upon the ground that the people of that county were prejudiced to such an extent that the defendant could not get an impartial trial there. The motion was

granted and the place of trial, by order of the court, changed to Golden Valley county, and the trial there had. W. L. Neussle, judge of the then sixth Judicial District, sitting at such trial at the written request of W. C. Crawford, Judge of the then tenth Judicial District.

The information in the case is as follows: H. A. Berguson, State's attorney, in and for said county of Stark and state of North Dakota, in the name and by the authority of state of North Dakota, informs this court that heretofore, to wit, on the 20th day of May, in the year of our Lord, 1917, that in the county of Stark in the state of North Dakota, one Adolph Lehman, late of the county of Stark and state aforesaid, did commit the crime of murder in the first degree, committed in the manner following, to wit: That at said time and place, the said defendant, Adolph Lehman, being then and there armed with a deadly weapon, to wit, a 38-calibre revolver, which deadly weapon was then and there loaded with leaden bullets, did wilfully, knowingly, unlawfully and feloniously, with premeditated design to effect the death of another, and with intent then and there to kill a human being, to wit, Mathias Wetzstein; discharged said deadly weapon as aforesaid at and upon the said Mathias Wetzstein and did then and there shoot with said deadly weapon the aforesaid Mathias Wetzstein, and the said Mathias Wetzstein did thereafter, and within the same day, languish and die from the effect of such wound as aforesaid.

To this information, the defendant entered a plea of not guilty. The trial was had with the result above stated. The defendant was sentenced to twenty years in the penitentiary. The defendant based his defense upon the principle of justifiable homicide, and interposed self-defense as a justification of the offense with which he was charged by the information.

Section 9503, Comp. Laws 1913, defines justifiable homicide, in so far as it is applicable to this case, as follows: "Homicide is also justifiable when committed by any person in either of the following cases: (1) When resisting any attempt to murder such person or to commit any felony upon him or her, or upon or in any dwelling house in which such person is; or (2) when committed in the lawful defense of such person or of his or her husband, wife, parent, child, master, mistress or servant, when there is a reasonable ground to apprehend a design to

commit a felony or to do some great personal injury, and imminent danger of such design being accomplished."

The defendant has assigned sixteen errors. Fifteen errors assigned relate to the exclusion of evidence which defendant claims proved or tended to prove self-defense. The sixteenth error assigned is that the court erred in denying defendant's motion for a new trial. Most of the fifteen errors assigned relate to the exclusion of certain evidence which it is claimed would prove or tend to prove that, at various times before the 20th day of May, 1917, the day upon which the homicide was committed, the deceased had made threats to kill the defendant, and that divers persons, in whose presence such threats were made, communicated them to the defendant prior to the date of the homicide.

To determine if it were a fatal error to exclude such evidence, it would be well to state the principles of law, within the spirit of which the excluded evidence in question must be, before considering the actual evidence and offer of proof excluded.

The defendant relies upon the principle of self-defense, and it is in relation to that principle only, under the errors assigned in this appeal, that the excluded evidence relating to threats of the deceased to kill the defendant, is admissible, if at all.

Bishop's New Criminal Procedure, in regard to this principle, states, in vol. 3, the following, with reference to the character, conduct, and utterances of the deceased:

Section 609. "Except under special facts, developed in the particular case, proof of the character, conduct or utterances of the deceased is not admissible in trials for homicide. For nothing of this sort will ordinarily even extenuate a killing. But the exceptional circumstances now to be explained may require a departure from the rule. Thus—

Section 610. "Under a claim of self-defense,—where the necessity of the defendant's resorting to it should be judged of by the facts as they appeared to him, whatever they truly were, he may give in evidence whatever he knew of the character, prior conduct, threats, or other utterances of the person with whom he was contending, which, not as showing that the man was bad, but that in the special instance and circumstances he was dangerous, might reasonably have place among the considerations guiding his actions."

This principle was recognized in this state in the cases of State v. Hazlet, 16 N. D. 426, 113 N. W. 374, and State v. Denny, 17 N. D. 519, 117 N. W. 869. Continuing, Bishop says:

Section 611. "What was unknown to the defendant cannot thus be shown, because it is impossible he should have acted upon it. We have seen that one may rely upon what he did not know when its effect is to prove the absence of any wrong or injury; because, then the criminal act did not concur with the criminal intent, both of which are essential in crime. But here, where the act, namely, the homicide has been committed and the further inquiry relates simply to the mental condition prompting it, only what the doer knew is relevant; for that alone could have influenced his mind or in any way contributed to the doing."

Section 619. "One has no right to seek out and kill another who has threatened his life. The law's step for him is rather to compel the other to find sureties of the peace, or lie in prison. Or if the two meet, he must not inflict on the other any violence, as in self-defense until there has been some overt act evincing a present purpose to carry out the threat. But when such act is done, and the danger appears imminent, the self-defense may begin; therefore,

Section 620. "If in violation of this rule, the threatened person kills the other who has made no overt demonstration against him, he cannot even lay before the jury the known threats on which he thus unlawfully acted. So that only after a foundation for the admission of threats has been laid in the contentions or proofs showing special grounds, will they be received. But—

Section 621. "If the defendant's contention—is, for example, that the alleged killing was in self-defense or was only manslaughter, he may prove that before the encounter the deceased had made threats against his person or life, and they had been communicated to him,—'as tending,' said Coleman, J., 'to show that in the assault on the deceased, he may have acted under a just fear of danger to his own life.' If he did not know of the threats, the ground of their admissibility fails and, at least under all ordinary circumstances, they should be rejected. Also, recent must be the threats to be thus admissible. The decisions have fixed no limit of time; probably none is possible. In reason, they

should not be of so long ago that presumably the prompting evil mind has relented. Hence—

Section 622. "If there are repeated threats, extending through a considerable period, and together they constitute one series of acts, the earlier may be shown in connection with the later, when any are admissible. And if a part only are known to the prisoner, the uncommunicated ones may be given in evidence with the others. The doctrine of the *res gestæ* and some other consideration support this proposition."

The forgoing principles of law, as enunciated by Bishop, are amply supported by the decisions of various courts, cited by him in support thereof.

At this point, it may be well to state the facts.

On the 20th day of May, 1917, at or about the hour of 4 or 4:30, P. M., Mathias Wetzstein, the deceased, at the residence of one Mrs. Darling, his mother-in-law, was shot and killed by Adolph Lehman, the defendant. The instrument used by the defendant in killing the deceased was a 38-calibre automatic revolver.

The version of the facts which occurred on the 20th day of May, leading up to the killing of the deceased by the defendant, as disclosed by the evidence on behalf of this state, and on behalf of the defendant, differ in some respects quite materially, and while the questions of fact are for the jury, the errors of law assigned in this case are to be determined by consideration of certain facts which are in evidence.

The evidence on behalf of the state shows or tends to show that the deceased came to the city of Richardton, on the day he met his death, on train No. 2, which arrives there some time between 3 and 4 o'clock. That, after his arrival in Richardton, he went directly to the home of Mrs. Darling, his mother-in-law; that he entered by the kitchen door and found his mother-in-law in the kitchen. He had some conversation with her with reference to his wife who was then in the hospital at Dickinson. After a few minutes conversation with her, he departed by the kitchen door with the purpose of going to look after his horses in the livery barn, and, in doing so, went toward a small barn which is on the back end of the lot upon which the dwelling house of Mrs.

Darling is situated, and which is more particularly described in the evidence.

As he reached the vicinity of this small barn, and within 5 or 10 feet of it, Lehman came from the barn, when Wetzstein turned around and ran back toward the house with Lehman in close pursuit. There is no direct evidence that the defendant had any weapon in his hand, but there is testimony that, at this time, Lehman started after the deceased, and reached down into his pocket and stuck his arm forward, and a shot was heard. This testimony is given by Frank and Stephen Lindeman, who were at that time passing on the road about 200 feet distant from the point where the deceased and the defendant were at that time.

Rosie Weller and Rosie Kilzer, two girls about sixteen years of age, heard a shot, which came from the direction of the east from where these girls were, which was the direction of Mrs. Darling's house from that place. They were in the vicinity of the Darling house, and in a westerly direction therefrom, and were on their way to get a certain cow.

Rosie Weiler testified that in about fifteen minutes after hearing the shot, and while they were going after the cow, she saw Adolph Lehman go to a window by the bedroom on the east side of Mrs. Darling's house, and that she called Rosie Kilzer's attention to that; that, just after she saw the defendant at the window, she heard two shots; and that, about two minutes after that, she saw him going up town on Front street, running.

Rosie Kilzer's testimony is much the same as Rosie Weiler's except that she did not testify that she saw Adolph Lehman at the window, but did see him run to town, about two minutes after they heard the shots, meaning thereby the two shots.

In making proof of the commission of the offense, the state proved, by competent evidence, that Mathias Wetzstein died in about one hour and a half after he was shot, and further showed that defendants followed Mathias Wetzstein from near the little barn to the house, through the back door of the kitchen, and kitchen, then through the living room up to the door leading to the bedroom to where Wetzstein had retreated, closely followed by the defendant, and where he, with Mrs. Darling,

from within the bedroom, pushed against the door to try to keep defendant from entering, the defendant being on the opposite side of the door and striving to push his way through the door, it, during such struggle, being opened about a foot and a half, and Mrs. Darling standing in or near the opening where she could see the defendant.

The defendant made three different and independent efforts to push the door in, which was thus held by Wetzstein and Mrs. Darling, but was unsuccessful as against their combined efforts. During some of these times, Mrs. Darling spoke to the defendant and evidently tried to reason with him, asking him not to commit murder in her house, to think what he was doing, and otherwise apparently tried to reason with him. It appears the defendant had stepped back from the door a couple of times; in other words, desisted from his effort for a short space of time to gain entrance to the bedroom. Failing to do so, he approached the door while Mrs. Darling retained the position above stated, and while Wetzstein was presumably on her right hand back of the door, and shot twice through the door, one of the shots cutting off Wetzstein's little finger.

When these shots were fired Mrs. Darling became frightened, crowded through the opening in the door, passed the defendant and escaped from the house to the yard where she cried aloud for assistance.

What happened immediately after this, with reference to the shooting, is disclosed from three sources; the direct testimony of the defendant, the dying declarations of Mathias Wetzstein, and the circumstances as testified to by Rosie Weiler and Rosie Kilzer.

The dying declarations of Mathias Wetzstein substantially corroborate the other evidence of the meeting, by Wetzstein, of Lehman near the barn, the pursuit of Wetzstein by Lehman to the house, and through it to the bedroom, and the shooting done by Lehman, through the door, which cut off Wetzstein's little finger. At this point he became too weak to give any further details, and thereafter entered into no further detail.

From the proof, there is not the least doubt but what Mathias Wetzstein was killed at the time and place in question by the defendant in the manner above shown by the testimony in behalf of the state. Though the defendant pleaded not guilty, he relies upon justifiable

homicide by way of self-defense as a justification for killing the deceased. Thus, in effect, admitting that he killed Wetzstein.

The version of the facts leading up to the final act which caused the death of Wetzstein, as disclosed by the defendant's witnesses, are, in some respects, quite materially different from that of the state. The defendant, by his own testimony, shows that he had been in Richardton twice on the day before that of the fatal shooting of Wetzstein; that his purpose is part in going to town on Saturday was to see Orrie Darling, the son of Mrs. Darling, for the purpose of getting him to do some breaking or plowing for the defendant. He had been operating a plowing outfit for a man by the name of Koesel. The defendant did not see him that day. He went down to Mrs. Darling's house and stayed a few minutes. The testimony shows that he was in the habit of going down there when he came to town.

There is some evidence in the record to the effect that Clara Wetzstein, who was the wife of Mathias Wetzstein and who was the daughter of Mrs. Darling, kept company with the defendant before her marriage to Wetzstein; that, after her marriage to Wetzstein, at times when she would be at Mrs. Darling's, the defendant would still come there. His coming was objected to by Mrs. Darling, she, in effect, stating that she had no objection to his coming there so long as Clara was not married, but after that, she did, as she did not think it was right, and would cause trouble.

On Sunday the 20th day of May, upon which the crime was committed, when Lehman came to town, he first went to the postoffice, and then directly down to Mrs. Darling's. His version of the story of meeting Wetzstein on this occasion is substantially as follows:

That on Sunday, after dinner, which was had about 2 o'clock, he took his horses to pasture about three-quarters of a mile distant, and for that purpose used a saddle horse. The pasture was toward Richardton. He left the pasture and went toward Richardton about half past 3 o'clock, went to the postoffice, and then to Mrs. Darling's residence; stated that he did not know what time No. 2 had gone through that day, nor what time he got to the Darling house. He testified that he carried with him on that occasion the revolver in question, and that it was in the holster which he had on him. He entered the Darling

premises from the rear of the lot, and entered the barn, and while there, he took off the holster which contained the revolver, and hung it up in the barn on a nail, and as he turned around and went to walk out, and while he was about in the middle of the barn, he met Mathias Wetzstein in, or just coming into, the barn, and that Wetzstein said to him, "You son of a b——, I got you, I am going to kill you," and that he rushed for the defendant and had his right hand in his pocket, and that he, the defendant, wanted to get out of the door, and he grabbed him; that they wrestled around there; that Wetzstein had got defendant's gun, which defendant had hung up in the barn, and that defendant was trying to get it. The defendant's testimony further shows he had hung the revolver and the holster up in the barn, and had turned around and started for the house when the meeting occurred. The defendant also testifies that Wetzstein further said, "You son of a b——, I got a gun in the house. I will kill you." The defendant further testifies that he knew of the guns being in the house, describing the same as a rifle and a shotgun. He further testifies that he had not a firearm on him when he visited the Darling house on Saturday, the 19th of May, nor that he had ever been in Mrs. Darling's house with a firearm on his person when Mrs. Darling was there.

The defendant, in his testimony, admits following Wetzstein right up from the meeting, which he claims was in the barn, to the house, and that Wetzstein and he both entered the house by the kitchen door, and that he followed him through the kitchen, through the sitting room, from the sitting room to the bedroom where Mrs. Darling and Wetzstein were holding the door. He testified that he could not see Wetzstein at the time he saw Mrs. Darling holding the door. He testified that he made an effort to get into the bedroom and could not on account of them holding the door; that he shot through the door once or twice; that after that, Mrs. Darling rushed out and he rushed into the bedroom. He testified that, after Mrs. Darling had made the statements with reference to "think what you are doing, etc.," that he said, "He has threatened my life, and offered to kill me." He testified that, as he entered the room, he grabbed for the guns, that is, the rifle and shotgun, to get the guns, and that Wetzstein grabbed him; that Wetzstein grabbed for defendant's gun, and that they both had hold of the same

gun, that is the automatic, and that Wetzstein got him down; that defendant had hold of the butt, and Wetzstein the barrel, trying to get the gun away from defendant; that they were both back of the door; that Wetzstein was on top of him, and that the gun went off; that he left right after the discharge of the gun. The defendant testifies that his condition was one of fear at the time he was there, meaning thereby the Darling residence.

The testimony of the state shows that the fatal wound was inflicted upon Wetzstein in the stomach near the median line; that the bullet which caused his death passed clear through him. There is considerable more testimony in behalf of the defendant by other witnesses. We have been compelled to refer to the testimony at length, in order to intelligently discuss and analyze defendant's claim of self-defense, and to determine if the court committed prejudicial, reversible error in excluding evidence of certain threats alleged to have been made by Wetzstein against the defendant at several different times prior to the date of his death at the hands of the defendant, and which were communicated to the defendant. In order for the claim of self-defense to be available to the defendant in this case, he must show that Mathias Wetzstein, at or before the commencement of the trouble, on the day the homicide was committed, did some overt act, which means an open act which indicated a present purpose on the part of Wetzstein to then do immediate and great bodily harm to the defendant. Assuming, as defendant claims, that the first meeting on the day in question between him and Wetzstein occurred in the barn, and admitting all that defendant testifies with reference to what occurred in the barn to be true, and admitting further that the defendant, as well as Wetzstein, knew of the gun, and the rifle being in the house, and that Wetzstein made the remarks and threats at this time which were testified to by defendant, did that, on the part of Wetzstein, constitute an overt act? If by him no overt act was committed, then the claim of self-defense is not available to the defendant, and all the prior threats made by Wetzstein against defendant, of which evidence was sought to be introduced, are inadmissible; or, if there were an overt act, and, after it occurred, the danger to defendant ceased, and he was in a position of safety, or could easily have reached a place of safety and thus have averted the crime,

the evidence of prior threats are, for this reason, equally inadmissible.

Words and phrases, in discussing the case of State v. Golden, 113 La. 791, 37 So. 757, uses the following language: "No exact definition of an 'overt act' can be given. It may be emotion, gesture, conduct, or demonstration, or anything else which evidences reasonable and present design to take the life of the accused or to do some great bodily harm. Such purpose may be manifested by conduct following short of personal violence, or actual assault and, in some instances, the extent of the 'overt act' which would induce the accused to act in self-defense, is measured by the character of the deceased for a violent, dangerous man, notorious in the community or known to the accused as such."

We are of the opinion, assuming the defendant's testimony to be true as to what happened in the barn, taking into consideration the language there used toward the defendant by Wetzstein, and that he placed his hand in his hip pocket in a menacing manner, and immediately after entered into a physical encounter with defendant, and getting possession of defendant's gun, which was on the wall of the barn, and all of the other testimony in this regard which the defendant has given, that such constituted an overt act on the part of Wetzstein, and if the defendant at that time believed his life was imperiled, and that he was about to lose it, and if it then appeared to him that his life was in danger, and he had at that time killed Wetzstein, there might be some merit in his contention that he killed him in self-defense, and, under such circumstances, the plea of self-defense would be a proper one, and to strengthen and substantiate such plea, previous threats made by Wetzstein against defendant's life, or to do him some great bodily harm, might be shown as bearing upon defendant's frame of mind at that time. This, however, the defendant did not do. Wetzstein left the barn to go to the house, and defendant testifies, with a threat to get a gun. It is quite a distance, as disclosed by the evidence, from the barn to the house. The barn was on the back end of the lot and the house on the front end.

After the encounter in the barn, if there were one, and after Wetzstein left the barn to go to the house, for the immediate time at least defendant was in no personal danger. He had means of retreat and could have left the barn and gone up town, and in all probability

avoided any further difficulty at that time. It appears to us the right of self-defense terminated at this point, and from thence forward the defendant was not acting on the principle of self-defense, but became a most persistent aggressor. He followed Wetzstein from the barn to the house. He shot at him at that time, but did not hit him. He followed him into the house, as we have above stated, to the door of the bedroom which he repeatedly and persistently tried to enter against the pleas of the lawful owner of the house, against her supplications that he not commit murder there, against her entreaty that he think what he was doing. Three times he threw himself against the door, trying to push it in, but he was unable to do so against the combined strength of Mrs. Darling and Wetzstein.

Seemingly baffled in his attempt to get into the room, and apparently without any thought of the feelings of Mrs. Darling, and in disrespect or her in her own house, and in spite of all her entreaties to him to desist from his apparently murderous intentions, he discharged, from his revolver, two shots into the door which Mrs. Darling was holding, resulting, as above stated, in cutting off Wetzstein's little finger.

Mrs. Darling apparently could stand the strain no longer, and her courage must have been extremely superb to have stood, as she did, firm as a rock, striving to prevent the impending crime. Wonder it is, that any woman could be possessed of such undoubted courage, she being placed in a position which would test, to the very extreme limit, the metal of the most courageous of men. It is not to be wondered at that, after the firing of the two shots, she felt that she had done all that she could do to prevent the impending crime, and thereafter sought her own personal safety, and sought assistance.

At last the defendant got into the room, and, either within the room or from the window in question, shot Wetzstein to death. That was murder, and one in which there are no extenuating circumstances.

Seldom, in the annals of crime, is there recorded a more revolting one, or one accompanied by more savage cruelty. It is a crime which, under the record in this case, admits of no excuse. There is no showing by the defendant after Wetzstein reached the bedroom, that he attempted to, or got hold of any of the guns in the room, and none of those guns were found near him, nor did he have any weapon upon him of any kind or character.

To have admitted, in evidence, alleged prior threats of the deceased against the defendant, on the theory or claim that they would afford some justification or palliation of the acts of defendant, from the time when he followed Wetzstein from the barn to the house, where he killed him in a most cruel and inhuman manner, would make a mockery of law and justice.

The persistent, deliberate, savage persistence of the defendant, at the door of the bedroom which alone separated him from his intended victim, are explainable, under the evidentiary facts and record of this case, under no other theory than an insatiate and unquenchable desire for the blood of his victim. Not until he had inflicted a mortal wound upon him, not until he knew or must have known that his life blood was fast ebbing away, not until he knew that the hand of death, by reason of his acts, had relentlessly closed upon the body of his victim, according to the records in this case, did he desist from his persistent, murderous purpose.

The threats were sought to be introduced in evidence only for the purpose of showing self-defense, and, under the circumstances we have stated, they were properly excluded. They were not claimed to be admissible in evidence for any other purpose, and thus there is no error in the record by reason of their exclusion. No error was committed in denying motion for a new trial.

The defendant has had a fair trial before an impartial court and a jury of his peers, in a county removed from the scene of the crime. He had the benefit of able counsel, of unquestioned and conceded ability in a trial of this character. He had been afforded every constitutional right in this trial.

The jury, under the law, had the right to fix the degree of the crime and the punishment therefor, subject only to the limitations prescribed by statute with reference thereto. It has done so. Its verdict is that the defendant was guilty of murder in the second degree. Upon that verdict the court entered a judgment, and the judgment should be affirmed.

It is affirmed.

CHRISTIANSON, Ch. J., and BIRDZELL, ROBINSON, and BRONSON, JJ., concur.

GEORGE GUSSNER, Appellant, v. R. MILLER & H. SHUPER, a Copartnership, Respondents.

(176 N. W. 359.)

Specific performance — allegation of default in payment — tender of payment by defendant — plaintiff not entitled to relief.

1. Plaintiff leased defendants certain lands upon certain terms, and sold them certain personal property for a given price, part of which was to be paid in cash, and the balance within a definite time, to be secured by a chattel mortgage upon the property.

Plaintiff brought this action for specific performance, claiming defendants made default in the payment, and in the failure to give chattel mortgage for the unpaid balance of the purchase price of the property. Defendant denies the default and claims full payment and tender of payment, and tender of a note and chattel mortgage for the unpaid balance.

Held, that the plaintiff is not entitled to a decree of specific performance, and that the defendants have paid, or tendered payment, and tendered a note and chattel mortgage in compliance with the terms of the contract, and in excess thereof to the extent of $641.81.

Evidence — sales — parol evidence admissible to show quality of property sold — recovery by buyer for breach of implied warranty of merchantability.

2. Among other personal properties sold defendants was a large quantity of hay. The hay was mentioned in the written contract, but nothing therein stated as to its quality. Defendants claim the plaintiff represented the hay to be put up in good condition, and free from dirt, weeds, etc., and that such representations were false and untrue, and that they relied upon them, etc.

The defendants introduced testimony showing the spoiled condition of the hay.

Held, that it was proper to introduce such testimony, and that it did not vary, nor attempt to vary, the terms of the written contract, nothing being said in the contract about the quality of the hay.

Held, further, that, under § 5981, Comp. Laws 1913, the defendants were entitled to recover, upon an implied warranty, the hay at the time of the purchase being inaccessible to their examination, being contained in some thirty-three stacks, the inside of which could not well be examined until they were used; and it being further shown that part of the hay was unmerchantable by reason of being spoiled or in a decaying condition.

Opinion filed November 8, 1919. Rehearing denied January 7, 1920.

NOTE.—On right to specific performance of contract to execute chattel mortgage or security on chattels, see note in 6 L.R.A.(N.S.) 588.

Appeal from the District Court of Grant county, *C. W. Buttz*, J., acting at the written request of J. M. Hadley, Judge of the 12th Judicial District.

Modified and affirmed.

Newton, Dullam, & Young, for the plaintiff.

All prior negotiations were merged in the written contract, and no former negotiations are admissible in evidence in a suit upon such contract. Gilbert Mfg. Co. v. Bryan, 39 N. D. 13, 166 N. W. 805; Comp. Laws 1913, § 5889; 23 R. C. L. p. 1395, § 219.

The existing statutes, and the settled law of the land at the time a contract is made, become a part of it, and must be read into it. 6 R. C. L. p. 855, § 243.

An agreement to give a chattel mortgage may be specifically decreed to be a chattel mortgage. Brown v. Van Winkle, 6 L.R.A.(N.S.) 588; 36 Cyc. 566; St. Louis Clay Products Co. v. Christopher, 152 Wis. 603, 140 N. W. 351; Gandy v. Collins, 214 N. Y. 293, 108 N. E. 415.

Jacobsen & Murray, for respondents.

The testimony shows that the plaintiff drew up this contract. Consequently all the ambiguities are to be construed in favor of the defendant. N. D. Rev. Stat. 1913, § 5914.

The vendor of personal property impliedly warrants the quality of the articles sold. Holbert v. Weber, 36 N. D. 106, 161 N. W. 560.

"An express warranty that the article should be in good order does not exclude an implied warranty of fitness for the purpose intended." 35 Cyc. 393, note 80, 539, ¶ 2; Blackmore v. Fairbanks, 79 Iowa, 282, 44 N. W. 548.

Conceding that the evidence does not show fraud, still it shows a failure of consideration. Such is a good defense. 35 Cyc. 539, ¶ 3.

"A parol contemporaneous agreement, which constituted the inducing cause of a written contract, or formed a part of the consideration therefor, is generally admissible in evidence." Erickson v. Wiper, 33 N. D. 193, 157 N. W. 592; Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93.

The breach of warranty was not waived by payment of the price. 35 Cyc. 433, ¶ 4.

GRACE, J. The plaintiff, in October, 1917, leased to the defendants certain real property, consisting of a large farm in Burleigh county, North Dakota, for the term of five years at a certain stipulated cash rental per annum.

The plaintiff, in said agreement, sold the defendant 160 head of cattle at the agreed price of $6.75 per hundred weight; 8 head of horses at $1,100; harnesses amounting to $140; a large amount of machinery at $1,556.72; 3 milch cows at $160, and a large amount of hay at $13.50 a ton, which was to be inventoried by November 1, 1917; the horses, harnesses, machinery, and hay were to be paid for by one half cash, the balance within seventy days, and to be secured by a mortgage on the horses, hay, machinery, etc.

The cattle were paid for in cash. The defendants paid $500 on the other property at the time of purchase. The dispute arose as to the amount remaining due upon the balance of the property so purchased, the defendants claiming that the alfalfa hay was represented as of good quality, and not spoiled or decayed; that it was well stacked and there was no dirt or clay raked into the stacks. The defendants claim that the hay was improperly stacked and the inside thereof decayed and rotten, which was unknown to them at the time they purchased the hay. The defendants claim that the representations were false, and that they relied upon them and purchased the hay. There is also a further contention on the part of defendants that they did not get all the machinery they purchased.

The plaintiff brings this action for specific performance of the contract. He claims there is still owing him, for the balance of the purchase price of the horses, hay, and machinery, $9,076.74. The defendants claim the amount should be $7,313.76, upon which they were entitled to a credit of $500, which was paid at the time of the contract. They tendered the plaintiff, on about the 10th day of November, 1917, $3,156.88 in currency as a balance of one half of the purchase price of the horses, hay, etc., and also tendered a note and chattel mortgage for $3,656.88 in settlement of the other half of such indebtedness, and, in compliance with the contract, tendered a good and sufficient bond in the sum of $4,000,—all of which tenders were unaccepted by the plaintiff.

The money, chattel mortgage, note, and bond tendered were deposited at the Capital Security Bank of Bismarck, and there lawfully tendered to plaintiff.

The defendants have counterclaims against plaintiff, and thereby claim damages for failure to receive part of the machinery, and for the unmerchantable condition of a portion of the hay. It is also a serious dispute as to the number of tons of certain alfalfa hay.

The principal questions for consideration relate to the amount and quality of the hay, the value of the machinery which defendants purchased, which was not delivered to them, and the actual balance due plaintiff after crediting defendant with the amount to which they are entitled by reason of any sum of money found to be owing them on any counterclaims. A decision of these questions will practically dispose of this case.

The plaintiff and defendants each have submitted in cubic feet, their calculation as to the amount of the hay. We have examined them with care, and conclude that of the defendants contained in their brief is substantially correct, which shows there was 174,730 cubic feet of hay.

The defendants' calculation does not seem to include a certain three-cornered stack of alfalfa hay which the plaintiff shows contained 2,296 feet and a fraction. The defendants' calculation on all the other stacks, both wild and alfalfa, is over the correct number of cubic feet to an extent which is sufficient to practically allow for the three-cornered stack, so that their calculation is approximately correct.

There is a contention as to the number of cubic feet which should be allowed for a ton of alfalfa hay, the plaintiff contending it should be 343 feet, and the defendants, that it should be 512 feet.

The plaintiff bases his contention on the provisions of § 3007, Comp. Laws 1913, which provides: "A ton of hay shall consist of 2,000 lbs.; or by measurement 343 cubic feet, after the same shall have been stacked thirty days or such time as may be agreed upon between the parties."

The number of cubic feet specified in that section for a ton of hay, we are fully convinced, relates to wild hay or such other specie of hay as is practically of similar texture to wild hay in the sense that the stalks thereof are of such small diameter that when placed in a stack

they will pack or solidify in the same proportion as wild hay. We know, however, that alfalfa and clover have quite large stalks or stems. Alfalfa is a specie of clover; it belongs to the clover family; its stems or stalks, as a rule, are coarse. When placed in a stack, it is self-evident that it will not be compressed or be so much solidified as hay of finer texture and stalks. A perfect cube thereof of 7 feet by reason of the coarseness of the stalk could not be compressed into as solid condition as a similar amount of wild hay or hay of similar texture. It must follow that the cube of alfalfa hay would weigh less than a like cube of wild or similar hay for the reason there is more space unoccupied in the cube of it referred to.

We are of the opinion that the preponderance of the testimony clearly shows it was agreed between the parties in measuring the alfalfa hay that 512 cubic feet thereof would be equivalent to a ton. Testimony further shows that, in the state of Montana, that number of feet are considered the equivalent of a ton of alfalfa. That measurement presupposes the alfalfa has been stacked sufficient time to become fairly packed, and, further, that it was stacked in proper condition and is in a proper state of preservation.

We are of the opinion that 343 feet should be considered the equivalent of a ton of wild hay, and, under the agreement between the parties, 512 feet the equivalent of a ton of alfalfa.

Taking respondent's calculations as approximately correct, there were 354.12 tons of hay. Disregarding the small fraction, 354 tons of hay at $13.50 per ton gives $4,779, as the total value of the hay, if it were all good hay.

The trial court allowed plaintiff for 382½ tons and found the value to be $5,163.75; it should not have allowed the plaintiff for more than 354 tons; it, however, allowed a deduction of 49 tons on account of that much of the hay being spoiled. This is to some extent misleading. Testimony shows that there were 100 tons of spoiled hay which the defendants admitted were worth $6 per ton. Their loss on the hundred tons would be $7.50 per ton, or $750. Deducting that amount from the total value of the hay would leave $4,029. The invoice price of the machinery, after allowing the discount agreed upon, was $1,537.75, and the harness, $140; total, $1,677.75. There should be deducted

from this amount $134.80 for articles of machinery which defendants did not get, and for a certain 2-horse engine with which defendants were improperly charged. Those deductions being made would leave $1,542.95 as the inventory agreed price for the machinery and harness. To this amount must be added $1,100, price of the horses, and $4,029, the net cost of the hay after above deductions, gives the total of $6,671.95.

The latter amount is the amount which defendants should have paid or tendered to the plaintiff for the purchase price for said personal property which is involved in this litigation, instead of the sum of $7,313.76; the difference, $641.81, the defendants are entitled to have returned to them from the plaintiff or from the bank where the amount of such tender was left, it being an excess payment or excess tender to that amount.

The plaintiff's claim that the money and the chattel mortgage tendered were not sufficient in amount contains no merit. He complains that the note and chattel mortgage tendered by the defendants was not in the proper form, not according to the terms of the contract. The contract really contains no terms in this regard, with the exception that it provides with reference to the payment for the horses, harness, machinery, and hay, that one half the total sum is to be paid in cash and the balance is to be paid on or before the expiration of seventy days, same to be secured by a mortgage upon the above-described horses, hay, machinery, etc.

Construing the contract literally, the defendants were not required to give a note, but simply a mortgage to secure the one-half purchase price remaining unpaid. According to the strict terms of the agreement, the defendants were required to execute only a chattel mortgage. The chattel mortgage, we presume, would be legal if it secured the sum named in it, that sum not being evidenced by a note. We think, so far as the agreement is concerned, the note and chattel mortgage executed more than complied with any requirement of it, though the note was in form, non-negotiable, and made subject to all defenses and counterclaims.

The plaintiff further complains that the chattel mortgage tendered was not sufficient by reason of certain clauses being stricken out of the

mortgage, and for the further reason that it contained a provision providing that the mortgagors could feed the hay. It seems, however, that the plaintiff made no objection to the tender upon any of these grounds, and it may be assumed that he waived any such defects; even though the clauses complained of were stricken out of the chattel mortgage tendered, if it had been accepted, it would have constituted a valid lien upon the property therein described.

In this connection, it is well to remember that it should be taken into consideration that the defendants, in pursuance of the terms of the contract, tendered to plaintiff a bond in the sum of $4,000. The sufficiency of this bond is not questioned. It operated to give plaintiff further security for the debt which defendants owed him, and which is the subject of this litigation. Nowhere in this record has it been shown that the defendants exercised any bad faith toward the plaintiff. On the contrary, it appears they have acted in the best of good faith.

Regarding the clause therein which provided that the defendants might feed the hay, it will be noted that the lease was dated October 13, 1917. The court has a right to take judicial notice of the seasons of the year, and in that respect may take notice that the grazing season was near its close at the time the lease was made.

The defendants had purchased from the plaintiff a large amount of personal property, consisting of, among other things, a large amount of live stock above mentioned, especially 160 head of cattle. The season was at hand when they would have to be fed hay. It seems apparrent that both parties knew and intended that the hay was purchased for the purpose of being fed to the stock in question. Certainly the plaintiff did not intend that the defendants should purchase all the hay, and then not to be permitted to feed it to the large amount of stock which he had purchased. Without laying down, or attempting to lay down, any rule in such case, we are of the opinion in this case that no other inference can be drawn from the facts and circumstances other than that both parties knew and intended the hay in question to be fed to the stock, and impliedly the plaintiff authorized and consented that it might be so used.

The defendants claim damages on account of overweight of cattle

caused by the plaintiff weighing the cattle at a different time, and under different conditions than those under which they were to be weighed. The cattle were weighed and were paid for without the defendants interposing any objection. There are no circumstances attendant upon the weighing and the settlement for the cattle that are sufficient to disturb the settlement then made. It is held that the settlement disposed of that matter.

The plaintiff challenges the finding of fact of the court with reference to the quality of the hay, and contends that any representations made by plaintiff to the effect that the hay was of good quality and not spoiled or decayed were made, if at all, prior to the written agreement in question, and for this reason merged in it. He cites in support of this contention the case of Gilbert Mfg. Co. v. Bryan, 39 N. D. 13, 166 N. W. 805. While that case, in part, supports the contention of plaintiff, it does not fully do so. It dealt with the attempt to vary the terms of a written contract by parol testimony. There was an attempt in that case to show that there were certain oral agreements made prior to the execution of the written instrument which were different than those in the written agreement. Where there is an attempt to prove parol agreements, made at or before the time of the execution of the written contract, which would vary the terms of it, and which were not the inducing cause of it, there is no doubt the rule laid down in the Gilbert-Bryan Case is a correct one. When it is read, however, carefully it will be seen that it deals only with the terms which are stated in the written contract. It does not include parol testimony as to agreement or agreements, or matter which is not covered by the written contract. It recognizes the rule that it is proper to prove by parol testimony a part of a contract or agreement not included in the written agreement.

In the case at bar, there is nothing in the written contract as to the quality of the hay. The written contract is entirely silent upon this matter. The introduction of parol testimony as to the quality of the hay did not attempt to vary any term in the written instrument in question, and was properly admitted.

Aside from the question of the written agreement, there was, under

the Sales Act, chap. 202 of the Session Laws of 1917, an implied warranty of the quality of the hay.

There were about thirty-three stacks of hay. Manifestly, it would have been practically impossible for defendants to have made an examination of it in the stack, by which its actual condition could have been ascertained. Its condition on the outside of stacks might be examined, and its condition, to some extent, determined, but that within considerable distance from the outside could hardly be known until the stacks were opened and used.

According to the testimony of Miller, the hay was described by Gussner as follows: "This hay is put up in the best shape you ever had hay put up," and, "This alfalfa hay is the best I ever put up," and "It is put up in good shape and there is no weeds in it and no dirt."

In these circumstances, the hay at the time of the sale was, in fact, inaccessible to the examination of the buyer.

Plaintiff, by reason of the implied warranty, is liable in damages to the extent in which such hay fails to correspond with merchantable hay.

The hay having been shown by competent testimony to have been in a damaged condition, to such an extent that 100 tons thereof were not of the value of more than $6 per ton, instead of $13.50, the sale price, it must follow that the hay was, to that extent, not merchantable, and that defendants suffered damages accordingly.

It is clear the plaintiff is not entitled to any relief by the remedy of specific performance or otherwise. The defendants have not been and are not in default. So far as this record is concerned, it shows they have performed, or offered to perform, the terms or obligations of the contract. They have either paid or tendered payment of the amounts due upon the contract, when due, and have tendered their note and chattel mortgage, as above stated, for the unpaid balance of the personal property in question.

The court ordered judgment in favor of the defendants upon the counterclaims for the excess payment and excess tender for the purchase price of the hay, machinery, etc., in the sum of $168.56. As we view the matter, the court was in error in its computation, and its error may be considered clerical and subject to correction by the modification

thereof to show the excess payment and excess tender which the defendants made, which is, approximately, $641.81.

The judgment of the District Court should be modified in the manner above indicated, and as modified should be affirmed.

It is so ordered.

The respondents are entitled to statutory costs on appeal.

ROBINSON and BRONSON, JJ., concur.

BIRDZELL, J. I concur, except as to the portions of the opinion relating to warranties and to an item of $134.80.

CHRISTIANSON, Ch. J. (dissenting in part). I am unable to agree with the conclusions reached by my associates on some of the questions involved in this case. The parties to this action entered into a written contract. The contract covers three pages of closely typewritten matter. It covers the transaction between the parties in detail. It is in all respects definite and unambiguous. There is no pretense or claim here of any fraud, accident, or mistake. The defendants merely assert that in the negotiations preceding the execution of the written contract there was a warranty as to the quality of the hay, and they claim the right to show and recover upon such warranty. Upon the trial, the plaintiff objected to the evidence offered relating to the alleged oral warranty, on the ground that the oral negotiations had been merged in the written contract; and that parol evidence was inadmissible to add to or vary a written instrument. In my opinion the objection was well taken. Under our laws "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 1913, § 5889. This section is applicable to the contract here. "The rule is well settled," says Mechem (Mechem, Sales, § 1254), "that where the parties have reduced to writing what appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the whole of the agreement between the par-

ties, and parol evidence or prior, contemporaneous, or subsequent conversations, representations, or statements, will not be received for the purpose of adding to or varying the written instrument. If, therefore, such a writing exists between the parties, and it contains no warranty at all, no warranty can be added by parol." Ruling Case Law says: "As a general rule a contemporaneous oral warranty cannot be ingrafted on a written contract or bill of sale which on its face purports to evidence the entire agreement of the parties, irrespective of whether it is silent on the matter of warranties or not. The reason for this is that a warranty, if made at all, forms a part of the contract of sale, and is not a collateral contract, and therefore proof of such warranty cannot be added to the written agreement by parol evidence." 23 R. C. L. pp. 1399, 1400, § 224.

I therefore believe that the evidence as to the oral warranty was inadmissible. I also believe that the evidence adduced in this case, if admissible, was insufficient to establish the warranty alleged.

The majority opinion holds that in any event there was a breach of the warranty implied under § 5981, Comp. Laws 1913. In my opinion this is incorrect. There was no averment of such implied warranty or of its breach. Defendants' counterclaim was based solely upon the express warranty. The implied warranty was not an issue. No recovery was sought thereon. It is elementary that a party who seeks to recover for the breach of a warranty must, by appropriate averment, show (1) the existence of the warranty; (2) the breach thereof; and (3) the resultant damages. 35 Cyc. 446–451.

The written contract was dated October 13, 1917. Under its terms the plaintiff sold certain machinery and harnesses to the defendants. The articles sold were enumerated, and a price fixed on each article in a list attached to the contract. The contract specified that the defendants were to pay for such articles "55 per cent of the invoice price during the season of 1915." The defendants contended that they had not received certain articles, the aggregate list price of which amounted to $134.80. The trial court awarded the defendants $134.80 on this account. It seems to me that this was erroneous. The articles were secondhand. There was no evidence of their value. The price given in the list was the invoice price of 1915. The defendants had agreed

to pay for this property only 55 per cent of $134.80 or $74.14. It seems to me that they should have been allowed to recover that amount only.

I agree with my associates that the evidence justified the trial court in finding that the parties, at the time they measured the hay, in effect, agreed that 512 cubic feet of alfalfa and 343 cubic feet of prairie hay should constitute a ton. I also believe that the findings in the majority opinion as to amount of hay are correct.

RALPH M. WARD, Doing Business as Ralph M. Ward & Company, Appellant, v. GEORGE E. VALKER, Doing Business as Valker's Minot Greenhouse, Respondent.

(176 N. W. 129.)

Sales — implied warranty as to fitness for purpose by seller.

In an action to recover a balance owing by the defendant, a florist, to the plaintiff, an importer of bulbs, where it appears that the plaintiff, in filling an order of the defendant, furnished an inferior quality of lily bulbs for which it later substituted a different species of cold-storage bulbs, and where the defendant filed a counterclaim based on the inferior quality of the bulbs, claiming consequential damages for the failure of the flower crop, the trial resulting in a judgment for the defendant for $843.26, it is *held:*

1. Under § 15 of the Uniform Sales Act (Sess. Laws 1917, chap. 202), where the buyer relies upon the seller's skill or judgment (though he be not the manufacturer or grower), the seller knowing the purpose for which the goods are intended to be used, there is an implied warranty that the goods shall be of merchantable quality and fit for the intended use.

NOTE.—The general rule of law, that where an article is ordered for a specific purpose, and that purpose is communicated to the seller, and the buyer relies upon the seller's skill, judgment, and experience to furnish something that will answer that purpose, there is an implied warranty that the article will be reasonably fit for the intended purpose, finds support in the authorities collated in notes in 22 L.R.A. 189; 15 L.R.A.(N.S.) 855, 868, 884; 31 L.R.A.(N.S.) 783; and 34 L.R.A.(N.S.) 737, on applied warranty of fitness of goods bought for a special purpose.

Sales — substitution by seller.

2. The fact that the seller substituted certain other lily bulbs for the ones ordered, and shipped them from a different source of supply, indicates an exercise of judgment sufficient to justify the buyer placing reliance upon its "skill and judgment.'

Sales — implied warranty — effect of printed statement against warranty in invoice.

3. Where circumstances anterior to the invoices indicate the existence of an implied warranty, a printed statement on the invoice in negation of a warranty does not operate to extinguish it as a matter of law.

Sales — where there is a substitution, clause against warranty does not apply.

4. The record showing that the damages recovered on the counterclaim were based upon a breach of an implied warranty in the sale of goods substituted for those originally ordered by the defendant, and that the substituted goods were not supplied as a part of the original order, the clause in the original order which expressly provides that no warranty is given is not applicable to the sale of the substituted goods.

Opinion filed January 10, 1920.

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

Affirmed.

Arthur M. Thompson for appellant.

"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; McQuade v. Ross, 22 L.R.A. 187.

"In sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity or thing sold, and the seller is guilty of no fraud, and is neither the manufacturer nor the grower of the thing he sells, the maxim caveat emptor applies." Benjamin, Sales, § 644; Barnard v. Kellogg, 10 Wall. 388; Egan v. Cole, 34 Pa. 236; American Forcite Powder Mfg. Co. v. Brady, 159 N. Y. 692, 53 N. E. 1122; Gardner v. Winter, 117 Ky. 382, 63 L.R.A. 647, 78 S. W. 143; 35 Cyc. 397–399; 36 Cyc. 406, 407; 10 C. J. 350.

Messrs. *Palda & Aaker*, for respondent.

"A disclaimer of warranty printed in fine type in the corner of a bill rendered to the purchaser of the seed, prior to his planting the

same, does not affect an implied warranty raised by the sale, where notice does not in fact come to his attention." Landreth v. Wyckoff, 73 N. Y. Supp. 388; Coates v. Harvey, 2 N. Y. Supp. 5; Grafter-Stamps Drug Co. v. Williams, 105 Miss. 296, 62 So. 273; Edgar v. Breck & Sons, 172 Mass. 581, 52 N. E. 1083; Hooven-Allison Co. v. Wirtz Bros. 15 N. D. 477, 107 N. W. 1078.

The vendor of personal property impliedly warrants the quality and quantity of the articles sold. Holbert v. Weber, 36 N. D. 106, 161 N. W. 560.

BIRDZELL, J. This is an appeal from a judgment of the district court of Ward county and from an order denying a motion for a judgment rendered in favor of the defendant on a counterclaim. The facts may be briefly stated as follows: The plaintiff was engaged in the business of importing bulbs and selling them wholesale to florists. The defendant operates a greenhouse at Minot, North Dakota. In the fall and winter of 1916, and again in the fall of 1917, the defendant ordered certain bulbs from the plaintiff. With certain exceptions these orders were filled, but the plaintiff failed to furnish an item of lily bulbs as ordered, and some cold-storage bulbs were shipped as a substitute. The action is brought to recover a balance of $861.55 which the defendant had not paid. The defendant filed a counterclaim based on the inferior quality of the goods substituted, claiming consequential damages for the failure of the flower crop. The trial resulted in a judgment for the defendant for $843.26.

The principal argument of the appellant is that the damages claimed in the counterclaim are not recoverable, for the reason that the goods were sold without a warranty. It appears that the orders which the plaintiff signed contained the following: "The above order is given subject to the following conditions, to all of which the purchaser hereby fully agrees. All understandings, representations, conditions, and agreements between the buyer and the salesman must be stated in this order. All bulbs and plants are carefully selected and packed, but, on account of the goods having been imported and of many other circumstances entirely beyond our control, no guaranty of the character of the goods, sizes, or flowering results is given under any

circumstances. All goods are sold subject to crop conditions and tariff revision. Unless otherwise stated in the order. Prices are considered f.o.b. New York city. The purchaser assumes the risk of transportation. Ralph M. Ward & Company shall not be held liable for any failures or delay in deliveries or interruption in the performance of this contract by reason of war or by any strike, fire, railroad, or other carrier's delays, or for any similar interference. Terms: Unless otherwise stated all bills for bulbs, plants, and roots are due sixty days from date of invoice; 2 per cent cash discount allowed if paid within ten days from date of invoice; all bills subject to sight draft if not paid when due; interest added to overdue accounts. Salesmen are not authorized to collect bills nor incur debts in our name under any pretext. Ralph M. Ward & Company reserve the right to decline the order, if taken at unsatisfactory prices or upon terms to which Ralph M. Ward & Company cannot agree. Countermands will not be accepted. It is understood that neither party is bound by any verbal contract."

In purported fulfilment of an order which the defendant had signed upon a blank containing the foregoing paragraph, some bulbs were sent, concerning which the defendant made complaint by letter, dated October 29, 1917, as follows:

"In regard to your invoice number 7285 calling for three cases of Formosa lily bulbs, 7 by 9, will say that this stock is very, very small and poor. We doubt if the bulbs average 4 inches, and there are only 61 bulbs out of the 3 cases that average 7 by 9. These are the poorest lot of lily bulbs we have ever received."

In replying to this letter the plaintiff, on November 3, wrote the defendant:

"What you say about Formosa is a great surprise to us, and it is evident there was a mistake made in shipping your cases, or the cases were improperly marked in Yokahama. We have received quite a few letters this year from customers who tell us that the Formosa is very satisfactory indeed.

"If you doubt you can get a good crop out of the Formosa you have we can send you some 7/9 packed 100 per case which we have in Chicago. Please advise us if you want them shipped to you. The charge

for the Formosa which have already been sent you can be left open until flowering time."

Defendant replied that he did not think he would get a third of a crop, and asked to have a duplicate order as suggested in plaintiff's letter. Plaintiff, in turn, wrote under date of November 10th:

"As it is evident that you wanted an early crop and we have not the full quantity of Formosa on hand to send you, we think the best thing to do will be to ship you some cold-storage Giganteum. Formosa planted now will not come in before Easter, whereas cold-storage Giganteum would flower during February and March, which is the time we presume you intended your crop of Formosa. We will ship you the cold-storage Giganteum from our warehouse in Omaha. . . ."

It appears that the cold-storage Giganteum bulbs which were shipped as a substitute for the Formosa were planted as soon as they were received, and that the flower crop from them was a failure, due to the quality of the bulbs.

The question that arises on the foregoing facts is as to whether or not the plaintiff is liable for the breach of an implied warranty of the quality of the goods sold. The first contention is that the plaintiff is not liable by reason of the stipulation in the written order hereinbefore quoted in full. But it is clear from the testimony and the correspondence in evidence that the damages claimed did not result from a breach of warranty concerning any goods embraced within the written order. On the contrary, it appears that the claim is based upon the inferior quality of bulbs sent as a substitute for an order which the plaintiff admitted was not properly filled by it.

Section 15 of the Uniform Sales Act (Sales Laws, 1917, chap. 202) provides that there is an implied warranty or condition as to quality or fitness:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies upon the seller's skill or judgment (whether he be the grower or manufacturer or not). . . ." And also:

"(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or man-

ufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

Under the Sales Act the implied warranty arises out of the reliance of the buyer upon either the skill or judgment of the seller, and the relative position of the parties, due principally to the character of the business or occupation of the seller, which was once deemed practically conclusive in determining the existence of an implied warranty, is not conclusive under the act. As to the effect of the Sales Act in broadening somewhat the liability of the seller, see Williston, Sales, § 248. Moreover, a comparison of the repealed statute with the section of the Sales Act touching the subject of implied warranties further illustrates the broadening of the basis of liability. Section 5980, Comp. Laws 1913, the repealed statute, apparently limited the warranty of fitness for a particular purpose to transactions where the article was sold by a manufacturer. This term, however, will be seen to be broad enough to include growers. See Williston, Sales, § 240. Whereas, under the sections of the Sales Act quoted above, the implied warranty may exist though the seller be not the manufacturer.

It is also contended that a printed statement upon the various invoices sufficiently negatived the implied warranties as a matter of law. The printed statement reads: "No warranty of any kind given. All claims must be made within five days after delivery." The observation of Holmes, J., in a parallel case is a sufficient answer to this contention, and we are content to adopt it as such: "The general printed warning on the billhead, that the defendant did not warrant seeds, could have no effect unless it led to the inference that the old contract had been rescinded, and a new one substituted, by mutual agreement. Even if the bill had been receipted, it would not have excluded proof of the warranty, and whether it was evidence of a rescission or not it did not establish one as matter of law." Edgar v. Joseph Breck & Sons Corp. 172 Mass. 581, 52 N. E. 1084. If the circumstances anterior to the invoices indicated the existence of a warranty, we cannot say that the printed statement on the invoice operated to extinguish it as a matter of law.

Under the facts in the instant case there can be little or no question that the purchaser relied upon the judgment of the seller in supplying

bulbs that would take the place of the ones previously shipped, and which would be capable of producing a flower crop for the market intended to be supplied by the first order. It is apparent, too, that the seller exercised its judgment in this particular by changing from one species to another and shipping from a different source of supply, to wit, cold storage from Omaha instead of Chicago.

There is ample testimony in the record to support the recovery upon the counterclaim to the extent of the verdict and judgment. In fact, the appellant does not seem to question the sufficiency of the evidence on this point. Being of the opinion that the record contains proof of sufficient facts to support an implied warranty of the substituted bulbs, and finding no reversible error, the judgment and order appealed from must be affirmed. It is so ordered.

CHRISTIANSON, Ch. J., and GRACE, and BRONSON, JJ., concur.

ROBINSON, J. I dissent.

STATE OF NORTH DAKOTA, Respondent, v. S. M. BURCHAM, Appellant.

(176 N. W. 657.)

Evidence — intoxicating liquors — question of maintaining "blind pig" was for jury.

Where the defendant was convicted of maintaining a common nuisance by keeping and maintaining a so-termed "blind pig," and where, upon appeal, the defendant has challenged the sufficiency of the evidence to charge him with the keeping or maintaining of such "blind pig," it is *held* that there is some creditable evidence in the record concerning the keeping and maintaining of the "blind pig" by the defendant, and, though meager, this evidence was for the consideration of the jury as a matter of fact.

Opinion filed January 12, 1920.

Criminal action for maintaining a common nuisance in District Court, Richland County, *Allen*, J. From a judgment of conviction the defendant has appealed.

Affirmed.

C. J. Kachelhoffer (*W. S. Lauder,* of counsel), for appellant.

Jos. G. Forbes, for respondent.

This court will not review sufficiency of evidence in the absence of a motion for a new trial. 17 C. J. 89; 12 Cyc. 813, 823.

Weight of evidence is for jury. State v. Reilly, 25 N. D. 339; State v. Gless, 29 N. D. 620; 12 Cyc. 731, 906, 907; Birmingham v. State (Wis.) 129 N. W. 670; Burnett v. State (Neb.) 130 N. W. 263; People v. Bowers (Cal.) 52 Pac. 553.

BRONSON, J. In the trial court the defendant was convicted of maintaining a common nuisance. He has appealed from the judgment therefor upon the sole ground that the evidence is insufficient to justify the verdict of guilty rendered.

The information charges the defendant and one McDonald with keeping and maintaining a place at Hankinson, between January 5, 1913, and June 1, 1914, where intoxicating liquors were kept for sale and sold, and where persons resorted for purposes of drinking the same as a beverage, contrary to the statute. The defendant alone was tried.

The evidence discloses that, during the time alleged in the information, the defendant conducted a restaurant with a pool room, called the "Gem Restaurant," in Hankinson. This place proper consisted of two rooms,—a large room used for a lunch counter and pool room; a smaller room used as a kitchen. Adjacent to these rooms, in the same building, there was another small room where there was maintained a "blind pig." There is no dispute in the record that in this room called a "blind pig," during the time alleged, beer was kept for sale, was sold, and was there drunk by purchasing customers, in abundance plenty. The question upon this appeal is, Who conducted, or was responsible for conducting, this "blind pig?" The defendant maintains that there is no evidence, as a matter of law, in the record, which formed any question of fact for the jury, that the defendant either conducted or was responsible for so conducting this place. The record has been examined at length.

The defendant asserts and testifies that McDonald was running the "blind pig," this same McDonald who later worked for him in the saloon business at Mishua, Minnesota. That although he had leased

this entire building, McDonald later got this room from him (just when he does not know), and ran this "blind pig" separate and apart from his rooms. In disposing of the beer in this room, the "modus operandi" was to lay down the money there, and soon, out through a "cuba hole," so-termed, the beer appeared, the dispenser unseen.

There is some evidence, however, that McDonald was working for the defendant; that he was cooking in the restaurant; that he worked upon or "fixed" the pool tables. The defendant received many shipments of liquor. One witness testified that he ordered beer from the defendant, while in this "blind pig" room, and McDonald got and was paid for the beer. This and other evidence, though meager, was sufficient, in our opinion, to take the case to the jury upon the questions of fact presented. See State v. Rozum, 8 N. D. 548, 558, 80 N. W. 477; State v. Kruse, 19 N. D. 203, 206, 124 N. W. 385; State v. Corn, 76 Kan. 416, 91 Pac. 1067; Scott v. State, 37 N. D. 90, L.R.A. 1917F, 1107, 163 N. W. 813; State v. Wheeler, 38 N. D. 456, 165 N. W. 574. Notoriously, "blind pigs" neither squeal aloud, nor see openly who their keepers are. The judgment is affirmed.

CHRISTIANSON, Ch. J., and GRACE, and BIRDZELL, JJ., concur.

ROBINSON, J. (dissenting). Colloquially, this is known as a "blind pig or common nuisance case." The complaint is that between January, 1913, and June, 1914, at Hankinson, in Richland county, the defendant did commit the crime of keeping a place for the sale of intoxicating liquors. A jury found Burcham guilty, and the judgment is that he be taken from the bosom of his family,—a wife and five young lasses,—and imprisoned in the county jail for three months, and that he pay a fine and costs amounting to $340. McDonald was clearly guilty. He had a government license to sell liquor, and there is documentary evidence showing that in each week he imported and received large shipments of beer. But McDonald escaped and went to Minnesota, and, as it appears, Burcham has been made the scapegoat to carry away into the wilderness and the county jail the sins of McDonald. In the opinion of one learned judge it is said: "The evidence against Burcham is quite meager." He says: "There is some evidence that

McDonald was working for defendant; that he was cooking in the restaurant and fixed pool tables of the defendant;" but that is all completely and fully disproven by the testimony of the defendant. And it seems that, without quoting or attempting to weigh or give the gist of the testimony, the learned judge puts the responsibility on the jury. That is in accordance with past usage, but it is high time to forever discontinue it. The judges have always been too much disposed to shirk work and responsibility, and, like Pontius Pilate, to wash their hands and say: I am innocent; let others bear the responsibility—and that has been a standing reproach to the judges. In cases of this kind we all know of reasons why appellate judges should weigh and consider the evidence with scrupulous care; we know that judges and prosecuting attorneys have been elected to office because of their tact in catering to what is known as the dry vote, and because of their zeal in the prosecution of pigs. We know the prosecuting attorney has come before this court and asserted that he believed the defendant guilty. We have reason to believe that he, in like manner, gave the opinion to the jury, and he argued to the jury that counsel for defendant was in the habit of defending pigs—as if that were a disgrace to him and a reason for convicting the defendant. It should be known that a prosecuting attorney must conduct his case with fairness; that he must not appeal to passion or prejudice, nor put his opinion in the scale to weigh against the accused.

Now let us consider the testimony,—and there is really no testimony except that of the defendant. He appears to be an honest, well-to-do and manly person. His testimony bears the impress of fairness and candor, and we say it is unimpeached and uncontradicted. He testifies: I have lived in Hankinson twelve years off and on. I am married, have five children. From January, 1913, to June, 1914, I conducted a place in Hankinson known as the Gem Restaurant and pool hall in the same building. The building was 40 feet wide and 60 feet deep. I had 40 feet of it (the 40 front feet). In the north end of the building there were two rooms, which were occupied by McDonald. I did not hire these two rooms; I never paid rent for them. I had nothing to do with ordering the beer shipped to McDonald. I never at any time requested or authorized him to ship beer to that place. I never

hired or requested any drayman to haul beer to that place or to haul away empties. I never paid for a single bottle, cask, keg, box, or anything else of the beer represented by the stack of papers (the exhibits of shipments to McDonald). Neither did I pay freight on any of them. My wife and my family drink beer, whisky, and occasionally wine. I bought liquor and had the same at my house for private use of myself and family. None of it went to the restaurant, and none of it was sold there.

I carried on a pool room and restaurant. Archie McDonald did not work for me in the pool hall and was not in my employ. I did not work for Archie McDonald. I did not sell one drop of intoxicating liquor of any kind to any person, either in the Gem Restaurant or in the room back of it or in any other place. McDonald boarded in the pool room. I never employed him to fix pool tables. I had a man working for me. He never did any cooking in the restaurant, though sometimes he cooked his own meals. He was a regular boarder there. I never sold a drop of liquor that was shipped to me.

In Nashua, commencing November, 1915, I ran a saloon in connection with a wholesale liquor house. I discontinued the business when they voted to close the saloons. I came back to Hankinson in 1916. At Nashua I had three others in my employ besides McDonald. (64) Such is the gist of the testimony of defendant—and I submit that it is wholly uncontradicted, either by facts or circumstances. There is no evidence to sustain the charge against the defendant, and on this old matter of nearly six years, there is no reason for subjecting the defendant and the county to the expense, vexation, and annoyance of a new trial.

Judgment should be reversed and action dismissed.

LANPHER, SKINNER, & CO., a Corporation, Respondent, v. JOHN L. SCHULDHEISZ, Appellant.

(176 N. W. 1.)

Sales — orders taken with the supposition that purchaser would keep his credit good.

In an action to recover on a book account where the defendant counterclaimed, asking damages for the failure of the plaintiff to fill certain orders for goods, which orders had been previously given by the defendant to a salesman representing the plaintiff, and receipt of which had been acknowledged by the plaintiff, it appears that according to a prior course of dealing between the parties the invoices for the goods represented by the order were to be dated November 1, 1917, defendant to have sixty days' credit thereafter. The defendant had allowed his previous accounts to become delinquent from six months to a year, and had refused to make settlement with plaintiff until plaintiff would ship the goods embraced in the order. It is *held:*

1. The orders were given and taken upon the implied understanding that the defendant would keep his credit good with the plaintiff.

Sales — seller not compelled to fill orders when buyer does not keep his credit good.

2. Under the facts disclosed by the evidence, the defendant failed to fulfil the implied condition which would entitle him to further credit, and the plaintiff was not guilty of a breach of contract in declining to ship in fulfilment of the orders previously acknowledged.

Opinion filed January 15, 1920.

Appeal from an order and judgment in District Court, LaMoure County, *Coffey,* J.

Affirmed.

Wolfe & Schneller, and *Hutchinson & Lynch,* for appellant.

The loss of profits sustained by appellant on account of nondelivery of the goods should have been submitted to the jury. 8 R. C. L. "Damages" §§ 62 et seq.; Taylor Mfg. Co. Hatcher & Co. 3 L.R.A. 587 and note; Cavanaugh Mfg. Co. v. Rosen, 92 N. W. 788; Pelsofsky v. Kaufman, 1 A.L.R. 433.

Nothing short of a breach of contract or actual insolvency would excuse a party from fulfilling the contract on its part. Frolich v. In-

dependent Glass Co. 107 N. W. 889; Cavanaugh Mfg. Co. v. Rosen, 92 N. W. 788.

Where a contract is severable, the failure of the purchaser to pay one instalment does not release the seller from the contract. Under the same rule, the failure of the defendant Schuldheisz to pay for goods already delivered, did not release the plaintiff from carrying out its contract of sale. Iowa Brick Mfg. Co. v. Herrick, 102 N. W. 787; Tucker v. Billing, 5 Pac. 554; Osgood v. Bauder, 39 N. W. 887; Myer v. Wheeler, 21 N. W. 692.

R. H. Sherman and *Winterer, Combs, & Ritchie,* for the respondent.

"If the failure to fully perform is deliberate and intentional, and not the result of inadvertence or inability to perform, the other party under these circumstances may treat the contract as being at an end." 9 Cyc. 649; Stephenson v. Cady, 117 Mass. 6; Blackburn v. Reilly, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159; Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Rugg v. Moore, 110 Pa. 236, 1 Atl. 320.

"If nonpayment of one instalment of goods be accompanied by such circumstances as to give the seller reasonable grounds for thinking that the buyer will not be able to pay for the rest, he may take advantage of this one omission to repudiate the contract." Stephenson v. Cady, supra; Stokes v. Barr, 18 Fla. 656; Geo. H. Hess Co. v. Dawson, 149 Ill. 138, 36 N. E. 557; W. H. Purcell Co. v. Sage, 200 Ill. 342, 65 N. E. 723; Rybold v. Voorhees, 30 Pa. 116; Hull Coal etc. Co. v. Empire Coal etc. Co. 113 Fed. 256; Burt v. Sand Co. 141 Ill. App. 603; Buggy Co. v. Forging Co. 168 Ind. 593, 81 N. E. 574, 11 Ann. Cas. 1045; Strothers v. Lumber Co. 200 Mo. 647; Coal Co. v. Coal Co. 205 Ill. App. 264; Coryell v. Furnace Co. 96 Atl. 65; Agency v. Penoyar, 167 Cal. 274, 139 Pac. 671; Mfg. Co. v. Furniture Co. 137 Ill. App. 622; Stores Co. v. Commercial Co. 178 Ill. App. 7; Brunswig v. Grain etc. Co. 100 Kan. 261, 164 Pac. 154.

"It is generally true that when a party who is guilty of the first breach of contract can neither found a right of action upon such contract, nor make it the basis of a defense to an otherwise just claim." State Co. v. Peck, 17 Kan. 271; Lumber Co. v. Lumber Co. supra.

"To entitle the defendant to recover compensatory damages upon his counterclaim, the actual detriment occasioned must be shown by com-

petent evidence and with reasonable certainty. In other words the evidence must afford date, facts, and circumstances, reasonably certain, from which the jury may find the actual loss." 8 R. C. L. 652, ¶ 195 and cases cited; Russell v. Olson, 22 N. D. 410, 37 L.R.A.(N.S.) 1217, 133 N. W. 1030, Ann. Cas. 1914B, 1069.

BIRDZELL, J.: This is an action to recover a balance which the defendant owed on an account. The trial court directed a verdict for the plaintiff for the amount claimed upon which judgment was entered in the sum of $951.01. There is no issue concerning the claim upon which the judgment is based. The appeal involves only the counterclaim of the defendant which is based upon the failure of the plaintiff to fill certain orders for goods. In stating his counterclaim, the defendant alleged that he was engaged in business as a retail merchant, operating stores at Kulm and Fredonia; that for several years he had purchased goods from the plaintiff for sale in his retail stores; that it was customary for the defendant to give orders to traveling salesmen representing the plaintiff, and that in the months of February, March, and April, at plaintiff's solicitation, the defendant bought for future delivery, commencing in August, 1917, merchandise to the amount of $2,400 wholesale price; that the invoices were to be dated as of November 1, 1917, and defendant was to have sixty days thereafter in which to pay. Defendant then alleged the plaintiff's failure to delivery any portion of the goods ordered and his damages incident to such failure.

It is claimed that the court erred in directing a verdict for the plaintiff and in refusing to submit the issues arising upon the counterclaim to the jury, for the reason that under the evidence it does not appear that the plaintiff was justified in the refusal to ship the goods.

In order to determine whether or not the plaintiff, by its refusal to ship the goods ordered, violated the terms of a contract with the defendant, it is necessary to examine the record facts for the purpose of determining the contractual relations existing between the parties. It appears that it was the custom of the plaintiff to solicit business through traveling salesman and that one F. C. Fales, in the capacity of salesman, visited the defendant's place of business at Kulm

at various times during the Winter and Spring of 1917, obtaining orders for goods which were to be delivered in time for the Fall trade. As these orders were received at the wholesale house of the plaintiff in St. Paul, receipt would be acknowledged by postal card, reading as follows: "We are in receipt of your esteemed order, and will give it our careful attention." The orders involved in the counterclaim are dated February 10th, March 31st, and April 12th, 1917. As orders were received and after their receipt had been acknowledged as above, they were turned over to the credit department which either refused or authorized shipment in the exercise of its judgment as to the satisfactory character of the account. The parties had been dealing with each other through a period of years and the defendant was cognizant of the methods according to which the plaintiff did business. The correspondence passing between the parties during the Winter, Spring and Summer of 1917, covering the period these orders were with the plaintiff unfilled, shows a most persistent effort on the part of the plaintiff to induce the defendant to pay up his back account for the year 1916. It seems that the Spring account, the invoices of which allowed 60 days' credit, matured on July 1, 1916, and was still unpaid in January, 1917. During the first six months of 1917 considerable correspondence passed between the parties relative to that account. It was not paid until the 19th of June, approximately one year after it was due. At that time the Fall account of 1916, upon which nothing had been paid, was approximately six months overdue. In the course of the correspondence relative to the Spring account of 1916, it appears that the plaintiff seriously considered cutting off delivery of the then current Spring order. Under date of March 21st, 1917, the plaintiff, writing in regard to an April 1st extension of the Spring account of the year previous, stated: "Before that time we hope to have settlement of the Spring account of last year, when we shall be able to send you the merchandise comprised in the Spring order." Taking the correspondence as a whole, which is perhaps the best evidence of the course of dealing between these parties, we are satisfied that it establishes beyond peradventure a course of dealing whereby the right of the defendant to demand further goods upon credit was always contingent upon so handling his account as to keep his credit with the

plaintiff in a satisfactory condition. We are also of the opinion that any acceptance of the orders for Fall goods in the year 1917 was upon the implied understanding that their shipment should be contingent upon the defendant's keeping his credit good with the plaintiff.

Instead of endeavoring to keep his credit good, it appears that the defendant sought to take advantage of his indebtedness to the plaintiff by making its payment contingent upon the receipt of future goods. The record discloses that the plaintiff required no inducement of this character to prompt it to fill its orders. On the contrary, it appears that the company desired to continue its business relations with the defendant, provided only that he would handle his credit account in a more satisfactory manner. The plaintiff company in fact never refused to fill the orders in question but it stated plainly to the defendant that when his account was fully paid up it would go into the matter of further business with him and that the continuance of his account would depend entirely upon what he proposed to do in regard to meeting plaintiff's bills in the future.

To adopt the defendant's version of the contractual relations between the parties, we would be required to hold that though the defendant, at the time the orders were received and acknowledged by the plaintiff, was already delinquent in considerable amount, the plaintiff was bound to extend a further credit of some $2,400, even though the defendant should repudiate entirely his existing indebtedness and give it no further attention. We think the more reasonable construction of the contractual relations of the parties resulting from the giving and taking of the orders in question, in the light of the course of dealing between them, is that the obligation of the seller, the plaintiff, to deliver future goods upon credit was subject always to the implied condition that the defendant should give reasonable evidence of ability and willingness to conform to the terms of that credit. The conduct of the defendant in the instant case is fully indicative of inability and unwillingness to conform to the terms of the credit arrangement as though he had become actually insolvent. In short, he had demonstrated his prospective inability to conform to the terms of the credit which he now demands extended to him as a matter of contract right. See Williston, Sales, § 576.

Being of the opinion that the record fails to show an unconditional contract binding the plaintiff to extend credit to the defendant for the goods embraced in the order, it follows that there is no basis for the recovery of the damages alleged in the counterclaim. The judgment and order appealed from are affirmed.

CHRISTIANSON, Ch. J., and ROBINSON and BRONSON, JJ., concur.

GRACE, J., dissents.

STATE OF NORTH DAKOTA EX REL. WILLIAM LANGER, Attorney General, Carl R. Kositzky, State Auditor, and Rachel L. Morris, Relators, Plaintiffs, v. OBERT A. OLSON, State Treasurer, Defendant.

(176 N. W. 528.)

Statutes — legislative power vested in legislative assembly and in the people.

1. The "legislative power," pursuant to the Constitution (arts. 26, 27), is vested in the legislative assembly, and in the people through the initiative and referendum.

Statutes — exercise of legislative power.

2. This legislative power, pursuant to the Constitution, may be exercised at a session of the legislative assembly or by the people at the polls through the initiative and referendum.

A "special session" is a "session" of the legislative assembly.

3. A "special session" of the legislative assembly, pursuant to the Constitution (§ 55, art. 2), is a "session" of the legislative assembly.

Statutes — special session acts subject to power of people.

4. A special session of the legislative assembly is governed by the constitutional provisions (art. 27) prescribing the time when acts of a legislative assembly shall become operative as laws, and is subject to the "legislative power" of the people (Const. art. 26), reserved in the initiative and referendum, in the same manner as a regular session of the legislative assembly.

Statutes — time when acts take effect.

5. An act of a legislative assembly, consonant with the Constitution, becomes effective as a law, as follows:

(1) Immediately upon its passage and approval by the governor, when stated and adopted by the legislative assembly as an emergency by the two-thirds affirmative vote required by the Constitution.

(2) On July 1st, following the close of the session, unless made subject to a referendum to the people, whereupon, by an affirmative majority of the electors, it becomes a law, and effective as such, thirty days after such election unless otherwise specified in the act.

(3) On a date, prescribed in the act, or otherwise, by the legislative assembly, subsequent to the constitutional date of July 1st.

Statutes — when acts passed at special session 1919 take effect.

6. The acts of the special session of the legislative assembly of 1919 are subject to the provisions of the Constitution, prescribing when acts of a legislative assembly become effective (art. 27) and, to the "legislative power" of the people reserved in the initiative and referendum (art. 26). The acts adopted at such special session, not as emergency measures, S. B. No. 40 changing the composition of the state auditing board, and H. B. No. 44, altering and reducing the state budget, do not become operative as laws until July 1, 1920, unless made subject to a referendum to the people, and sooner ratified by the people at an election, pursuant to the Constitution.

Statutes — effect of emergency measure not constitutionally adopted.

7. The act, H. B. No. 60, which provides that all acts passed at a special session not emergency measures, shall be operative as laws, within ten days after the close of such special session, and which was adopted by such special session not as an emergency measure, pursuant to the constitutional provisions, is not effective as a law either until July 1st next, or, unless sooner ratified by the people, pursuant to such constitutional provisions, and therefore does not apply to the time when S. B. No. 40 and H. B. No. 44 become operative as laws.

Opinion filed January 16, 1920.

Original Petition for Mandamus to compel the state treasurer to pay a state warrant to a special clerk in the office of the State Auditor. Writ granted forthwith.

William Langer, Attorney General, *Edward B. Cox,* and *Albert E. Sheets, Jr.,* Assistant Attorneys General, for plaintiffs.

The words "no" or "any" when used for the purpose of classification are all inclusive or exclusive. Cooper v. Utah, 35 Utah, 570, 136 Am. St. Rep. 1075, 102 Pac. 202; American Surety Co. v. Bernstein, 101 Tex. 189, 105 S. W. 990; Hershiser v. Ward, 29 Nev. 228, 87 Pac. 171; City v. Cincinnati R. Co. 144 Ky. 646, 139 S. W. 858; Platt

v. Payette, 19 Idaho, 470, 114 Pac. 25; 1 Words & Phrases, 2d Series, p. 216, under the word "any;" Com. v. Frederick, 119 Mass. 199.

Where the court provides either expressly or by implication that acts of the legislative department shall not become effective until a certain time has elapsed so as to give the people an opportunity to review such act tending in any degree to cut off this reserved right is a violation of the Constitution. State v. Meate, — Wash. —, 147 Pac. 11; Statutes, Cent. Dig. 330; Dec. Dig. 248.

While the established procedure adopted by one succeeding body after another for many years oftentimes controls with the courts in their decisions, nevertheless, "legislative interpretation of old laws has no judicial force." Frey v. Meichie, 68 Mich. 323, 38 N. W. 184; see also Statutes, Cent. Dig. 298; Dec. Dig. 220.

William Lemke, Foster & Baker, and *Joseph Coghlan,* for defendant.

"A presumption in favor of the constitutionality is raised by the mere fact of the enactment of a statute by the legislature; and the burden of showing that it is unconstitutional is on the party asserting it." 12 C. J. 791, 794, §§ 221, 222.

"It is an established rule of construction that, when a Constitution confers a power or enjoins a duty, it also confers, by implication, all powers that are necessary for the exercise of the one or for the performance of the other." 12 C. J. 719, citing cases in note 26.

"It is regarded as a safe rule to look to the nature and objects of the particular powers, duties and rights with all the lights and aids of contemporary history, and give to the words of each just such operation and force consistent with their legislative meaning as may fairly secure and attain the ends proposed." 12 C. J. 719, note 26 f; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; State v. Glenn, 18 Nev. 34, 42, 1 Pac. 86; Story, U. S. Const. § 405a.

"Merely technical rules of the construction are not to be applied so as to defeat the principles of the government or the objects of its establishment." 12 C. J. 699, § 42 and note 73, p. 700.

"The legislature needs no specific constitutional authorization for its enactments, as all the legislative authority of the state which is not

denied to the legislature by the Constitution of the state resides in that body." 12 C. J. 702, § 44, 749, notes 17 and 18.

"When no time for the going into effect of a statute is fixed by the statute itself, and there is no constitutional or general statutory provision governing the matter, it becomes effective on the day of its passage and needs no promulgation to give it operation." 25 R. C. L. 797, citing Mathews v. Zane, 7 Wheat. 164, 5 L. ed. 425.

"Independent of any constitutional provision, a statute duly made takes effect from its date, when no time is fixed, and this rule is fixed beyond the power of judicial control." Parkinson v. State, 14 Md. 184, 200.

"A statute, when duly made, takes effect from its date when no time is fixed and this is now the settled rule." 1 Kent, Com. 7th ed. *454.

House Bill No. 60 interprets the Constitution, and the legislative interpretation should be followed by the court. Gantt v. Brown, 224 Mo. 271, 149 S. W. 644, Ann. Cas. 1913D, 1283; Fargo v. Powers, 220 Fed. 697; Coyle v. Smith, 28 Okla. 121, 113 Pac. 945; Smith v. Auditor General, 165 Mich. 140, 139 N. W. 557.

BRONSON, J. This is an application for the exercise of the original jurisdiction of this court to compel the state treasurer to make payment of a state warrant to the relator Morris, for her salary, as a special clerk, in the office of the state auditor, from December 19th, 1919, to December 31st, 1919.

Among the issues presented, the prime question involved is the validity of S. B. No. 40 and H. B. No. 44, adopted by the special session of the legislative assembly of 1919, as present operative laws, pursuant to the provisions of H. B. No. 60, also enacted by such special session, which makes operative such acts ten days after the close of the session.

The relator Morris is a special clerk in the office of the state auditor. She has presented a warrant issued by the state auditor for her salary as such clerk from December 20 to December 31, 1919. The state treasurer has refused payment. The warrant was issued upon a voucher for her salary, payable out of the contingent fund of the state auditor, such voucher being approved by the state auditor and the state auditing board as composed pursuant to § 375, Comp. Laws 1913. The special session of the legislative assembly held from November 25,

1919, to December 11, 1919, passed acts which affect the composition of such state auditing board and the contingent fund of such state auditor.

S. B. No. 40, enacted by this special session, amends said § 375, Comp. Laws 1913, by removing from the state auditing board the state auditor and the secretary of state, and substituting instead the commissioner of agriculture and labor, and the state bank examiner.

H. B. No. 44 amends the Budget Act (Laws 1919, chap. 16), by making large and substantial reductions in the amounts of the appropriations for various departments and, in particular, eliminating the contingent fund of the state auditor, out of which the salary warrant involved is payable.

Measures were enacted which changed the composition of the emergency commission (H. B. No. 13), the composition of the state equalization board (S. B. No. 26), reduced the number of assistants to the attorney general (S. B. 4 & 13), and transferred the licensing and inspection of pool halls and theaters, etc. (H. B. No. 7), from the department of the attorney general to the state sheriff.

In all, this special session enacted some seventy-two measures; thirty-three of these were emergency measures, enacted as such pursuant to the constitutional provisions requiring for each a two-thirds affirmative vote of both branches of the legislative assembly; thirty-nine of such measures did not receive such two-thirds vote, and were enacted by a majority vote. Among these measures so receiving a majority vote are S. B. No. 40, H. B. No. 44, H. B. No. 60 and the measures affecting the department of the attorney general.

H. B. No. 60 reads as follows:

"An act declaring and defining the time within which laws passed at any special session of the legislative assembly shall take effect.

"Whereas, the Constitution of this state fails to define time within which laws enacted at any special session shall take effect, and

"Whereas, there should be some definite and certain time when such laws take effect, therefore

"Be it enacted by the Legislative Assembly of the State of North Dakota

"All acts of any special legislative assembly of the state of North

Dakota shall take effect within ten days after the close of any such special session, unless the legislature by a vote of two thirds of the members present and voting in each house shall declare it to be an emergency measure, in which event it shall take effect and be in force from and after its passage and approval by the governor."

In the senate, this bill was approved by a vote of twenty-nine ayes and twelve nays; in the house, by a vote of sixty-six ayes and forty-one nays. It was approved by the governor on December 11, 1919.

This act, H. B. No. 60, affecting the measures as above stated has created uncertainty and doubt as to the composition and powers of certain existing boards, the existence of the contingent fund, involved, and also salaries, the auditing of accounts, and the prerogatives and functions of state officials.

The issues present squarely a question for the exercise of the original jurisdiction of this court, involving the prerogatives and functions of state officials. If H. B. No. 60 is a present operative statutory enactment, which affects acts, not emergency measures, adopted by this special session, clearly the salary warrant involved herein should not be paid both by reason of want of auditing by a proper state auditing board, and also by want of a fund out of which payment may be made; for by the terms of H. B. No. 60, if operative as a law, all the acts of such session, not emergency acts, became effective as laws, commencing on December 22, 1919.

On December 20, 1919, there was filed with the secretary of state, referendum petitions upon said H. B. No. 60, which the secretary of state has certified are sufficiently signed by some 15,000 electors of the state for referendum to the people of such act under the constitutional amendment (art. 26), provided therefor.

The relators contend that H. B. No. 60, without determining the constitutionality of this provision, is, in any event, subject to the refendum filed and therefore is suspended; that the act is unconstitutional because in contravention of the constitutional provision, § 67 as amended, providing the time when acts of the legislature, not emergency measures, shall become effective; and, furthermore, that said H. B. No. 60 is unconstitutional because violative of § 61 of the Constitution which provides that no bill shall cover more than one subject.

The respondent contends that, as applied to a special session of the legislative assembly, there exists no constitutional provision applicable concerning the time when the acts involved become operative; that § 67 of the Constitution as amended does not apply to a special session of the legislative assembly; that H. B. No. 60 covers one subject, namely, the time when acts of a special session become effective; that even though H. B. No. 60 be deemed subject to the referendum petitions filed, and therefore suspended (which is not admitted), the constitutional provisions concerning time not being applicable to a special session, the acts involved and which the relators contend are not effective as laws, became effective as laws immediately upon their passage and approval.

The contention of the relators, without a consideration of the constitutionality of the subject-matter of H. B. No. 60, is that this act is neither stated to be in terms nor has it been adopted as an emergency measure; that, therefore, it is subject to the provisions of the constitutional amendment granting the right to referend and suspend measures not adopted as emergency measures by a legislative assembly; that referendum petitions have been filed which are sufficient to so suspend such act until voted upon by the people. Plainly, this contention, even though it be recognized as tenable, and, further, that proper referendum petitions have been filed so as to suspend such act, does not avail the relators in any manner in support of the writ sought herein.

If, for any reason, or upon the theory advocated by the respondents, the subject-matter of H. B. No. 60 is constitutional, and the constitutional provision concerning when acts of the legislature are operative as laws, does not apply to a special session of the legislature, then there exists no law, constitutional or statutory, fixing the time when acts of a special session become laws. The general rule of law then obtains, not denied by the parties, namely, that statutory enactments, in the absence of constitutional or statutory provision, take effect upon their passage and approval.

The main acts involved herein are H. B. No. 44 and S. B. No. 40 relating respectively to the new state auditing board and the contingent fund involved. H. B. No. 60 is concerned with the rights of the relators only as its subject-matter pretends to make operative said S. D.

No. 40 and H. B. No. 44 as laws. If H. B. No. 60 is suspended and referred and the constitutional provision quoted does not apply to a special session, such acts are now operative as laws, and concededly relators cause of action fails.

It results, therefore, that the principal question before this court is whether in fact, the constitutional provisions, providing a time when the acts of a legislative assembly become effective, apply to a special session of the legislature.

It is not denied by the parties that if the constitutional provisions invoked do not apply to a special session of the legislative assembly, the act is a valid statutory enactment; that, on the contrary, if such constitutional provisions do apply, the act in question is unconstitutional.

In determining this prime and decisive question it is necessary to briefly consider the constitutional provisions invoked and such other constitutional provisions, legislative enactments, or interpretations, together with judicial decisions which may serve to throw light upon the determination of this question.

The original constitution of this state was submitted to and adopted by the people on October 1, 1889, and, at the same time, state officers were elected. The state was admitted into the Union by presidential proclamation on November 2, 1889.

In this Constitution (art. 2, § 67) it is provided: "No act of the legislative assembly shall take effect until July 1st, after the close of the session, unless in case of emergency (which shall be expressed in the preamble or body of the act), the legislative assembly shall by a vote of two thirds of all of the members present in each house otherwise direct."

In this Constitution it is also provided that the governor upon assuming the duties of his office shall issue his proclamation convening the legislative assembly of the state. Sched. § 17. That all laws now in force in the territory of Dakota, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or be altered or repealed. Sched. § 2.

Accordingly the first session of the legislative assembly of this state, by the governor's proclamation, was convened and met on November 19, 1889. It thereupon proceeded to elect United States Senators and

to enact statutory acts for the state. This session concluded on March 18, 1890.

In reviewing the acts enacted by this first session, it is apparent that this legislature conformed with the constitutional provisions concerning the time when its acts should become operative as laws. This legislature enacted acts prior to the month of January, 1890. Many emergency measures were passed at this session. In many of such acts it is particularly recited that it is necessary for the act to take effect before July 1st, following. Laws 1890, chap. 145, 146, 169, 170, 185, 197.

At this time there was also existing a territorial act that all laws enacted by the legislative assembly, unless otherwise expressly provided therein, should be in force and effect on the 1st day of July after their passage and approval. Terr. Laws 1889, chap. 3. This provision was held not to be repugnant to the constitutional provisions in Re Hendricks, 5 N. D. 114, 121, 64 N. W. 110.

Was the session of 1889–90 a special or extraordinary session, or a regular session?

In State ex rel. Larabee v. Barnes, 3 N. D. 319, 55 N. W. 883, the question was raised concerning the constitutionality of certain legislation enacted at this first session. It was contended that this session, convened before the regular time of a regular session, and prior to the commencement of a legislative term, as constitutionally prescribed for the legislators elect, contravened the constitutional provisions (§ 41, art. 2) which provided that such term of the legislative members should commence on the first Tuesday of January after their election, and (§ 53, art. 2) which provided that the legislative assembly should meet on the first Tuesday after the first Monday in January, in the year following the election of its members.

It was held that these constitutional provisions did not apply to this first session; that it applied only to subsequent legislatures, whose members were elected in the regular manner.

Nevertheless, this first session, convened by the governor's proclamation, at a time anterior to the regular session provided in the Constitution, conformed to the constitutional provisions concerning the time when its acts should become effective as laws.

In Re Hendricks, supra, the constitutional provisions (§ 67) were considered. The question arose concerning the time when the 1895 Revised Codes of this state went into effect; the legislature of 1893 (Laws 1893, chap. 74) provided for the revision and codification of the laws, and that the Revised Codes, when compiled, should take effect and be in force thirty days after the proclamation of the Governor announcing the delivery and his acceptance of the Codes delivered. The proposed Revised Codes also covered measures to be enacted by the subsequent or succeeding legislative assembly. In 1895, the legislative assembly passed acts, some with emergency clauses, and some without emergency clauses. It was held competent for the legislature to constitutionally prescribe a date subsequent to July 1st, succeeding their passage, when anticipated laws should take effect. That emergency clauses of the 1895 legislature, however, became effective upon passage and approval.

In the original Constitution, § 25, art. 2, provides: "The legislative power shall be vested in a senate and a house of representatives."

In November, 1914, this § 25 was amended by a constitutional amendment, submitted to and ratified by the people, which provides that the legislative authority shall be vested in the legislative assembly consisting of a senate and a house of representatives, but that the people reserved to themselves the power to propose laws, etc., and the power to approve or reject at the polls any act, item, or section or part of any act or measure, passed by the legislative assembly. In such amendment, provision was made for referring any act by filing referendum petitions therefor. It was further expressly provided in this amendment that, when necessary for the immediate preservation of the public peace, health, or safety, a law should become effective without delay, such necessity, and the facts creating the same, should be stated in one section of the bill, and if, upon an aye and nay vote in each house, two thirds of all the members elected to each house should vote, on a separate roll call, in favor of the said law going into instant operation, such law should thereupon become operative upon approval by the governor (art. 15, Amend. Const.). This amendment came into question before this court in the case of State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955, where the

question concerning the Board of Regents Act (Laws 1915, chap. 237) was presented, among other questions, when such act became effective. This act had been adopted by an emergency provision pursuant to § 67, Const. but not pursuant to the emergency provision contained in said art. 15 (§ 25 amended). Two members of this court held that the emergency measure could be made effective as a law under § 67, Const. Two other members of this court held that an emergency measure to be made effective must be pursuant to said art. 15.

On November 5, 1918, § 67 of the original Constitution was amended by a constitutional amendment submitted to and ratified by the people. Const. art. 27 Amend. The amendment reads as follows:—

"No act of the legislative assembly shall take effect until July 1st after the close of the session, unless the legislature by a vote of two thirds of the members present and voting, in each house, shall declare it an emergency measure, which declaration shall be set forth in the act, *provided,* however, that no act granting a franchise or special privilege, or act creating any vested right or interest other than in the state, shall be declared an emergency measure. An emergency measure shall take effect and be in force from and after its passage and approval by the governor."

At the same time, said art. 15 (Amendment of said § 25), was again amended by constitutional amendment submitted to and ratified by the people.

The provision mentioned in said art. 15, concerning the method of adopting an emergency measure by the legislative assembly was eliminated in this amended article. Art. 26. It was transplanted in an amended form to the amendment of said § 25, art. 27. Among the provisions of this amendment there may be stated the following (for purposes of consideration, some words or phrases have been underscored by the court):

"The *legislative power* of this state shall be vested in a *legislature* consisting of a senate and a house of representatives. The people, however, reserve the power, first, to propose measures and to enact or reject the same at the polls; second, to approve or reject at the polls *any measure* or any item, section, part or parts of, any measure enacted by the *legislature.*

"The second power reserved is the referendum. Seven thousand electors at large may, by referendum petition, suspend the operation of *any measure* enacted by the *legislature,* except *an emergency measure.* But the filing of a referendum petition against one or more items, sections or parts of any measure, shall not prevent the remainder from going into effect. Such petition shall be filed with the secretary of state not later than ninety days after the adjournment of the session of the legislature at which such measure was enacted.

"Any measure, except an emergency measure, submitted to the electors of the state, shall become a law when approved by a majority of the votes cast thereon. And such law shall go into effect on the 30th day after the election, unless otherwise specified in the measure.

"If a referendum petition is filed against an emergency petition such measure shall be a law until voted upon by the electors. And if it is then rejected by a majority of the votes cast thereon, it shall be thereby repealed.

"The word *'measure'* as used herein shall include any law or amendment thereto, resolution, *legislative proposal,* or *enactment* of *any character.*

"This section shall be self-executing and all of its provisions shall be treated as mandatory. Laws may be enacted to facilitate its operation, but *no laws* shall be enacted to *hamper, restrict, or impair* the exercise of the rights reserved to the people."

Said arts. 26 and 27 are now a part of the Constitution. State ex rel. Byerly v. State Canvassers, ante, 126, 172 N. W. 80.

In 1892 a special session of the legislative assembly was held from June 1st, to June 3d, inclusive; seven acts were adopted. No attempt was made to prescribe a different date when such acts should become laws than that prescribed by the Constitution.

In 1918 again a special session of the legislature was held from January 23d, to January 29th; twelve acts were passed. All of these acts were enacted with emergency clauses approved by a two-thirds affirmative vote of the members of each house, upon a separate roll call, in accordance with the constitutional provisions concerning emergency clauses then existing. In the recent special session involved herein, it is clear that, with the exception of H. B. No. 60, no attempt was

made by this special session to enact measures other than in conformity with the constitutional provision concerning emergency measures or when acts otherwise should become effective.

Thus far it is evident, that there exists, through a constitutional provision, legislative actions or construction, on judicial interpretation, concerning the time when statutory enactments become effective as laws, three, or possibly four, methods.

(1) By an emergency clause to make the act effective as a law upon passage and approval by the necessary two-thirds affirmative vote required by the constitutional provision.

(2) By permitting an act not stated or adopted as an emergency act to become effective July 1st, after the close of the session, pursuant to the constitutional provision.

(3) By a specific provision in the act providing that such acts shall become effective as a law at a time subsequent to July 1st, after the close of the session.

(4) Possibly by the referendum of an act not an emergency measure to the people, and through adoption of the same at an election, whereupon pursuant to the Constitution, concerning the referendum (art. 27), such act becomes effective as a law thirty days after such election.

The third method was adopted by the legislative assembly of 1913, when it provided, in the act, that the same should go into effect on January 1, 1914. Laws 1913, chap. 194.

The pertinent question now is, "Do these constitutional methods and constitutional provisions quoted apply to a special session of the legislature?" "Do they apply to S. B. No. 40 and H. B. No. 44 and, particularly, to H. B. No. 60 which, by its terms, makes the former acts effective as laws within ten days after the close of the special session?"

No question is raised, and no contention is made, that such constitutional provisions do not apply to a regular session of the legislature. There is, likewise, no contention that a regular session, by resolution or enactment, may contravene these constitutional provisions. These propositions stand admitted.

If the constitutional provisions quoted apply to a special session, S. B. No. 40 and H. B. No. 44 do not become effective as laws until July 1st, next. This is evident.

If they do not apply to a special session, then S. B. No. 40 and H. B. No. 44 became laws upon their passage and approval, unless, by the ten days' period mentioned in such act, their effect as laws has been postponed. If H. B. No. 60 has been suspended by the referendum, S. B. No. 40 and H. B. No. 44 are now effective as laws. In either event, relator's cause fails.

For it is a general rule, not denied by the parties, that statutory enactments take effect upon their passage and approval, unless there be constitutional or statutory provisions to the contrary. Sutherland, Stat. Constr. § 104; 36 Cyc. 1196.

H. B. No. 60, therefore, demands consideration only to the extent that it affects S. B. No. 40 and H. B. No. 44, concerning the time of their operation, and to that extent involves herein possibly the question of salary in the interval of time.

What is the *legislative power?* In whom is it vested? How may it be *exercised?* These questions are answered in the Constitution of this state directly and explicitly. In constitutional construction, it is elemental to state that constitutional provisions are to be construed so as to give effect to every part and portion of a constitution as a harmonious whole where possible. 8 Cyc. 730; State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 7.

The Constitution states that the legislative power is vested in a legislature, with the right of initiative and referendum to the people reserved. Art. 27. The term "legislature" is synonymous with "legislative assembly." § 52.

It will be noted that this power is possessed not alone by the legislature, but also by the reserved powers of the people through the initiative and referendum.

This legislative power so vested is all the power resident in the legislative department of a sovereign government in our tripartite form of government.

The legislative assembly composed of a senate and house of representatives (§ 52), exercise as such the legislative powers at session, subject to the constitutional provisions therefor.

These sessions are biennial, except as otherwise provided in the Constitution. § 55.

It is otherwise provided in the Constitution for the first session being convened by the governor and for the power to convene the legislative assembly on extraordinary occasions. § 75.

Can there be any question that the legislature which met in *special session* in 1919 was a *legislative assembly?* Can it be doubted that such *session* was not a *session* of the *legislative assembly?* Is there any room for construction or argument that, under the Constitution, the same members of the house and the senate might one day be sitting in regular session bound by the constitutional provisions, requiring a two-thirds vote in order to enact an emergency measure, and that acts not so passed should not become effective until July 1st, and that several days later, after adjournment and reconvenement by the governor, this same legislature composed of exactly the same members, sitting in special session, would have the power to enact statutory enactments, irrespective of the constitutional provisions, and in disregard of the legislative power reserved to the people in the initiative and referendum?

Section 67 of the Constitution as amended by its direct and explicit language, which provides that no act of the legislative assembly shall take effect until July 1st, after the close of the session. This is general and inclusive language. There ought to be no question concerning its application to a legislative session whether in regular or special session. The contention is made that in § 67 the statement "after the close of *the* session" was particular in referring to a regular session, but in the same article reference is made in §§ 55 and 56 to all sessions of a legislative assembly—the biennial sessions and those otherwise provided in the Constitution.

In People ex rel. Carter v. Rice, 135 N. Y. 473, 16 L.R.A. 836, 31 N. E. 923, the point was made that an extraordinary session was not such a session as was contemplated by the Constitution. It was held than an extraordinary session is nevertheless a session of the legislature. That the governor by the terms of the Constitution has the power to convene the legislature on extraordinary occasions, and that when convened the legislature was in session.

No distinction in the Constitution can be found in terms between the powers and duties of a regular and a special session of the legisla-

tive assembly. The powers, duties, and restrictions upon a legislative assembly are all found in the same article of the Constitution. From statehood they have all been followed as applicable. If it be possible for the special session to ignore the provisions of § 67 of the Constitution amended (art. 27) it is possible for it to disregard the entire article which further provides that no act of the legislature, granting a franchise or special privilege, or act creating any vested right or interest other than in the state, shall be declared an emergency measure. If it may disregard the constitutional provisions of said § 67, upon parity of reasoning, the special session may likewise disregard the constitutional provisions mentioned in § 69 of the same article, which provides that the legislative assembly shall not pass certain local or special laws.

In November 1918, art. 27 (§ 67 as amended), and art. 26 were ratified by the people as amendments to the Constitution. There can be no question that these two articles specifically reserve the power to the people upon all acts of any description for initiative or referendum purposes. The power reserved to the people in art. 26 to approve or reject any measure enacted by the legislative assembly not an emergency measure, not only specifically includes all enactments that any legislature may pass, but it distinctly connects up art. 27 (§ 67) which defines emergency measures, with art. 26 covering the initiative and referendum. Furthermore the very term contained in art. 26 that the word "measure" shall include any law or legislative proposal of any character, and, further, that no laws shall be enacted to hamper legislation or impair the exercise of the rights reserved by the people, indisputably show the reservation of legislative power to the people upon all acts or measures of a legislature in uncertain terms.

True it is that every reasonable presumption must be drawn in favor of the validity and constitutionality of legislative enactments. The solemn acts of a legislative assembly should not be overturned upon light considerations. This is indeed emphasized by the constitutional policy expressed in this state by the amendment to our Constitution which requires four members of this court to assent to the declaration of the unconstitutionality of a statutory enactment. The Constitution, however, is the supreme law of this land. Its provisions are equally

obligatory upon the court, and upon the legislature. It is the duty of this court to uphold the Constitution in its plain words and meaning, so long as this court has imposed upon it the sworn duty to uphold the Constitution. In this Constitution the people of the state have placed restrictions and checks upon the exercise of legislative powers. In it the people of this state have reserved to themselves the right to approve or reject legislative powers exercised by the legislative assembly. The plain mandates of the Constitution must be followed. When the legislative branch transcends or violates such constitutional mandates, the court, following its sworn duty, can do nought else than so declare. Following its sworn duty concerning the inviolability of constitutional provisions, rules of expediency, or of impropriety concerning constitutional provisions, have no application. Neither may public clamour, majority desire, present apparent need, if any, unreasonableness of constitutional provisions as particularly applied, influence or swerve the court in following its sworn duty. The constitutional provisions involved clearly apply to a special session of the legislature. Under such constitutional provisions, S. B. No. 40 and H. B. No. 44 have not yet become operative as laws.

Likewise, H. B. No. 60, being subject to the constitutional provisions mentioned, and not being adopted by the requisite vote constitutionally required concerning emergency measures, does not become operative as a law, until July 1st, next, or until sooner ratified by the people, pursuant to such constitutional provisions. It therefor does not apply to the time when S. B. No. 40 and H. B. No. 44 become operative as laws.

The determination of these constitutional questions, necessarily affords to the relators the relief demanded. No issues have been raised and this court does not express any opinion upon what salaries or disbursements may be made out of the contingent fund, involved, or, upon the retrospective effect, if any, of the acts of the special session, when the same do become operative.

The writ demanded should issue forthwith.

BIRDZELL, J. This is a petition for a writ of mandamus directed to the state treasurer to compel him to pay a warrant of $40 previously

issued to one of the relators in payment of salary earned by her as special clerk between the dates of December 20 and December 31, 1919. A fund, known as the state auditor's contingent fund, was previously appropriated by the legislature in § 2 of chapter 16 of the Session Laws of 1919 and the warrant in question was drawn so as to be payable out of that fund. Payment is refused by the defendant on the ground that an amended budget contained in House Bill 44, which was enacted at a special session of the legislature in November and December, 1919, repeals the previous appropriation of the auditor's contingent fund. There is no contention made here that House Bill 44 of the special session does not repeal the appropriation previously made by the regular session, but it is contended by the relators that the repeal does not take effect until July 1st, 1920.

The ultimate question for decision is whether or not the appropriation for the contingent fund, upon which the warrant in question was drawn, was an appropriation legally existing and available for the payment of services of a special clerk from December 20 to December 31, 1919. House Bill 44 of the special session, which for brevity may be referred to as the amended budget, was passed without receiving a two-thirds vote on the emergency feature, which, according to the title, had been declared in the bill, and it was approved at 11:30 A. M. December 13, 1919. The special session of the legislature had adjourned previous to the approval of this bill at 12 o'clock noon on the 11th day of December, 1919.

Section 67 of the Constitution, in so far as it may be applicable provides: "No act of the legislative assembly shall take effect until July first after the close of the session, unless the legislature by a vote of two thirds of the members present and voting, in each house, shall declare it an emergency measure, which declaration shall be set forth in the act."

It is clear, and no contrary contention is made, that if the foregoing section is applicable, the amended budget would not take effect until July 1, 1920. It is equally clear, according to elementary rules governing the taking effect of legislative enactments, that, if § 67 of the Constitution does not apply, and in the absence of other legislation affecting

the question, the amended budget would take effect immediately upon its approval.

It is contended both that § 67 of the Constitution is not applicable to acts passed at a special session of the legislature and that there is other legislation controlling the date at which the amended budget may take effect. House Bill 60, which was approved at 7:10 P. M. December 11, 1919, is referred to as controlling. This bill was likewise passed without receiving a two-thirds vote. It provides that all acts of any special legislative assembly shall take effect within ten days after the close of any special session, "unless the legislature by a vote of two thirds of the members present and voting in each house shall declare it to be an emergency measure, in which event it shall take effect and be in force from and after its passage and approval by the governor."

If the contention of the defendant with respect to the nonapplicability of § 67 of the Constitution be correct, it is obvious that the amended budget was in effect from and after 11:30 A. M. December 13th, 1919, unless by virtue of House Bill 60 it was postponed until the expiration of ten days after the adjournment of the session. The session adjourned, according to the journals, at 12 o'clock noon, on December 11, 1919. The question, so far as it is affected by House Bill 60, is further complicated by the fact that a referendum petition has been filed with the secretary of state which purports to suspend the operation of the bill.

From the foregoing statement it will be seen that if neither § 67 of the Constitution nor House Bill 60 controls the time of the taking effect of the amendment budget, it was in operation during all of the time the salary in question was earned. Also that if House Bill 60 controls, the amended budget was in effect from December 21st, and hence for the period of ten of the eleven days during which the salary was earned. The important question, therefore, and it seems to us to be the single question that should be decided, is whether or not § 67 of the Constitution controls the date at which acts passed at a special session of the legislative assembly shall take effect. If it does control, the legislature has no power to prescribe a different date. In fact, it has not attempted to prescribe a different date except upon the sup-

position that § 67 was not controlling, for in the preamble to the enacting clause of House Bill 60 it is stated: "Whereas the Constitution of the state fails to define the time at which laws enacted at a special session shall take effect, etc."

In our opinion it is necessary to consider but one question and that is the meaning and effect of § 67 of the Constitution. To us it seems clear that it applies to all laws passed by the legislature, whether in regular or special session. In that part of the section which refers to the time when legislation shall take effect, the date is fixed at "July 1st after the close of the session, unless the legislature, by a two-thirds vote of the members present and voting, in each house, shall declare it an emergency measure." The term "session" is here used in a generic sense and would include either a regular or a special session. This language, as employed in article 27 of the amendments, is exactly the same as that originally found in § 67 of the Constitution. In the article devoted to the "legislative department" reference is made to various "sessions" of the legislative assembly. In § 56 there is a limitation as to the length of the "regular session" and in the same section there is a longer limitation prescribed for the "first session." In § 31 the time of electing a president *pro tempore* of the senate is fixed as being at the beginning of each "regular session" and in § 35 the time of providing for the legislative apportionment is fixed as being at the "first regular session" after each census enumeration, with additional power given to reapportion "at any regular session." It is thus clear that throughout the article dealing with the legislative department, the constitutional convention distinguished wherever it was thought necessary between the regular session, a session specially provided for as the first session, and any other session in which the legislature may be convened; while in § 67, when fixing the time for the taking effect of the acts of the assembly, it only used the expression "the session." If it were intended that all acts passed at a special session should be deemed emergency measures, it is difficult to see why such pains would be taken to differentiate between regular and special sessions in other particulars and so important a matter as this left to bear inference. Our conclusion is that it was not left to inference at all but rather that § 67 was intended to apply to all legislation, regard-

less of when passed. Reference to the legislative practice from statehood indicates that this section has always heretofore been considered applicable to legislation passed at other than regular sessions.

Any other construction than the one we have adopted would render the Constitution inharmonious in other respects. Article 26 of the amendments, which provides for the initiative and referendum, reserves to the people legislative power previously vested exclusively in the legislature by § 25 of the original Constitution. Under this amendment power is reserved "to approve or reject at the polls any measure or item, section, part or parts of any measure enacted by the legislature," and special provision is made for referring emergency measures to popular vote. An emergency measure is not suspended by the filing of a referendum petition but is repealed in case it is rejected at the polls. This article, for purposes of referendum, nowhere recognizes two classes of emergency legislation, nor does it purport to deal separately with any legislation passed at a special session of the legislature. There is no doubt in our minds that the emergency legislation, upon which the special provisions concerning the referendum operate, is that which carries the two-thirds vote of the members present and voting within § 67 of the Constitution as amended, and that there is no other class of emergency legislation. Under the defendant's view, every act passed at a special session would be an emergency act regardless of the vote received, and this, no matter how foreign to the subject or subjects embraced in the proclamation.

It is argued that, since it is only upon extraordinary occasions that the governor has the power to convene the legislative assembly, it was intended that the enactments of a majority of that body in special session should have immediate effect, particularly if a majority so determine. The unsoundness of this argument seems to us to be quite apparent. The governor is the sole judge of the existence of an extraordinary occasion, but, except through the exercise of his constitutional control over legislation as such, he does not control the exercise of the legislative function. And this is true, even in those states where the governor has power to limit the matters that may be considered at a special session. See Re Governor's Proclamation, 19 Colo. 333, 35 Pac. 530; People ex rel. McGaffey v. District Ct. 23 Colo. 150, 46

Pac. 681; State v. Fair, 35 Wash. 127, 102 Am. St. Rep. 897, 76 Pac. 731. In short, the legislative assembly, when convened either in regular or special session, exercises its functions independently of the executive, and it not only has the right to differ with the executive as to the existence of an extraordinary occasion by passing no legislation, but it also has the right to pass such laws as, in its judgment, will meet the existing situation. If it does the latter, it may even differ with the executive as to when they shall take effect. If it were the intention to make the judgment of the executive as to the existence of an extraordinary occasion controlling as to the time the legislation enacted to meet it should take effect, it would seem that this judgment should prevail over that of a bare majority of the assembly. But in the instant case the majority has attempted to postpone the date ten days. If the majority could postpone the date ten days, it could likewise postpone it ten weeks or ten months. (It could doubtless do the last. In fact the independent power to legislate must imply the power to fix the date when an act shall become a law, provided it be not earlier than that limited in the Constitution, because the legislature must be free to say that its act shall take effect when stated or its members will reject the bill.) So this argument, when analyzed and applied to this case, is in reality inconsistent because it is advanced, not alone to support the contention that the chief executive, by proclamation, controls the time of taking effect of legislation, but that the executive, combined with a majority of the assembly, controls. Surely this element of legislative power does not thus pass a shuttlecock between the chief executive and the legislative assembly. It is clear to us that the matter was not left in so inconclusive a state by the constitutional convention, and that it is adequately covered by § 67. Under his section all laws go into effect on July 1st after enactment, or later if so stated; unless two thirds of the assembly present and voting agree upon an emergency that fixes an earlier date.

It follows that the writ should issue.

GRACE, J. (specially concurring in the opinion prepared by Justice Bronson).

This proceeding is one brought by the relators, to procure this court

to issue an original writ of mandamus, commanding the state treasurer to pay a certain warrant issued by the state auditor, and numbered A——221,195, presented to the defendant for payment, on the 2d day of January, 1920, and payment refused, on the ground that it is not authorized by the amended budget of the special session, which convened in November, 1919.

The 16th legislative assembly of North Dakota convened in regular session on the 7th day of January, 1919, and concluded its duties on or about the 1st day of March, 1919. It enacted chapter 16 of the Session Laws of 1919, which was denominated the general budget, and which was, by both houses, passed as an emergency measure and became effective immediately upon such passage, and its approval by the governor. Among other things, subdivision 7 thereof provided for a contingent fund of $35,000, to be used in complying with new laws.

On the 25th day of November, 1919, the Legislative Assembly of North Dakota convened in special session. By House Bill 44 it amended and re-enacted subdivisions of chapter 16 of the Session Laws of 1919, including subdivision 7 thereof, with the exception, that it repealed that part which provided for the said contingent fund of $35,000.

This bill received a majority of the votes of the members elected to each house; it did not receive an affirmative vote of two thirds of the members of each house present and voting thereon. In other words, the emergency clause was not attached to the bill upon its passage. It does not become effective and operative until July 1st, after its passage, unless House Bill No. 60 was effective, to place it in operation sooner; or unless every bill enacted as a special session is an emergency measure, whether enacted as such or not; or unless other provisions of the Constitution provide, under certain conditions, an earlier time thon July 1st, when a law becomes effective.

The material portion of House Bill No. 60 is as follows:

"All acts of an special legislative assembly of the state of North Dakota shall take effect within ten days after the close of any such special session, unless the legislature, by vote of two thirds of the members present and voting, in each house, shall declare it to be an emer-

gency measure, in which event it shall take effect and be in force from and after its passage and approval by the governor."

Section 67 of the Constitution, as amended, is as follows:

"No act of the legislative assembly shall take effect until July 1st, after the close of the session, unless the legislature by a vote of two thirds of the members present and voting, in each house, shall declare it an emergency measure, which declaration shall be set forth in the act, provided, however, that no act granting a franchise, or special privilege, or acts creating any vested right or interest other than in the state, shall be declared an emergency measure.

"An emergency measure shall take effect and be in force from and after its passage and approval by the governor."

At the special session, there were seventy-two bills passed, to thirty-nine of which there was no emergency clause attached, and they would not go into effect nutil July 1st, unless for one of the three clauses above stated.

The mere fact that a bill is passed at a special or extraordinary session does not constitute it an emergency measure. Such bill only becomes an emergency measure, and thus immediately effective after its passage and approval, if it has attached to it the emergency clause required by § 67, as amended, and is approved by the required two-thirds vote therein prescribed.

The fact that House Bill 44 was passed at a special session would not accelerate the time when it would become effective. The time when it would become effective would be July 1st, after its passage, it not having been passed with the emergency clause attached, and a two-thirds vote of the members of each house present and voting, but by only a majority vote of the members elected to each house. It would not, therefore, become effective until July 1st, unless House Bill No. 60 places it in effect within ten days after its passage and approval, as provided in that bill.

To hold that House Bill 60 could have this effect would result in rendering the provision in § 67, with reference to the emergency clause, largely nugatory. If we hold House Bill 60 is effective as to fixing the time when Bill 44 becomes effective, there would be no necessity of attaching the emergency clause to a bill, and voting thereon at the time

of its passage. That could all be deferred until the end of the session, and, then, with such a bill as 60, all measures passed, at that session, or such as were desired, could be declared emergency measures, and passed by a bill such as 60, by a mere majority of the members elected to both houses.

Thus, by such a bill, might all measures passed, at a given session, become emergency measures, though they receive not a two-thirds vote of the members of both houses present and voting, but only a majority, as above stated.

As we view the matter, this cannot be done, and House Bill 60 is not effective, to make House Bill 44 effective within ten days after its passage and approval, and, so far as House Bill 60 is concerned, House Bill 44 will not become effective until July 1st, it having been passed without an emergency clause attached, and without receiving the required two-thirds vote of the members of both houses present and voting.

On July 1st it will become effective as any other bill passed without an emergency clause attached.

A proper petition has been filed, and House Bill 60 has been referendumed under the provisions of § 25 of the Constitution, as amended. The bill not being an emergency one, and not having received the required two-thirds vote of both houses, it is suspended by the filing of the referendum petition. It will have to be voted upon at a state-wide election, or at a special election, if one should be called. If, at such election, it is approved by a majority of the votes, so far as time is concerned, and according to § 25 of the Constitution, as amended, it would go into effect 30 days after the election, unless otherwise specified in the measure.

This seems to be the only way in which a law may go into effect before July 1st, unless it is passed with an emergency clause attached, as required by § 67.

CHRISTIANSON, Ch. J. (concurring specially). Upon the oral argument it was frankly conceded, and the members of the court are all agreed, that if House Bill No. 60 had been enacted at a regular session of the legislative assembly it would unquestionably be invalid as violative of § 67 of the Constitution. But it is contended that § 67

applies only to laws enacted at a regular session, and has no application to laws enacted at a special session of the legislative essembly. The question presented in this case is whether this contention is sound. In opinions prepared by my associates Birdzell, Bronson and Grace it is held that § 67 applies to all legislative enactments—those enacted at a special as well as those enacted at a regular session. In the opinions prepared by Justice Birdzell and Bronson many, and it seems to me unanswerable, reasons are advanced for the conclusions reached. I shall not endeavor to advance further or different reasons. In fact I am of the belief that § 67 furnishes its own argument. It expressly says: "No act of the legislature shall take effect, etc." It does not say: "No act enacted at a regular session of the legislature shall take effect, etc." "The language is all-inclusive. It, and the preceding sections, cover all legislative enactments whether enacted at a regular or a special legislative session. By the express command of the Constitution this language must be construed as "mandatory and prohibitory." Const. § 21. It is the sworn duty of the members of this court to give effect to the will of the people as expressed in the fundamental law. Hence, it must be held that House Bill No. 60 contravenes § 67 of the Constitution, and is in fact no law at all.

Robinson, J. (dissenting). The majority decision will seriously impede and hamper the industrial progress of the state. It will largely undo the work of the special session, tie the hands of the lawmakers and the hands of the governor, and leave the state like a ship without a captain. It may induce several amendments to the Constitution and a recall of the court power to undo any act of the legislature. The power is arrogant and dangerous; its use must impede or ruin every state industry.

The case turns mainly on § 67 of the Constitution as amended, which is that no act of the legislature shall take effect until the 1st of July after its passage. We claim this general language does not apply to an emergency session, which may close eleven months before the 1st of the following July. While it is true that the words "of the section" have always the same literal meaning, yet they have not always the same application. They cannot apply to an emergency session without

nullifying the purpose of the session. An obstructive minority can nearly always defeat an emergency vote. Surely the Constitution is not so inconsistent as to provide for the calling of an emergency session, and at the same time to declare that without a majority of two to one no act of the session shall have any force or effect until some indefinite period of from four to eleven months after the close of the session.

This case presents a question on the constitutional validity of several acts passed by the late extra session, and especially House Bill No. 60. This provides that all acts of the extra session shall take effect within ten days after the session. The extra session passed acts reducing the appropriations, changing the members of the state board of equalization, the members of the state auditing board and of other boards, and as those acts did not receive a two-thirds majority vote, the old boards are claiming the right to hold over and their claim is disputed. The result is that the state treasurer has justly refused to honor warrants issued by either or any of the contesting boards. The presumptions are in favor of House Bill No. 60. By a large majority in each house, it was duly enacted and it was approved by the governor. Now the question is: Should this court assume to annul and declare void the act of our parliament?

By a recent amendment it is declared that no statute shall be held void unless by the concurrence of four judges. Hence, every statute must be held valid unless four judges concur in holding it void. The amendment might have gone farther and provided that no act of the legislative assembly shall be held void by any court. Then our courts would have no more power than the English courts to annul or hold void a statute. Then the Constitution would become a great Magna Charta, binding only on the conscience of the lawmakers. Then it would be no longer possible for one or two judges to overrule a large majority of the lawmakers; and that is the goal to which we are drifting. Great Britain has found no special danger from giving effect to every act of parliament and from putting the parliament above the courts and above the cabinet officers. The same rule prevailed in this country and in every state until changed by an able decision of Chief Justice Marshall. Then the courts began to assert the power by a

bare majority of one to annul acts of Congress and of legislative assemblies. Now the people begin to mistrust the courts and to trust the makers and interpreters of law and themselves. In either case there is not claim to infallibility. The most important decisions of the United States Supreme Court are given by a bare majority of one, which is, in effect, by one judge, and of course in all such cases when doctors disagree there must be grave reasons for doubting the correctness of the majority decision.

However, as rational beings, we must attempt to give a reason for the faith that is in us. In the construction of statutes and Constitutions it is certain that the literal meaning does not always control. It is an old maxim: He who sticks in the letter sticks in the bark. In an Oregon donation case the United States Supreme Court held that the words "single man" mean "a single woman" and include either men or women unmarried. [Silver v. Ladd, 7 Wall. 219, 19 L. ed. 138.] Similar cases are numerous. Reason is the soul of the law and when the reason of the law ceases, so does the law itself. "Laws are framed with a view to such things as are frequent, and not to such as are of rare occurrence." The regular session of our legislature commences in January and ends in March. Then it is but a short period from the close of the session until the 1st of July, when the body of the laws takes effect. On the contrary, a special session has been of rare occurrence. It may commence and end in July. From the close of the session until the 1st of the next July may be ten or eleven months. A special session is usually called for emergency purposes. The purpose of the session may be wholly defeated if the acts not passed by a two-thirds majority can have no force until the next July. These things may not have occurred to those who framed and who voted for the ten amendments, which were adopted in November, 1918. Those amendments were not framed by a convention of great legal architects similar to those who framed the Constitution of the United States. They were not framed by any known convention or body of men; their origin is unknown. What we do know is that at the general election in 1918, pursuant to a petition signed by some 50,000 citizens, the ten amendments were submitted to the electors and all the amendments had the strenuous support of the party in power and the strenuous

opposition of the other party. Among other things, the amendments provided for a radical departure in the affairs of state government, and for a great industrial system to be carried on by the state. They provided for the initiative and referendum, or direct legislation by the people. Ten thousand voters at large may propose a measure and have it submitted to the people, and, if adopted, it becomes a law and the governor may not veto it. The initiative petition is the proper method of reviewing and undoing any act passed at an emergency or special session. In general language, the amendments declare 7,000 voters at large may, by referendum petition, suspend the operation of any measure enacted by the legislature, except an emergency measure. Nowhere do we find anything to indicate that the above refers to an act passed at an emergency session. Nothing is said of such a session. It may be that it was not considered or that it was thought best to leave the same without any special provision.

The amendments expressly give the state and any county or city power to engage in any industry, or enterprise, or business. Now, to make a success of any business, it must be done in a businesslike way. There must be some head to the business. If it is done by a corporation, its board of directors must have power to meet frequently and to make rules and regulations and to give the same immediate effect. The state is a public corporation; the lawmakers are its directors. To do a successful business they must meet as occasion requires and make necessary laws, rules, or regulations, and give the same effect; and why should the directors meet and pass rules if they cannot give effect to the same, or if the rules may be suspended on a petition of 7,000 or 10,000, or even 30,000 voters. If the people do not like the rules or laws adopted, it is easy enough to undo them by the way of an initiative petition and a vote at the next general election, or by electing other directors for the state corporation.

To illustrate, let us consider the reasons for calling the late extra session and for passing the acts in question. The governor is the head of the state. He is the chief executive officer. It is his special duty to take care that the laws be faithfully executed. His principal cabinet officers and coworkers are the secretary of state, the attorney general, the state auditor and treasurer. Unfortunately during the summer of

1919 there came about a great split between the governor and his cabinet. The house was divided against itself and ready to fall. The division went to such an extent that one or more of the principal cabinet members—and the chief law officer—passed a considerable portion of the time going over the state berating the governor and his measures and thus expending the public money and neglecting their official duties. Some members of the state auditing board came to practically ignore the governor, and to meet and allow numerous bills against the state regardless of objections by the governor. Then it appears that the cabinet officers and their legal adviser, acting as a state board of equalization, put up the assessed valuation of property to about five times what it was in 1918, and in that way they virtually removed all limits on tax levies. Thus the municipalities were permitted to levy exorbitant taxes, and for this—their own fault as well as the act of the governor—the cabinet officers went onto the stump disclaiming against the governor and his advisers, as though he alone were responsible. The result was an emergency session of the lawmakers, the directors who represent the people of the state, and whether right or wrong, they came to the conclusion that some of the cabinet officers could not longer be trusted with the disposal of the public money. If these officers had done their duty faithfully it is quite certain the excessive appropriations would not have been allowed; the enormous assessments would never have been made, and there would be no reason to complain of the excessive tax levies.

Now the question is: Should this court assume to impugn the wisdom of the lawmakers and to undo the effect of their legislation; should the court set itself above the legislature and practically undo all the work of the extra session? Should the court make a decision that would tie the hands of the state corporation, its directors and officers and deny them the right to give immediate effect to such laws, rules, or regulations as they may deem necessary and proper to make a success of the state industries? The answer must be, "No." Hence the conclusion is that House Bill No. 60 is a valid statute, and that the state treasurer should pay only bills, claims, and accounts allowed pursuant to laws passed at the extra session.

S. A. REKO, as Guardian of the Person and Estate of John H. Williams, Incompetent, Respondent, v. CHARLES A. MOORE and Elza J. Moore, Appellants.

(176 N. W. 115.)

Judgment — judgment is final as to parties and their privies as to all matters implied or determined in reaching final judgment.

1. A judgment in a prior suit is deemed final and conclusive in subsequent litigation between the parties, or their privies, as to those matters necessarily determined or implied in reaching the final judgment, although no specific finding may have been made with reference thereto.

Judgment — effect of conclusiveness of judgment cannot be avoided by withholding proof of amount.

2. Where, in an action to set aside transfers on the ground of incompetency of the original grantor, an accounting is ordered and had to determine the value of the use and occupation of the premises, and the amount, if any, of payments made by the transferees for taxes and encumbrances upon the premises, a transferee cannot avoid the conclusive effect of the judgment merely by withholding proof of the amount of payments made by him.

Opinion filed January 17, 1920.

From a judgment of the District Court of Sargent County, *Allen*, J., defendants appeal.

Affirmed.

Kvello & Adams, for appellants.

"A judgment in a former action between the same parties is not conclusive evidence in a subsequent action between them on a different cause of action, unless it is made to appear that the particular controversy sought to be concluded was necessarily tried and determined." Herman, Estoppel, § 275; Carter v. Carter, 14 N. D. 66, 103 N. W. 425; Coyle v. Due, 28 N. D. 400, 149 N. W. 122; Selbie v. Graham, 100 N. W. 755.

"A demand or claim is not *res judicata* though it was interposed in a prior suit along with other claims, and leave to withdraw it was denied by the court, if the final judgment of the court appeared to be upon other claims and there is no evidence that the claim, the right to withdraw which was refused, was in fact considered or determined by the court." Nashau & L. R. Corp. v. Boston & L. R. Corp. 164 Mass. 222, 49 Am. St. Rep. 424; Zook v. Thompson (Iowa) 82 N. W. 930.

"The parties to the suit are conclusively bound by only what was in fact, litigated and decided." Citing: Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Rossman v. Tillney (Minn.) 83 N. W. 42; State ex rel. etc. v. Cooley (Minn.) 69 N. W. 338; Fave v. Patch, 132 Mass. 105; Montpelier Sav. Bank & T. Co. v. School Dist. No. 5 (Wis.) 92 N. W. 439; Pitts v. Oliver (S. D.) 83 N. W. 591; Wentworth v. Racine County (Wis.) 74 N. W. 551; Chicago, R. I. & P. R. Co. v. St. Joseph Union Depot Co. 92 Fed. 22; Lawrence v. Stearns, 79 Fed. 878; 2 Black, Judgm. 2d ed. art. 506; Re Freud (Cal.) 66 Pac. 476; Stroup v. Pepper (Kan.) 76 Pac. 825.

Wolfe & Schneller and *J. A. McKee,* for respondents.

"Courts do not speak through their opinions, but through their judgments and decrees; therefore the announcement of the learned trial judge at the conclusion of the testimony, may be disregarded." Heck v. Bailey (Mich.) 169 N. W. 940.

"At the outset of the consideration of the doctrine of *res judicata,* it must be noted that there is a wide difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action." 15 R. C. L. p. 951; Luckman v. Union R. Co. (Or.) 69 L.R.A. 480; Selbie v. Graham, 18 S. D. 365.

"A former adjudication is conclusive on all facts adjudicated or necessarily involved in the former action, with their necessary legal effects." Howden v. McNamara, 20 N. D. 225; Patterson v. Wold, 33 Fed. 791; United States v. California & O. Land Co. 192 U. S. 355.

CHRISTIANSON, Ch. J. The plaintiff is an incompetent person, having been adjudged insane by the county court of Iowa county, Wisconsin, on January 23, 1907. Subsequently he was paroled or escaped from custody, and took up his residence in Sargent county in this state. The order declaring him to be insane has never been vacated or set aside, While residing in Sargent county he became the owner of the quarter section of land involved in this controversy. In November, 1910, the plaintiff bought from the Daniels-Jones Company a half section of land in Kidder county, in this state, paying down $1,900 in cash, and assuming certain mortgages against that land. In January, 1911, the Daniels-Jones Company sold and assigned to the plaintiff a contract of purchase covering a certain quarter section of "school" land in Clay county, Minnesota. As consideration for the assignment of such school land purchase contract, the plaintiff conveyed to the Daniels-Jones Company by deed the quarter section of land in Sargent county, and the half section in Kidder county. The quarter section in Sargent county alone is involved in this suit. It appears that the Daniels-Jones Company transferred that land to one A. P. Guy, and that he thereafter sold it to the defendants Moore, who went into possession thereof in the fall of 1911, and remained in possession until ousted by the judgment rendered in this action on April 14, 1919.

In 1912 a guardian was appointed for the plaintiff, Williams, on the ground of his incompetency, and a suit was brought by such guardian to set aside the conveyances of the Sargent county land. The defendants in the present action were named as defendants in that action, as were also the Daniels-Jones Investment Company, A. P. Guy, Harvey T. Daniels, and the Harvey T. Daniels Investment Company. That action came on for trial on May 29, 1913. Apparently the trial court announced its determination that the conveyances must be set aside, and the plaintiff, Williams, adjudged to be the owner of the Sargent county land. Thereupon application was made by his attorneys for an accounting in that action, and on August 20, 1915, the trial court made an order "that an accounting be had between the respective parties as to all matters involved in said action relating to the specific lands . . . involved in this action, especially as to the rental values of said lands and the use and profits of the same, and for taxes paid

thereon or for interest paid upon the encumbrances thereon, and upon any of the matters of detail involved in an accounting between the respective parties to said action, as relates to the lands involved herein." Thereafter testimony was taken before a referee at times and places stipulated by the attorneys for the respective parties. On January 24, 1917, the trial court made its findings of fact and conclusions of law, wherein it found that the plaintiff, Williams, was incompetent and ordered judgment to be entered vacating and setting aside the various conveyances to the land in controversy. In its findings the court found: "To adjust the equities between the several parties to this action, it is necessary to state an account of the rents, profits, and payments of taxes and on encumbrances by the several parties hereto involving the lands in controversy and to find the balance thereof, and the apportionment thereof." The court further found: "That the use plaintiff, John H. Williams, is not entitled to recover of any of the defendants any sum or sums whatsoever, for the use of said lands during the years 1911, 1912, 1913, 1914, and 1915, save and excepting the net sums actually received by such defendants for the use of said lands during said years, and that none of said defendants received anything whatever for the use of said lands during any of said years, excepting that the Harvey T. Daniels Investment Company for the use of the Kidder county land, received in 1913 the sum of $26.50, and in 1915 the sum of $47, total: $73.50." The court also found that the Harvey T. Daniels Investment Company had "paid on account of encumbrances, taxes, and interest on said lands in Kidder county" sums aggregating $1,346.54; and adjudged that the said company have and recover from the said Williams the sum of $1,273.04" (the excess of payments over rents and profits received), which sum was decreed to be a valid lien upon the Kidder county land. The court also found that the "Daniels-Jones Company had paid on account of encumbrances and taxes on said Kidder county lands the sum of $3,100;" that the plaintiff, Williams, had paid interest and taxes on the Clay county, Minnesota, land aggregating $110.39; and judgment was awarded the said Daniels-Jones Company in the sum of $2,989.61 (the excess of payments made by it on the Kidder county lands over the taxes and interest paid by

Williams on the Clay county lands), which sum was adjudged to be a valid lien upon the Kidder county land.

Judgment was entered April 9, 1917. The correctness thereof has never been questioned either by motion in the trial court or on appeal. The defendants Moore did not, however, see fit to surrender the land to the plaintiff, Williams. On the contrary, they retained possession thereof and farmed it during the seasons of 1917 and 1918. The plaintiff thereupon instituted this action to eject them, and to recover the value of the use and occupation. The defendants by way of counterclaim averred that they had paid certain taxes, and interest and principal of mortgages, against the land. The plaintiff interposed a reply to the counterclaim wherein he asserted that the matters set out in said counterclaim had been fully and finally settled and adjudicated by the judgment entered in the former action. The case was tried upon the issues thus formulated. The trial court allowed plaintiff to recover the value of the use and occupation of the premises during the time subsequent to the rendition of the judgment in the former action. It also permitted defendants to recover for tax payments made subsequent to the rendition of such judgment, but disallowed all payments made prior to that time on the ground that the right to recover such payments was involved in the former action, and that the judgment therein was conclusive upon that question.

The only question presented on this appeal is whether the trial court ruled correctly in holding that the judgment in the former action precludes a recovery upon the counterclaim. No question is raised as to the amount allowed for the use and occupation of the premises during the farming seasons of 1917 and 1918. Nor is any question raised as to the correctness of the judgment in so far as it awards plaintiff the possession of the premises.

The defendants contend that the former judgment is not a bar. They contend that the claims which constitute the basis of their counterclaim were not passed upon in that case. In support of that contention they call attention to the letter of the trial judge written January 24, 1917, to one of the attorneys for the defendants in the former action, wherein the trial judge said: "You will observe that I have said nothing with regard to the rights of E. J. Moore and C. A. Moore,

inasmuch as no evidence was offered as to whether they had ever paid any encumbrances or taxes upon any of the said lands. If, however, they have paid anything and counsel for the parties desire that some finding be made with reference to reimbursement, I am willing to make such a finding upon the stipulation of the parties as to what is due them." The findings were dated on that day, but were not filed until April 6, 1917.

We are of the opinion that the trial court was correct in holding that the payments made by the defendants for taxes and encumbrances against the land in controversy, which payments might have been proved and recovered in the former suit, cannot be made the basis of a counterclaim in this case.

We do not have before us the pleadings in the former action, but we do have the findings of fact and conclusions of law and the judgment therein. We also have the order providing for an accounting. It must be assumed that the pleadings presented the issues covered by the findings and the judgment. From the findings and judgment it is apparent that the purpose of the action was to obtain a full and final determination of all rights and interests of the several parties in and to the lands in controversy. The obvious and avowed purpose of the accounting was to obtain an adjustment in that action of all claims then existing growing out of the transactions in controversy, and thus obviate all necessity of any further litigation.

Nor do we see wherein the letter of the trial judge supports the contentions of the defendants—leaving the question of admissibility thereof wholly on one side. The letter clearly shows that the trial judge was of the opinion that the claims which the defendants attempt to assert as a counterclaim in this suit were properly involved and determinable in that action. The trial judge, of course, did not know whether such claims existed, and could make no finding with respect thereto in absence of evidence. He specifically called attention to the fact that no evidence had been adduced tending to establish such claims, and that for that reason he had made no finding with respect thereto. Similar claims existing in favor of the Daniels-Jones Company and the Harvey T. Daniels Investment Company were covered by the find-

ings and judgment in the case. Upon the record presented we are of the opinion that the claims which the defendants seek to assert by way of counterclaim in this case were properly provable, and are concluded by the judgment in the former action. 15 R. C. L. pp. 976, 977. The defendants could not avoid the effect of the judgment rendered in that case merely by withholding proof of such claims. Marshall v. Bryant Electric Co. 107 C. C. A. 599, 185 Fed. 499; Smith v. Cretors, 181 Iowa, 189, 164 N. W. 338; 23 Cyc. 1312, 1313. Nor does it appear (except from the trial judge's letter) that no proof was adduced. The findings purport to pass upon the entire controversy. There is no intimation that any claims were withdrawn, or that any right was left undetermined.

The judgment appealed from must be affirmed. It is so ordered.

BIRDZELL, ROBINSON, and BRONSON, JJ., concur.

GRACE, J., concurs in the result.

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ACKNOWLEDGMENT.

1. In an action to foreclose a mortgage it is held: That the mortgage was not entitled to be recorded for the reason that the certificate of acknowledgment did not show that the mortgage was executed by a person authorized to execute it for the corporation, as required by the laws of this state. First Nat. Bank v. Casselton Realty & Invest. Co. 353.

APPEAL AND ERROR.

1. An appeal from an order appointing a receiver is not triable anew in the Supreme Court. Dale v. Duffy, 33.
2. Mere verbal inaccuracies or technical defects in instructions, which are not likely to have misled the jury to appellant's prejudice, constitute no ground for reversal. Munster v. Stoddard, 105.
3. Where there is any substantial evidence to support a verdict, the granting or denying of a new trial on the ground of insufficiency of the evidence rests in the sound, judicial discretion of the trial court, and its ruling will not be disturbed unless an abuse of such discretion is clearly shown. Munster v. Stoddard, 105.
4. Where an action properly triable under the Newman Act is tried by the court as a law case, with the consent of the respondent, this court will consider and review the same as a law case, where in so doing it is without prejudice to the rights of the appellant. Jensen v. Sawyer State Bank, 225.
5. Defendant moves the supreme court to vacate its decision entered in this cause on March 6, 1914. For reasons stated in the opinion the motions denied. Patterson Land Co. v. Lynn, 251.

APPEARANCE.

1. An appearance for the sole purpose of objecting to the jurisdiction of the court over a foreign corporation on the ground that the person upon whom service has been made was not authorized to receive such service, is a special appearance only, and does not waive the want of service of process. Kluver v. Middlewest Grain Co. 210.

ASSAULT AND BATTERY.

1. In an action for indecent assault, where the plaintiff, the mother of two little children, was employed by the defendant, a bachelor fifty-nine years old, as his housekeeper, and where, during a period of two weeks employment, the defendant attempted at various times to take indecent liberties with the plaintiff, finally culminating in a bolder attempt, which compelled the plaintiff to leave the defendant's employ, to protect her virtue and integrity, all of which occasioned to her suffering, humiliation, and disgrace,—it is held that a verdict of $2,500 is not so excessive as to disclose the result of passion and prejudice of the jury. Leiferman v. Daniels, 76.

ATTORNEY GENERAL.

1. In an original proceeding, where the attorney general has made a motion to strike the return and answer of the workmen's compensation bureau, made and filed by one of the members thereof, upon the ground that such attorney general is the sole legal adviser and person entitled to appear by law for such bureau, and that, further, such answer and return was filed without his knowledge or consent, it is held that any board or department of the state government have the right to personally appear in their own defense before this court, and that the attorney general, although he is by statute the legal adviser of the departments of the state government and entitled to represent them in actions, sustains, nevertheless, in such actions a relation similar to that of attorney and client, and he may not overrule or entirely disregard rights of defense or of personal appearance that such departments may desire to assert. State ex rel. Amerland v. Hagan, 306.

BANKS AND BANKING.

1. Where, in order to raise moneys for banking operations, an arrangement is made, pursuant to an agreement of the officers and directors of a bank, to deed certain lands then held by the bank to its cashier, and for the cashier then to mortgage such lands to secure two notes for $4,500 each, to be signed by the directors thereof, and where, pursuant to such agreement, such deed, notes, and mortgages are executed and $9,000 secured thereby through a sale of such notes and mortgages, and where, thereupon, such proceeds are paid to the bank and credited to its real estate or loans and discounts account, representing real estate held, and the lands involved are thereafter treated, in making sales, in raising crops in payment of taxes, and in rentals thereof, as the lands of the bank, and it was so understood between all the bank officials and directors, even though, on the books of the bank, the specific liability therefor is not shown in

BANKS AND BANKING—*continued.*

the usual form, and where such cashier, after ceasing to be such, deeded the lands involved to his successor, it is held that the bank is legally liable to the parties who assumed and executed such notes, for the amount of moneys paid by them, upon such obligation so assumed, for the interest and purposes of the bank. Jensen v. Sawyer State Bank, 225.

2. Where, subsequent to such agreement and its consummation, ninety-five shares of the stock of such bank are sold to persons not parties to such arrangement, at about 50 per cent of the par value of such stock, and where such parties, so purchasing, examined such bank and its condition prior to such purchase, and relied in part upon the judgment of its then cashier, who knew all about this transaction, and who theretofore had received and retained a deed to the lands involved from its former cashier, and where, in addition, one certain piece of real estate so deeded is directly carried in the real estate account of such bank as owned and possessed by such bank, all of which furnished a means and an opportunity of knowing and understanding the real nature of this transaction concerning the real setate, it is held that such persons are not innocent purchasers of such stock so as to create an estoppel against the persons who assumed such obligation, in an action thereupon against the bank, even though such obligation is not evidenced upon the books of the bank in the usual form. Jensen v. Sawyer State Bank, 225.

BILLS AND NOTES.

1. Defendant received from the plaintiff bank an accommodation note for $5,000 and interest, and subsequently deducted the amount of the note and interest, $5,208.63, from the account of the plaintiff. Hence, judgment against the defendant for the sum deducted is affirmed. First State Bank of Lucca v. First National Bank of Casselton, 86.

BROKERS.

1. The plaintiff employed the defendants to make for her a loan of $800 on a homestead, and out of the loan to pay expenses, liens and claims against the land. Defendants paid $158.07 which was not a lien or legal claim against the land, and withheld the same from the plaintiff. Held: That in this case judgment was justly given against the defendants for $158.07, with interest and costs; also, that defendants having paid a judgment in favor of J. M. Hanley are entitled to be subrogated as judgment creditors. Arndt v. Remington, 95.

CONSTITUTIONAL LAW.

1. A proceeding for the amendment of the Constitution initiated by the people, in the exercise of their sovereign power under the provisions of the initiative and referendum (article 16) is the exercise of a political power, legislative in its character, and the agencies and instrumentalities designated for securing the expression of the sovereign will exercise a political function. State ex rel. Byerley v. State Board of Canvassers, 126.

2. The State Board of Canvassers in determining and certifying to the vote of the people given upon a proposed amendment to the Constitution initiated by the people under the provisions of the initiative and referendum (article 16) exercises a political function legislative in its character. State ex rel. Byerley v. State Board of Canvassers, 126.

3. Where the State Board of Canvassers have not refused to canvass the returns upon an initiated proposed amendment to the Constitution and where it is sought to exercise the judicial power to compel such board to canvass such returns in a particular manner upon the ground that their action taken is unwarranted in law, this court has no jurisdiction to interfere, the action of such board being political in its character. State ex rel. Byerley v. State Board of Canvassers, 126.

4. Held, following State ex rel. McCue v. Blaisdell, supra, and other cases, that the phrase, "a majority of all the legal votes cast at such general election," contained in subdivision 2 of article 16 of the amendment to the Constitution, means a majority of the votes cast upon the particular amendment submitted to the electors. State ex rel. Byerley v. State Board of Canvassers, 126.

5. Held further following State ex rel. McCue v. Blaisdell, supra, and other cases, that the determination and certificate of the State Board of Canvassers, stating that the amendments initiated by the people and submitted to the electors at the last general election in November, 1918, were adopted by having received, each of them, an affirmative vote equal to a majority of the votes cast on each amendment respectively, was proper and correct. State ex rel. Byerley v. State Board of Canvassers, 126.

6. In the Workmen's Compensation Act of 1919, it is provided that employers subject to the act shall pay to the compensation fund, in proportion to the annual pay-roll expenditures, a rate prescribed by the bureau, pursuant to a classification of employments with respect to the degree of hazards, and that if an employer does not comply with such act he shall be deprived of common-law defenses concerning injuries sustained by his employees; and, further, that, upon compliance, the employer shall not be liable for injuries sustained by his employees, but that recourse must be had to the workmen's compensation fund. It is further provided that in such act no contract made by the employer with his employee which serves to deduct or retain any moneys that are paid to comply with this

CONSTITUTIONAL LAW—*continued.*

Compensation Act shall be valid. It is held that these provisions in the act are not deemed so arbitrary and unreasonable as a matter of law as to be violative of relator's constitutional rights, either under the due-process clause, the equal privileges and immunities clause, or the clause concerning the impairment of the obligation of contracts of either the Federal or state Constitution. State ex rel. Amerland v. Hagan, 306.

7. It is further held that the Compensation Act, which grants to the bureau power to classify employment and prescribe rates, is not unconstitutional upon the ground of an improper delegation of judicial power. State ex rel. Amerland v. Hagan, 306.

8. Where a proposed amendment to the Constitution of the state of North Dakota is, at a regular or special election, duly submitted to the electors for their approval, and a majority of the qualified electors voting at such election vote in favor of it, and it is later duly submitted to the legislature and by it agreed to and duly ratified, and it is thereafter approved by the governor of the state, it duly becomes a part of the Constitution of the state of North Dakota. Green v. Frazier, 395.

9. It is held, the amendments to § 182 and to § 185 of the Constitution of the state of North Dakota each were regularly, lawfully and in accordance with the provisions of the state Constitution relative to the amendment thereof, duly and legally adopted and are a part of the Constitution of the state of North Dakota. Green v. Frazier, 395.

10. It is held, that the people of this state have the privilege, right and authority, under the principles and prerogative of self-government, to adopt such Constitution and such amendments to it as to them may seem right and proper and best calculated to insure their general welfare, security, and prosperity, subject, however, in this respect to every limitation or restraint imposed upon them by the Constitution of the United States. Green v. Frazier, 395.

11. It is held, that neither of the amendments in question, in any manner, contravene any of the provisions of the Constitution of the United States; nor are they repugnant to it, nor are any of the laws relative to the construction and ownership of certain state-owned industries and utilities, invalid, void, or unconstitutional under the state Constitution; neither do they contravene any provision of the Constitution of the United States, nor are they within any of the restraints imposed by it upon the several states. Green v. Frazier, 395.

12. The building, owning, and operating of such state-owned industries and utilities being for a public purpose, and the profits from such inuring to all the people of the state, and are payable as such into the state treasury for the equal use and benefit of all the people of this state, it is held, that such ownership and operation of such industries and utilities con-

CONSTITUTIONAL LAW—*continued.*

stitute a public purpose, to carry out which the state may issue bonds as prescribed by law, and may levy a tax on all property of this state not exempt from taxation under the laws of this state or of the United States, for the purpose of paying the principal and interest of such bonds and that in levying and collecting of such tax there is no violation of either the state Constitution nor the Constitution of the United States nor the 14th Amendment. Green v. Frazier, 395.

13. It is further held, that the authorization of the governor and industrial commission to fix the rate of interest, date of maturity, etc., of such bonds, is not the delegation of a legislative power or function, but merely the conferring of administrative duties upon them. Green v. Frazier, 395.
14. The constitutional amendments and laws in question promote home ownership. The state, as such, is made up of units. Those units are represented by homes. The more homes, the more prosperous and secure they are, the more prosperous, secure and permanent is the state. The state, its integrity, morality, intelligence, prosperity, and permanence is measured largely by the average of those same virtues in its citizenship, and those virtues are greatly promoted by permanency of home ownership, which the laws in question are intended to establish. Green v. Frazier, 395.
15. Under § 202 of the Constitution requiring a proposed amendment to the Constitution to be entered on the journal of the house with the yeas and nays taken thereon, such entry is sufficient if it refer to the proposed amendment by an identifying reference such as the title and number of a bill containing the resolution, accompanied by the entry of the yea and nay vote. State ex rel. Twichell v. Hall, 459.
16. Where a practice has been uniformly followed by the legislature for more than twenty years, which carries out the spirit of a constitutional requirement, such a legislative construction is entitled to weight in construing the Constitution. State ex rel. Twichell v. Hall, 459.
17. The 16th Amendment is examined and held to be self-executing. The rights to be enjoyed are fully set forth therein, and steps necessary to be taken to effect the enjoyment thereof are contained therein. State ex rel. Twichell v. Hall, 459.
18. The publication of a proposed constitutional amendment in pursuance of the provisions of chap. 41, Compiled Laws 1913, constitutes and is a legal and sufficient publication thereof. State ex rel. Twichell v. Hall, 459.
19. Under the 16th Amendment, when a petition has been signed by twenty-five per cent of the voters in not less than one half of the counties of the state proposing an amendment to the Constitution with reference to any subject-matter, such petition is sufficient, and the legislature has no power or authority to increase the minimum percentage required. If the legislative assembly should enact such a law it would obviously be in

CONSTITUTIONAL LAW—*continued.*

conflict with the percentage requirement of the 16th Amendment. State ex rel. Twichell v. Hall, 459.

20. In construing a constitutional amendment adopted in the manner prescribed by § 202 of the Constitution, great weight should attach to the fact that it was proposed to and passed by two successive legislative assemblies, and was thereafter properly and legally submitted to and ratified by a majority of the electors at a general election. State ex rel. Twichell v. Hall, 459.

21. Where a petition for a proposed constitutional amendment has been properly and legally signed and prepared as required by the Constitution and filed with the secretary of state, it is his executive duty to proceed with the same as required by § 979, Compiled Laws 1913, and he should not be restrained or interfered with in the performance of his duties. State ex rel. Twichell v. Hall, 459.

CONTRACTS.

1. In an action to recover for goods sold and delivered to the defendant, where the answer, by way of admission, defense and counterclaim, admits a contract, and pleads a breach of warranty, and where the proof discloses a sale and delivery of such goods upon an agreed price, it is error to direct a verdict of dismissal upon the ground that the complaint states a cause of action upon implied contract. West End Furniture Co. v. Norman, 45.

2. Where, in an action on an express parol contract to perform certain threshing at an agreed price, there is a conflict between the parties as to which of two figures was the agreed price, evidence of the reasonable value of the work is admissible as bearing upon the probability of the one or the other being correct. Munster v. Stoddard, 105.

CORPORATIONS.

1. Service of process on a person who has ceased to represent a foreign corporation either as its agent or officer prior to the bringing of the suit is not service upon such corporation. Kluver v. Middlewest Grain Co. 210.

2. In a civil action brought by the attorney general, in which it is sought to procure the cancelation of the corporate charters of the defendants, where the complaint alleges a combination of the defendants to control the price at which they will sell fruits and berries contrary to chap. 65 of the Penal Code, it is held: The civil remedy in the nature of quo warranto to procure the annulment of corporate franchises for abuse of powers, which is provided in § 8004, Comp. Laws 1913, in the Code of Civil Procedure, is the ordinary common law remedy through which the state might vindicate its sovereign rights, and it is not to be deemed superseded by

CORPORATIONS—*continued.*

a criminal remedy, or another civil remedy, in the absence of a clearly expressed legislative intention to that effect. State ex rel. Langer v. Gamble-Robinson Fruit Co. 376.

3. Neither the absence of provision for a civil remedy in a penal statute prohibiting trusts, pools and combinations, nor the provision in such penal statute making a judgment of conviction operate as a forfeiture of corporate franchises, sufficiently evidences a legislative intention to make the criminal remedy exclusive. State ex rel. Langer v. Gamble-Robinson Fruit Co. 376.
4. The civil remedy provided by § 8004, Comp. Laws 1913, is not conditioned on a successful criminal prosecution under the penal statutes, and may be brought independently of criminal proceedings. State ex rel. Langer v. Gamble-Robinson Fruit Co. 376.
5. Section 8004, Comp. Laws 1913, in the Code of Civil Procedure, authorizes a civil action by the attorney general for the annulment of corporate franchises for abuse of powers, and the alleged acts of the defendants constitute abuse of their corporate powers within subdivision 2 of the section. State ex rel. Langer v. Gamble-Robinson Fruit Co. 376.
6. Misuse of a corporate franchise constitutes abuse of powers justifying the application of a statutory civil remedy whenever the acts of misuse involve injury to the public, although the same acts may constitute a violation of a penal statute. State ex rel. Langer v. Gamble-Robinson Fruit Co. 376.

(Failure of service upon, as to right to appear specially to object to jurisdiction over a foreign corporation on the ground that service was made upon one not authorized to receive such, see Appearance 1.)

COSTS.

1. In this case the parties stipulated that the action be dismissed. The stipulation was dated May 24, 1916. On August 4, 1916, the defendant caused judgment of dismissal to be entered. Neither the stipulation, nor the order for judgment, make any reference to costs, and none were taxed in the judgment. More than fifteen months thereafter the defendant sought to tax costs. It is held that the trial court was right in denying the defendant's application. State ex rel. Linde v. Equity Co-operative Exchange, 299.

COURTS.

1. By the terms of § 112 of the Constitution of the state of North Dakota and § 9006, Compiled Laws 1913, justices of the peace have concurrent jurisdiction with the district court in all civil actions when the amount in

COURTS—*continued.*

controversy, exclusive of costs, does not exceed $200. These provisions are as applicable to an action sounding in tort as to one on contract. Jorgenson v. Farmers & Merchants Bank, 98.

2. Where the legislative expression and enactment and the judicial construction had concerning the meaning of a particular phrase, "a majority of all the legal votes cast," has been consistently followed and adopted in this state ever since statehood, and has been repeatedly followed by decisions of this court, thus establishing a rule of construction affecting personal and property rights, the rule of stare decisis obtains. State ex rel. Byerley v. State Board of Canvassers, 126.

DAMAGES.

1. The owner of such automobile is liable for its negligent operation by a third person, directed or permitted by his wife, in her presence, to drive such automobile for purposes of the business or pleasure of the owner's family. Ulman v. Lindeman, 36.

DEPOSITIONS.

1. A deposition is not admissible in an action unless it was taken in a former action where the parties and the issues were the same. Fosston Manufacturing Co. v. Lemke, 343.

DIVORCE.

1. In divorce actions the supreme court has appellate jurisdiction only (Const. §§ 86, 87), and cannot entertain an original application for modification of a decree of divorce so as to allow an increase of alimony. Gray v. Gray, 89.
2. For reasons stated in the opinion it is held that the order appealed from in this case, in effect, merely required the plaintiff to comply with the provisions of a final decree of divorce, and hence plaintiff is in no position to assert that the order is erroneous. Gray v. Gray, 89.

ELECTIONS.

1. Held, following State ex rel. McCue *v.* Blaisdell, 18 N. D. 31, 119 N. W. 360 and other cases: That a "vote" is the registration in accordance with law of the preference or choice of an elector on a given subject. That "votes cast" are the totals of the separate votes or expressions of voters' preference for or against a proposed amendment to the Constitution. State ex rel. Byerley v. State Board of Canvassers, 126.

ELECTRICITY.

1. In an action by the plaintiff against the defendants, to recover damages for injuries sustained on account of the negligence of the defendants in the operation of an electric light plant, and the instrumentalities connected therewith, whereby the plaintiff was severely injured and burned, and one of his hands thereby crippled, and the question of defendants' negligence and plaintiff's contributory negligence and assumption of risk having been submitted to a jury, and the jury having returned a verdict in plaintiff's favor in the sum of $15,000,—it is held, upon an examination of the record, that the verdict is sustained by the evidence. York v. General Utility Corporation, 51.

2. The plaintiff was called to one W. J. Payne's residence to make repairs upon the electric wires therein. Ordinarily, such wires contained a voltage of 110. By reason of defendant's negligence, two primary wires rested upon an upper crossarm on a pole, loosely, and were uninsulated. A secondary wire, which was on the second crossarm, extended upward and immediately under the two unfastened primary wires, and then led to certain houses in the vicinity, to which it conveyed electric current; among others, being the Payne house.

   Each of the primary wires contained a voltage of 2,300. By reason of the close proximity to the secondary wire which passed under and very near to them, and by reason of the noninsulation of the primary wires, the voltage of 2,300 contained in such wires was transmitted to the secondary wire, and, by it, transmitted to the Payne residence, where plaintiff, upon proceeding to make the repairs, and in attempting to take hold of one of the disconnected wires in the basement of the Payne residence, received the excessive voltage of 2,300.

   If plaintiff, before going to the basement to make the repairs, had turned off the switch, he would not have been injured. When he went to the basement, he placed a dry board under his feet before starting to make the repairs. If there had been only 110 volts in the wires to be repaired, instead of 2,300, the use of the board would have been a safe method.

   The defendants claim that plaintiff had the choice of two methods one of which was dangerous and the other safe, and that he chose the dangerous method. The evidence shows that the method selected by plaintiff was safe had the wires contained only 110 volts. It further shows that that method became unsafe by reason of the negligence of the defendants in failing to properly insulate the primary wires in question. York v. General Utility Corporation, 51.

EVIDENCE.

1. It is not necessary to the competency of a pleading, as an admission against

EVIDENCE—*continued.*

the party, that it be one filed in an action between the same parties. A pleading filed in any action is competent against the party if he signed it, or otherwise acquiesced in the statements contained in it, if such statements are material and otherwise competent as evidence in the cause on trial, not by way of estoppel, but as evidence, open to rebuttal, that he admitted such facts. Union Nat. Bank v. Western Building Co. 336.

2. Where the actual intention with which an act is done is material, a party may give direct testimony of his intention. State ex rel. Olson v. Royal Indemnity Company, 550.

3. Among other personal properties sold defendants was a large quantity of hay. The hay was mentioned in the written contract, but nothing therein stated as to its quality. Defendants claim the plaintiff represented the hay to be put up in good condition, and free from dirt, weeds, etc., and that such representations were false and untrue, and that they relied upon them, etc.

The defendants introduced testimony showing the spoiled condition of the hay.

Held that it was proper to introduce such testimony, and that it did not vary, nor attempt to vary, the terms of the written contract, nothing being said in the contract about the quality of the hay. Held, further, that, under § 5981, Comp. Laws 1913, the defendants were entitled to recover, upon an implied warranty, the hay at the time of the purchase being inaccessible to their examination, being contained in some thirty-three stacks, the inside of which could not well be examined until they were used; and it being further shown that part of the hay was unmerchantable by reason of being spoiled or in a decaying condition. Gussner v. Miller, 587.

4. Where the defendant was convicted of maintaining a common nuisance by keeping and maintaining a so-termed "blind pig," and where, upon appeal, the defendant has challenged the sufficiency of the evidence to charge him with the keeping or maintaining of such "blind pig," it is held that there is some creditable evidence in the record concerning the keeping and maintaining the "blind pig" by the defendant, and, though meager, this evidence was for the consideration of the jury as a matter of fact. State v. Burcham, 604.

FERRIES.

1. The relators, Leach and Friesham, were arrested and brought before a justice of the peace of Morton county, charged with the operation of a ferry without a license, contrary to the provisions of Comp. Laws 1913, § 9777. To the complaint, they entered a demurrer which was overruled, and they

FERRIES—*continued.*

were held to answer, and their bail fixed at $200, which they failed to give and they were committed to the custody of the sheriff. They applied to this court for a writ of habeas corpus, which was granted, and a day certain was set for the hearing upon said writ. After the hearing thereon, the same is quashed for the reason stated in the opinion. State ex rel. Leach v. Olson, 367.

FINDINGS OF FACT.

1. In this case the findings of fact, as made by the trial court, are sustained. The conclusions of law and the judgment are modified and affirmed, without costs. First State Bank v. Bratlie, 205.

FOREIGN CORPORATIONS.

1. A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there, and has subjected itself to the jurisdiction and laws of such state. Kluver v. Middlewest Grain Co. 210.
2. Where it is sought to make service upon a foreign corporation by delivering process to one of the officers or representatives enumerated in subdivision 5, § 7426, Comp. Laws 1913, such service is ineffectual unless the person served at the time of such service was "within the state, doing business" for such corporation. And where it is sought to make service upon a foreign corporation under subdivision 6, of said section, the service is not binding upon the corporation unless the person served at the time of service was "found within this state acting as the agent of, or doing business for, such corporation." Kluver v. Middlewest Grain Co. 210.

GARNISHMENT.

1. Where one has been duly and legally served with an affidavit of garnishment and garnishee summons, and then or at any time prior to return day has or acquires knowledge that the funds or property in his possession or under his control are claimed by another than the garnisher, and fails to make affidavit or answer disclosing such knowledge before or on return day, as required by law, and permits judgment to be taken against him by the garnisher, and pays the money or property over to the garnisher, either voluntarily or by order of the court, cannot complain if he is compelled to repay the amount of funds or property under his control to the person whom he knew claimed the same, if, in a subsequent action against the garnishee, it should be made to appear that that person had a superior right to such funds or property. Jorgenson v. Farmers & Merchants Bank, 98.

GIFTS.

1. Under a judgment for household necessaries, the defendant caused a span of mares to be sold as the property of the plaintiff's husband. There is no merit in the claim of the plaintiff that she owns the mares under an oral gift from her husband. Livingston v. Erickson, 111.

HOMESTEADS.

1. A deed from husband to wife of a statutory homestead in 1891 is valid although the wife did not concur and join in the execution thereof, pursuant to the law then existing. Wehe v. Wehe, 280.

HOMICIDE.

1. Where one is charged with murder and is duly placed upon trial therefor, and a plea of not guilty is entered, and the defense is justifiable homicide based upon a claim of self-defense, threats of the deceased made prior to the time of the homicide are not admissible, though it appear, assuming the evidence offered on behalf of defendant to be true, that at the commencement of the final trouble resulting in the homicide, the deceased committed an overt act by threatening to take the life of defendant and engaged in physical encounter with him, though displaying no dangerous weapons, and where later, desisting from the struggle, threatened to go to the house and get a gun and shoot the defendant, the barn being on one end of a village lot, and the house where the crime was committed on the other, where it further appears that defendant might have retired to a place of safety when deceased went to the house, but instead of doing so, pursued the deceased and shot at him while pursuing him, followed him into the house and through it to the bedroom, where deceased had taken refuge, and where he and his mother-in-law tried, by holding against the door, to prevent the defendant from entering, and who after failing to push the door in, shot into and through it twice, wounding the deceased, and afterwards entering and shooting him to death. State v. Lehman, 572.
2. The claim of self-defense is not maintainable where the defendant had ample and full opportunity to retire to a place of safety and thus avert the crime. State v. Lehman, 572.
3. When the deceased first assaulted and attacked the defendant, it was an overt act, initiating the right of self-defense in behalf of the defendant. Had he then acted, there possibly would be merit in his claim of self-defense, and evidence of prior threats would have properly been admissible. After the deceased retired to the house and was followed by defendant to and through the house to the bedroom, and there, with his mother-in-law, tried to hold the door thereof in an effort to protect his life, by preventing the entrance of the defendant, who persisted in trying to enter, and who,

HOMICIDE—*continued.*

in endeavoring to enter, shot twice through the door, and afterwards gained entrance and shot his victim to death,

It is held, in these circumstances, the defendant was not acting in self-defense, but as a persistent aggressor, and evidence of prior threats was properly excluded and were not admissible for the purpose of establishing a claim of self-defense. State v. Lehman, 572.

HUSBAND AND WIFE.

1. The owner of an automobile, kept and used for the business and pleasure of the family, is liable for its negligent operation by his wife, when driven for such purposes, with his knowledge and consent. Ulman v. Lindeman, 36.
2. The mere fact that the wife was the record owner of a certain house occupied by her and her family, including her husband, as a home; and that she knew that the plaintiff was installing or altering certain plumbing therein,—does not make her liable for the work so performed by the plaintiff, where it appears that the services were performed under a contract made by the husband alone; that plaintiff performed the work and extended the credit solely to the husband, charged the amount of the indebtedness to him upon its books, received partial payment from him, brought suit and recovered judgment against him alone for the balance due on the account and had execution issued upon the judgment. Minot Plumbing & Heating Co. v. Bach, 71.
3. In such action, where the father, after such conveyance to his wife in 1891, farmed and occupied the premises until 1896, and thereafter removed from the same, but managed and controlled the land through tenants and generally paid the taxes thereon until the year 1913, and in other ways treated the farm as his own, it is held that such acts were not hostile to the title of the wife and do not constitute acts of adverse possession. Wehe v. Wehe, 280.

INSURANCE.

1. This is an appeal from a judgment against defendant for $1,000 on its insurance of a registered Belgian stallion that weighed 2,000 lbs. and was worth $2,200. The defense is that the insurance for which defendant received $100 was obtained by a false representation, which was that the horse never had colic, while in the proof of loss it is written that the horse had a slight colic in the winters of 1916 and 1917. The proof of loss was written by the state agent of the plaintiff, and two witnesses swear that it did not contain anything about colic. It is held: Under the evidence the question of the falsity of the representation was for the jury. Fekjar v. Iowa State Live Stock Ins. Co. 389.

JUDGMENT.

1. A judgment binds only parties and privies, not strangers to it. Against strangers, it is not evidence to prove any of the facts upon which it was rendered. Union Nat. Bank v. Western Building Company, 336.
2. A judgment in a prior suit is deemed final and conclusive in subsequent litigation between the parties, or their privies, as to those matters necessarily determined or implied in reaching the final judgment, although no specific finding may have been made with reference thereto. Reko v. Moore, 644.
3. Where, in an action to set aside transfers on the ground of incompetency of the original grantor, an accounting is ordered and had to determine the value of the use and occupation of the premises and the amount, if any, of payments made by the transferees for taxes and encumbrances upon the premises, a transferee cannot avoid the conclusive effect of the judgment merely by withholding proof of the amount of payments made by him. Reko v. Moore, 644.

JUSTICE OF THE PEACE.

1. In an action in the justice court for damages for tort, the amount claimed in the summons was $200, with interest. Held that the interest commenced from the date of the summons, and not from the time of the commission of the tort; that the amount in controversy did not exceed $200. Jorgenson v. Farmers & Merchants Bank, 98.
2. An action was brought in justice's court upon two notes secured by chattel mortgages. The plaintiff asked judgment for the amount due upon the notes, and, also, for foreclosure of the chattel mortgages. The defendant appeared and, without objection, tendered an issue as to his liability upon the notes. Such issue was tried, and the justice of the peace rendered judgment against the defendant for $106.44, the amount due on the notes. The justice further adjudged that the plaintiff was entitled to the possession of the property described in the chattel mortgages; that the amount found due the plaintiff was a lien upon such property, and that the property be sold to satisfy such lien. The defendant, claiming that the justice of the peace had no jurisdiction to adjudge foreclosure of a chattel mortgage, brought suit in conversion against the officer who made the levy and sale. In such suit it is held that that portion of the jeweler's judgment which awarded judgment for the amount due on the notes was valid, even though the portions relating to the enforcement of the chattel mortgages were invalid and that the officer was not guilty of conversion in making levy and sale under the execution. Palmer v. Donovan, 348.

LANDLORD AND TENANT.

1. Where a lease to a certain tract of land was oral, and there was a dispute

LANDLORD AND TENANT—*continued.*

as to what were the actual terms of the lease, and testimony was introduced by each of the parties as to what were the terms, what the terms of the lease actually were was a question of fact for the jury. Sandvig v. Kleppe, 5.

2. Plaintiff having recovered for the value of certain hay alleged to have been converted by the defendant, it is held the verdict is sustained by the evidence. Sandvig v. Kleppe, 5.

LIBEL AND SLANDER.

1. Under § 4353, Comp. Laws 1913, the false and unprivileged publication of an oral statement which charged any person with crime, or imputes to him want of chastity, constitutes slander. Martinson v. Freeberg, 363.
2. It is not necessary that the charge of unchastity should be made in direct terms; but it is sufficient if the words used are such as impute unchastity and were so understood by those who heard them. Martinson v. Freeberg, 363.
3. A complaint charging the false and unprivileged publication by the defendant of an oral charge that plaintiff and defendant's wife went upstairs together, and that this did not look good to the defendant and that the charge was understood by the persons who heard it to mean that the plaintiff and defendant's wife went upstairs for the purpose of having carnal intercourse, —states a cause of action. Martinson v. Freeberg, 363.

MANDAMUS.

1. In an original application for a writ of mandamus to compel the state auditor to issue the salary warrant of the tax commissioner, where it appears that the state auditor, without warrant of law, has transferred from the general fund into a specific fund, known as the Glander and Dourine Horse Fund, cash moneys in the sum of $15,000 of which amount there remains therein over $13,000 unexpended, and where it further appears that such amount so unexpended, together with the balance remaining in the general fund, is sufficient for the payment of the salary warrant of such tax commissioner, it is held that a peremptory writ of mandamus will be awarded. State ex rel. Wallace v. Kositzky, 291.
2. Where it appears from the return of the state auditor that there are claims filed in the state auditor's office, payable out of the general fund, prior in point of time to the claim of the tax commissioner for his salary warrant, but where no contention is made that any of such prior claims should first be paid, and no attempt is made to prove or establish the priority of any of such claims for purposes of refusing the writ, no issue is presented to this court for consideration upon the priority of such

MANDAMUS—*continued.*

claims, and the writ of mandamus will issue if there are moneys in the general fund with which to make payment of the salary warrant demanded. State ex rel. Wallace v. Kositzky, 291.

3. This is a mandamus proceeding against the secretary of state to compel him to receive and file a certain certificate presented by the plaintiff corporation on August 4, 1919, showing that said corporation by a majority vote of its stockholders on July 12, 1919, decided to accept the benefits of and to be bound by the provisions of chapter 99, Laws 1919. The secretary of state asserts that the statute is unconstitutional for the reason that it impairs the contract obligations existing in favor of stockholders, and that as to stockholders who do not consent it is violative of the contract and due process provisions of the Federal Constitution. For reasons stated in the opinion it is held that these defenses are not available to the secretary of state. Mohall Farmers Elevator Co. v. Hall, 430.
4. Thomas Hall, as secretary of state, having refused to attest and certify that certain bonds in the sum of $2,000,000, issued pursuant to law by the governor and treasurer of the state of North Dakota, were within the debt limit, a petition was presented to this court on behalf of the state that a writ of mandamus issue out of this court requiring and commanding him to do so. Held that it is proper that the writ of mandamus should issue in this case. State ex rel. Langer v. Hall, 536.

MASTER AND SERVANT.

1. In 1919 the legislative assembly of North Dakota enacted a compulsory Workmen's Compensation Act to cover employees engaged in hazardous employment, wherein hazardous employment is defined to be an employment in any business, trade, or occupation wherein one or more persons are employed, not casually, excepting agricultural, domestic, and railroad employees. Upon the issue raised by the relator engaged in the real estate and loan business, that this definition by legislature first covers his employment which is nonhazardous and free from danger, it is held that it is within the province of legislative power, in the exercise of the police power pursuant to public demand and as a matter of public policy, to classify generally a given employment as possessing elements of risk or hazard, and that such legislative expression will not be deemed arbitrary and unreasonable by the court unless a specific showing be made as a matter of fact that the employment of such relator is nonhazardous and without risk. State ex rel. Amerland v. Hagan, 307.
2. It is within the province of the legislature, in the proper exercise of its police power as a matter of public policy, to declare that there is an element of hazard or of danger in employment in the modern business world, and this court, upon construction of its definition in that regard, will not

MASTER AND SERVANT—*continued.*

presume that the term "hazardous" must necessarily refer to employments that have heretofore been termed hazardous by reason of extra features of hazard inherent to the nature of occupation. State ex rel. Amerland v. Hagan, 306.

3. The legislature, within the exercise of its police powers in enacting a compulsory compensation act, may abrogate common-law defenses and impose liability without fault, substituting new rules of legal procedure in place of the old, so long as its action in that regard is not arbitrary, unjust, or unreasonable. State ex rel. Amerland v. Hagan, 306.

MORTGAGES.

1. It is held (in a case where a mortgage was on record which was not entitled to be recorded and where a creditor had obtained a judgment against the mortgagor after said mortgage had been recorded), that the record of such mortgage did not constitute notice to a creditor, who lawfully obtained a judgment against the mortgagor, in whose name the title to the real estate described in the mortgage appeared of record. First Nat. Bank v. Casselton Realty & Invest. Co. 353.
2. That the judgment is a lien prior to the mortgage. First Nat. Bank v. Casselton Realty & Invest. Co. 353.
3. Sections 8075 and 8076, Comp. Laws 1913, provide: "It shall be unlawful for any agent or attorney of any mortgagee, assignee, person or persons, etc., owning or controlling any real estate mortgage to foreclose the same until he shall receive a power of attorney from such mortgagee, assignee, person or persons, etc." It is further provided that a power of attorney shall, before the day of sale, be filed for record in the office of the register of deeds of the county wherein the real estate is located. Davidson v. Houge, 449.
4. Where the notice of foreclosure sale is signed by the mortgagee, or his name is signed thereto by his agent or attorney, without such agent or attorney's name appearing on such notice, and such notice is published and foreclosure proceedings completed, and the property is bid in in the mortgagee's name and by his direction, and he accepts, receives, and retains the benefits thereof, such foreclosure proceedings may be considered under these circumstances as the act of the mortgagee, and a foreclosure by him is a valid foreclosure. Davidson v. Houge, 449.
5. Certain exhibits were excluded from evidence which tended to prove that foreclosure was made with the knowledge, consent and acquiescence of the mortgagee, and that he received and retained benefits under such foreclosure, while contending the foreclosure was void by reason of failure to comply with the above laws: Held, that the exclusion of such exhibits was reversible error. Davidson v. Houge, 449.

NEW TRIAL.

1. Where one of two defendants who was notified of the date of trial more than ten days before the convening of the term of court was not present when the case was called for trial, it appearing that he had been called out of the state on account of the illness of a sister-in-law, it was not error, in the circumstances of this case, for the trial court to order the trial to proceed. Bergh v. Hellickson, 9.

2. But where, on motion for a new trial, it appeared that the facts relied upon by the defendants were more peculiarly within the knowledge of the absent defendant; that the other defendant relied upon the absent defendant for notice of the date of trial as well as for proof of facts; and that the absent defendant was under such state of mental depression, due to the recent death of his mother, his wife, and his only child, and the fresh news of the serious illness of his sister-in-law, as to be incapable of properly attending to his own affairs, the failure of the defendants to be present to defend the action being attributable to the foregoing facts, a new trial should have been granted conditioned on the defendants paying the costs accrued prior to the motion. Bergh v. Hellickson, 9.

NOVATION.

1. A promissory note of a debtor does not operate as an absolute payment of his obligation unless it was intended to so operate. State ex rel. Olson v. Royal Indemnity Co. 550.

PARTNERSHIP.

1. It is held for reasons stated in the opinion that there was sufficient evidence to require submission to the jury of the question whether the defendant, Person, was a member of the Western Building Company, a fictitious co-partnership, and as such liable upon notes given by that company to the plaintiff bank. Union Nat. Bank v. Western Building Co. 336.

PRINCIPAL AND AGENT.

1. An agent possessing general authority from his principal to act as manager in the sale, trade, and exchange of stallions under guaranty contracts, may waive the provisions thereof when possessed of such authority, even though there is a stipulation contained in such guaranty contract providing that salesmen are forbidden, in any way, to change the printed form of the guaranty. Leroy v. Hagen, 1.

2. In an action on promissory notes given for the purchase price of a stallion, where a guaranty contract provided that the stallion should be serviceable and a 50 per cent foal getter, after fair trial on sure breeding mares, with the right of the purchaser to return the stallion and receive another

PRINCIPAL AND AGENT—*continued.*

horse of equal value that is supposed to be sure, provided such stallion was handled carefully, returned in proper condition, and reports made monthly of the service of such stallion; and contained the specific provision that salesmen are forbidden, in any way, to change the printed form of the guaranty contract, and where it appears that there is evidence that the stallion was not a 50 per cent foal getter, that the purchaser reported such fact to the agent who sold such stallion, and the agent thereupon advised the purchaser to keep the horse and try him another year, and that he would ship up another horse in exchange therefor, the agent possessing the authority so to make an exchange,—it is held that the questions of the utility of the stallion under the contract, and the authority of the agent, were questions of fact for the jury; and that the trial court erred in directing a verdict against the defendant. Leroy v. Hagen, 1.

PROCESS.

1. Where certain chattel mortgages were foreclosed by an action, and a summons was issued which claimed to recover, from the defendant, more than four times the amount actually owing upon the mortgages, and, in the course of the action, a warrant of seizure was issued and placed in the hands of the sheriff, under which all of the property described in the mortgages was taken from the possession of the defendant, such property consisting of a large amount of live stock, machinery, grain, and other property, the plaintiff in that action knowing, at the time it caused to be issued said warrant of seizure, that it was foreclosing such mortgage, and maintaining said action for more than four times the amount actually owing it, and the complaint, in this action, which is one for abuse of process in the foreclosure action, alleging all the foregoing facts, and further alleging that the warrant of seizure was maliciously and wilfully issued, with such knowledge.

   It is held, the complaint states a cause of action for abuse of process, and that the court erred in not receiving evidence offered by the plaintiff to substantiate the allegations of his complaint. Blair v. Maxbass Security Bank, 12.

REAL PROPERTY.

1. A deed delivered with the name of the grantee therein blank, with no proper authorization shown to fill in the name of the grantee, is void in law on its face. Brugman v. Charlson, 114.

RECEIVERS.

1. Under the provisions of § 7588, Comp. Laws 1913, a receiver may be appointed, among others, in an action between partners or others jointly

RECEIVERS—*continued.*

owning or interested in property, on the application of the plaintiff, or of any party whose right to or interest in the property is probable, and when it is shown that the property is in danger of being lost, removed, or materially injured. Receivers may also be appointed in all other cases where receivers have heretofore been appointed by the usages of courts of equity. Dale v. Duffy, 33.

2. For reasons stated in the opinion the order appointing a receiver in this case is affirmed. Dale v. Duffy, 33.

SALES.

1. In this case defendant appeals from a judgment for $700 and interest. For a Cadillac car he paid, in cash, $1,600, and turned over to plaintiff a Hudson auto valued at $700. The Hudson car was in possession of the Minot Auto Company for repairs. Both parties went together and notified the company of the trade, and plaintiff took and carried away the tools of the Hudson car. Held, that the plaintiff at once became the owner of the Hudson car, and the Auto Company became his bailee, regardless of the fact that defendant had agreed to pay for the repairs. Harshman v. Smith, 83.

2. In an action to foreclose a chattel mortgage on a tractor and other machinery, where it appeared that the tractor was sold under parol representations and warranties which were not embraced within the written order, and where the written order expressly negatived warranties, the purchaser being induced to sign it by misrepresentations of agents, who stated that it contained the warranties agreed upon, and where the duplicate order intended for the purchaser was delivered to him but immediately retaken by the agent under the pretext that it was needed for convenience in checking the goods on arrival, and where the purchaser made a claim for damages for loss of time and expenses incurred by reason of the failure of the tractor to perform as warranted, which claim was settled in full for $200 and upon the additional understanding that the tractor would be put in working order, and where the evidence shows that the tractor did not comply with the warranties,—that it was never put in working order, and that by reason thereof the consideration for the defendant's notes as represented by the price of the tractor had failed, except to the extent that he had been benefited by its use, it is held: That the contract of purchase, in so far as it relates to the tractor should be rescinded and the defendant's obligations to that extent reduced, and that defendant should have judgment for the payments made and for his damages as agreed on. Emerson-Brantingham Implement Co. v. Busch, 259.

3. Upon the settlement of a claim for damages incident to the failure of a

SALES—*continued.*

tractor to work as warranted, where the written portion of a receipt signed by the purchaser expressly states that it is "for damages and lost time in full," and the printed portion, not read by the purchaser, embraces also a release of all claims and all warranties, the testimony showing that the latter was no portion of the agreement of the parties, the receipt or release does not bar the defendant from reliance upon the warranties. Emerson-Brantingham Implement Co. v. Busch, 259.

4. In an action to recover a balance owing by the defendant, a florist, to the plaintiff, an importer of bulbs, where it appears that the plaintiff, in filling an order of the defendant, furnished an inferior quality of lily bulbs, for which it later substituted a different species of cold storage bulbs, and where the defendant filed a counterclaim based on the inferior quality of the bulbs, claiming consequential damages for the failure of the flower crop, the trial resulting in a judgment for the defendant for $843.26, it is held: Under Sec. 15 of the Uniform Sales Act (Sess. Laws 1917, chap. 202), where the buyer relies upon the seller's skill or judgment (though he be not the manufacturer or grower), the seller knowing the purpose for which the goods are intended to be used, there is an implied warranty that the goods shall be of merchantable quality and fit for the intended use. Ward v. Valker, 598.
5. The fact that the seller substituted certain other lily bulbs for the ones ordered, and shipped them from a different source of supply indicates an exercise of judgment sufficient to justify the buyer placing reliance upon its "skill and judgment." Ward v. Valker, 598.
6. Where circumstances anterior to the invoices indicate the existence of an implied warranty, a printed statement on the invoice in negation of a warranty does not operate to extinguish it as a matter of law. Ward v. Valker, 598.
7. The record showing that the damages recovered on the counterclaim were based upon a breach of an implied warranty, in the sale of goods substituted for those originally ordered by the defendant, and that the substituted goods were not supplied as a part of the original order, the clause in the original order which expressly provides that no warranty is given is not applicable to the sale of the substituted goods. Ward v. Valker, 598.
8. In an action to recover on a book account where the defendant counterclaimed, asking damages for the failure of the plaintiff to fill certain orders for goods, which orders had been previously given by the defendant to a salesman representing the plaintiff, and receipt of which had been acknowledged by the plaintiff, it appears that according to a prior course of dealing between the parties the invoices for the goods represented by the order were to be dated November 1, 1917, defendant to have sixty days' credit thereafter. The defendant had allowed his previous accounts

SALES—*continued.*

to become delinquent from six months to a year, and had refused to make settlement with plaintiff until plaintiff would ship the goods embraced in the order. It is held: the orders were given and taken upon the implied understanding that the defendant would keep his credit good with the plaintiff. Lanpher, Skinner & Co. v. Schuldheisz, 609.

9. Under the facts disclosed by the evidence, the defendant failed to fulfil the implied condition which would entitle him to further credit, and the plaintiff was not guilty of a breach of contract in declining to ship in fulfilment of the orders previously acknowledged. Lanpher, Skinner & Co. v. Schuldheisz, 609.

SCHOOLS AND SCHOOL DISTRICTS.

1. The school board called an election for the specific purpose of voting upon the removal of a schoolhouse from its present site to another definite location which was named in the resolution. The notice of election did not state the purpose of the election in accordance with the resolution of the school board and the provisions in § 1185, Compiled Laws 1913. Held, that the notice of election was insufficient, and was in fact no notice, and that the election held in pursuance of such invalid notice was invalid. Deide v. Antelope School District, 256.

2. The legislature, pursuant to constitutional authority and excepting as restricted by constitutional limitations, possesses the power to regulate the educational system and public schools of this state and to prescribe the courses of study in such schools. State ex rel. Langer v. Totten, 557.

3. The Board of Administration Act, known as S. B. No. 134, enacted by the legislature in 1919, and referred to and adopted by the people of the state, so far as the same grants the specific power to the board of administration to supervise and control the preparation of the courses of study in the common schools of the state, is not unconstitutional upon the ground that it interferes with and takes from the superintendent of public instruction prerogatives possessed as a constitutional officer. State ex rel. Langer v. Totten, 557.

4. The superintendent of public instruction has no constitutional power or inherent right to prescribe and prepare the courses of study for the common schools of the state. This right, pursuant to direct constitutional provision, has been granted to the legislature. Ex parte Corliss distinguished and held not in point. State ex rel. Langer v. Totten, 557.

5. In connection with the application of such rules of statutory construction, where a specific power has been granted, in a statute to a board of administration with which a general reservation therein concerning the duties and powers of the superintendent of public instruction is inconsistent, the

SCHOOLS AND SCHOOL DISTRICTS—*continued.*

specific power so granted will prevail over the general reservation stated. State ex rel. Langer v. Totten, 557.

6. In 1919, pursuant to Senate Bill No. 134, the legislative assembly enacted the board of administration bill, wherein there is specifically granted to such board the power to have charge and supervision of the preparation of courses of study for the several classes of public schools; however, in section nine thereof, it is provided that the powers and duties of the superintendent of public instruction shall be subject to the supervision and control of such board only in so far as such powers and duties were by law subject to the supervision and control of the state board of education and other boards to whose powers such board of administration succeeded. Upon an original application by the superintendent of public instruction to compel such board to refrain from investigating, preparing, and prescribing courses of study for the common schools of the state, the same being a power and duty theretofore possessed by such superintendent, it is held, upon legal construction of the intent and purpose of the act in regard to the preparation and prescription of the course of study for the common schools of the state, that the superintendent of public instruction possesses the power and duty to prepare and prescribe courses of study for the common schools of the state subject to the power of supervision and control by such board of administration pursuant to the specific power theretofore granted in the act. State ex rel. Langer v. Totten, 557.

SEDUCTION.

1. In an action for the violation of the personal relation brought by the parent, for the debauching of her daughter, aged seventeen years, the chastity of the daughter is presumed. Dwire v. Stearns, 199.
2. In such action, whether the wrong be termed seduction or unlawful enticement, it is the act of securing or procuring the debauching of the daughter, and the civil liability therefor is not prescribed by the statutory definition of criminal seduction. Dwire v. Stearns, 199.
3. In such action, when actual or constructive loss of the service has been established under the legal fiction pursuant to which such action is maintained, damages may be recovered for all that the parent has suffered through the ruin of the daughter, and the disgrace occasioned, including exemplary damages. Dwire v. Stearns, 199.

SPECIFIC PERFORMANCE.

1. In an action for specific performance to enforce a contract for the sale of land by the vendor, where such vendor has tendered, or has offered to perform by the delivery of a deed delivered to him by his grantors with

SPECIFIC PERFORMANCE—*continued.*

the name of the grantees therein blank, and where the vendor does not show an ability to furnish a title, or a conveyance directly from his grantors to the purchaser, or from himself to the purchaser, which is reasonably free from doubt, equity will not decree specific performance. Brugman v. Charlson, 114.

2. Where a vendor of a contract to convey real estate seeks to enforce specific performance thereof, and where it appears that the title to such vendor is evidenced by a deed delivered to him with the name of the grantee therein blank, so taken for the purpose of avoiding notoriety of his title, equity will not aid him in specifically enforcing his contract, where he seeks to furnish this deed as a title direct from his grantors to the purchaser, and to avoid thereby possible claims and demands of his judgment creditors. Brugman v. Charlson, 114.

3. The plaintiff brought an action of specific performance to compel the defendant to convey to him by deed certain real estate which she owned, and which plaintiff claims to have purchased from her. It is claimed by plaintiff that there exists between them a binding, written contract of sale. He bases such claim upon certain letters written by him to defendant, and answers received thereto from her, and upon other letters written by her to him: Held, on examination of all such letters and other evidence in the case, that, for the reasons stated in the opinion, no legal, written agreement between them, for the sale of the real estate, was made. Carns v. Puffett, 438.

4. Plaintiff leased defendants certain lands upon certain terms, and sold them certain personal property for a given price, part of which was to be paid in cash, and the balance within a definite time, to be secured by a chattel mortgage upon the property.

Plaintiff brought this action for specific performance, claiming defendants made default in the payment, and in the failure to give chattel mortgage for the unpaid balance of the purchase price of the property. Defendant denies the default and claims full payment and tender of payment, and tender of a note, and chattel mortgage for the unpaid balance.

Held, that the plaintiff is not entitled to a decree of specific performance, and that the defendants have paid, or tendered payment, and tendered a note and chattel mortgage in compliance with the terms of the contract, and in excess thereof to the extent of $641.81. Gussner v. Miller, 587.

STATES.

1. Where an application is made for the prerogative writ of this court upon the relation of private individuals as taxpayers and electors, without first securing the consent of the attorney general or his refusal to maintain the action in behalf of the state, and its interests, and where the matter

STATES—*continued.*

concerns only the state, its sovereignty, its franchises, or prerogatives, or the liberties of its people, no right of the relators or of any citizen of the state being immediately threatened with invasion or abrogation, this court will refuse to take jurisdiction. State ex rel. Byerley v. State Board of Canvassers, 126.

2. Where the legislature has appropriated $25,000, or so much thereof as may be necessary to indemnify the owners of animals afflicted with the disease known as glanders and dourine, for a period from June 30, 1919, to July 1, 1921, the state auditor is not authorized to set aside and transfer from the general fund of the state, into a separate and distinct fund, cash moneys amounting to $15,000 as a part of such appropriation, so as to thereby deprive the state of cash moneys necessary to meet current obligations. State ex rel. Wallace v. Kositzky, 291.

3. A private business or enterprise is one in which an individual or individuals, an association, copartnership, or private corporation have invested capital, time, attention, labor, and intelligence for the purpose of creating and conducting such business, for the sole purpose that those who make such contributions may, from the conducting and operating of it, make, gain, and acquire a financial profit, for their exclusive benefit, improvement, and enjoyment, and exclusively for their own private purposes and use. Green v. Frazier, 395.

4. A public purpose or public business has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division, as, for example, a state, the sovereign powers of which are exercised to promote such public purpose of public business. Green v. Frazier, 395.

5. It is held, that the building, owning, and operating of state-owned elevators, flouring mills, and other state industries in question, is for a public purpose as defined in paragraph 6, supra; it further appears that every resident and business in the state depends directly or indirectly upon the agricultural productions of the state for financial success, and that approximately 90 per cent of the wealth of this state is produced from the farms therein, and consists mostly of small grains, and, further, that great losses have been, and still are, being suffered by the farmers in marketing such grain outside the state, and that it is the purpose of such state-owned industries to establish a stable and fair market for such products within the state of North Dakota, where the producers of farm products within this state may receive the full market value of their products. Green v. Frazier, 395.

STATUTES.

1. While every reasonable presumption is in favor of an enrolled bill, such presumption is not conclusive; and where the legislative journals clearly show that a statute was in fact never passed the court will adjudge it to be void. State v. Schultz, 269.

2. For reasons stated in the opinion it is held that chapter 136, Laws 1917 was not constitutionally enacted. State v. Schultz, 269.

3. It is further held that the Workmen's Compensation Act, which in the title thereof states that the enactment is for the benefit of the employees engaged in hazardous employment, is not subject to the constitutional objection that it embraces more than one subject. State ex rel. Amerland v. Hagan, 306.

4. In applying legal rules of statutory construction the object intended to be accomplished should be considered; in considering conflicting statutory provisions the main object to be kept in view is the ascertainment of the legislative intent; this legislative intent may be determined from a general consideration of the whole act, with the established policy of the legislature as disclosed by the general course of legislation. State ex rel. Langer v. Totten, 557.

5. The "legislative power," pursuant to the Constitution (arts. 26, 27), is vested in the legislative assembly and in the people through the initiative and referendum. State ex rel. Langer v. Olson, 614.

6. This legislative power, pursuant to the Constitution, may be exercised at a session of the legislative assembly or by the people at the polls through the initiative and referendum. State ex rel. Langer v. Olson, 614.

7. A special session of the legislative assembly is governed by the constitutional provisions (art. 27) prescribing the time when acts of a legislative assembly shall become operative as laws, and is subject to the "legislative power" of the people (Const. art. 26) reserved in the initiative and referendum, in the same manner as a regular session of the legislative assembly. State ex rel. Langer v. Olson, 614.

8. An act of a legislative assembly, consonant with the Constitution, becomes effective as a law, as follows:

(1) Immediately upon its passage and approval by the governor, when stated and adopted by the legislative assembly as an emergency by the two-thirds affirmative vote required by the Constitution.

(2) On July 1st, following the close of the session, unless made subject to a referendum to the people, whereupon, by an affirmative majority of the electors, it becomes a law, and effective as such, thirty days after such election unless otherwise specified in the act.

(3) On a date, prescribed in the act, or otherwise, by the legislative assembly, subsequent to the constitutional date of July 1st. State ex rel. Langer v. Olson, 614.

STATUTES—*continued.*

9. The acts of the special session of the legislative assembly of 1919 are subject to the provisions of the Constitution, prescribing when acts of a legislative assembly become effective (art. 27) and, to the "legislative power" of the people reserved in the initiative and referendum (art. 26). The acts adopted at such special session, not as emergency measures, S. B. No. 40 changing the composition of the state auditing board, and H. B. No. 44, altering and reducing the state budget, do not become operative as laws until July 1, 1920, unless made subject to a referendum to the people, and sooner ratified by the people at an election, pursuant to the Constitution. State ex rel. Langer v. Olson, 614.
10. The act, H. B. No. 60, which provides that all acts passed at a special session not emergency measures shall be operative as laws within ten days after the close of such special session, and which was adopted by such special session not as an emergency measure, pursuant to the constitutional provisions, is not effective as a law either until July 1st, next, or unless sooner ratified by the people, pursuant to such constitutional provisions and therefore does not apply to the time when S. B. No. 40 and H. B. No. 44 became operative as laws. State ex rel. Langer v. Olson, 614.

SUMMONS.

1. Where a motion is made to set aside the service of a summons, the court has power to reopen the hearing after it has announced its intention to deny the motion. It also has power to vacate an order denying the motion and to entertain a second motion to set aside such service. Kluver v. Middlewest Grain Co. 210.

TRIAL.

1. The court's instructions to the jury should be considered and construed as a whole. Munster v. Stoddard, 105.
2. Though the action be one triable to the court as a suit in equity, it was not error for the court to deny the defendant's motion that the case be tried to the court. Under § 7608, Comp. Laws 1913, the trial court, in its discretion, could properly submit to a jury issues of facts in an equity case for an advisory verdict. State ex rel. Olson v. Royal Indemnity Co. 550.
3. Where a party allows hearsay testimony to be elicited without objection, he cannot predicate error on the refusal of the trial judge to strike out on motion a selected portion of such testimony. State ex rel. Olson v. Royal Indemnity Co. 550.

TRUSTS.

1. Section 5365, Comp. Laws 1913 reads as follows: "When a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

   The plaintiff, and one Wm. Schulz, now deceased, were the owners and equally interested in several quarter sections of school land. The title of one of the quarter sections, purchased at a school-land sale, was evidenced by a contract taken in the name of Schulz, though it appears, by competent evidence, that the plaintiff paid one half of part of three purchase-price payments, each for $512, and one half of the interest on deferred payments, and one half of the taxes from the year 1903 to the year 1918; and that then the defendant paid, without the knowledge or consent of the plaintiff, the last two payments on the school-land contract, and the interest then due.

   William Schulz, prior to his death, assigned the contract to his wife, this defendant.

   It is held, under the above section, that the said William Schulz held one-half interest in said land in trust for the plaintiff, subject only to the condition that the plaintiff must pay one half of the two remaining payments paid by the defendant, and, half of the accrued interest on such payments made by her. Kernkamp v. Schulz, 20.

2. Under §§ 6279 and 6280, Comp. Laws 1913, it is further held that the contract for the purchase of the school land in controversy was inadvertently and by mistake, taken in the name of William Schulz, and that he held one half interest in the land described therein, as an involuntary trustee for the benefit of the plaintiff, upon the plaintiff paying his one half of the purchase price thereof, and one half of the interest on deferred payments, and one half of the taxes levied against such land during each year since it was so purchased. Kernkamp v. Schulz, 20.

3. In an action to determine adverse claims, where it appears that in April, 1891, the father deeded the land involved to his wife in order to protect his home and save the land from demands of creditors, although it was unnecessary for him so to do by reason of the land being a statutory homestead and therefore exempt from the claims of the creditors, and where the father thereafter acquiesced in such conveyance and made no attempt to secure reconveyance until 1916, after his wife had died, it is held that in equity no trust of any kind arose and the father is not in a position to claim reconveyance. Wehe v. Wehe, 280.

4. In such action, where the wife, who had received such deed, made a will in October, 1913, devising a legacy of $1,000 to each of their three children, with a division of the residue of her estate among her remaining children,

TRUSTS—*continued.*

share and share alike, and, where, on the day following, she executed a deed, absolute in form, conveying the land involved, being the entire property possessed by her, to the three children named as legatees in the will, and thereafter in February, 1914, again made a will containing the same terms, and where it appears that the reason for the execution of such deed was that the mother feared that an attempt might be made to break the will, and where, further, it was the understanding that the property should belong to the mother until her death, and that the persons designated as grantees in the deed should carry out the intention of the mother as expressed in the will in the devises therein made, it is held that such deed imposed a constructive trust upon the grantees named to carry out the intention of the grantor as expressed by her in the will, and that the will is a memorandum in writing of the terms of such trust. Wehe v. Wehe, 280.

VENDOR AND PURCHASER.

1. The defendant sold the real estate to Nettie A. Isham, the intervener, and received the full purchase price thereof, and delivered a deed of the premises to her. Held, that the intervener, for the reasons stated in the opinion, became the legal owner, in fee simple, of the premises. Carns v. Puffett, 438.

WAREHOUSEMEN.

1. In an action upon a warehouseman's bond, where it appeared that the principal was insolvent and his patrons who held storage tickets for the grain stored in the principal's elevator had surrendered them in exchange for promissory notes of the principal in order to allow him to continue in business, and the defendant bond company knew of the insolvency and of the settlement and received the storage tickets from the principal, it is held: Where a warehouseman's bond is conditioned for the payment by the warehouseman for all grain purchased and all sums for which the principal shall become liable to holders of warehouse receipts, allegations of fraud, false representations and mistake in the surrender of storage tickets for promissory notes are nonessential and need not be proved. State ex rel. Olson v. Royal Indemnity Co. 550.
2. Where liability is based upon a joint bond of the warehouseman and a bonding company, the principal is a necessary party defendant, but where the action is brought as one in equity to determine the rights of all parties having an interest in litigating the liability of the bondsman, and where neither plaintiff nor defendants seek any relief against the ware-

WAREHOUSEMEN—*continued.*

houseman, a judgment may properly be entered against the bondsman. State ex rel. Olson v. Royal Indemnity Co. 550.

WITNESSES.

1. It is the duty of an attorney to maintain inviolate the secrets of his client; communications received in this relation are confidential; an attorney appearing for the adverse party to, and as a witness against, his former client, may not disclose such communications, over the objection of his former client. Fosston Manufacturing Co. v. Lemke, 343.