REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

September 1, 1922 to August 31, 1923, and one case decided in April, 1920, one case decided in November, 1921 and two cases decided in December, 1921.

JOSEPH COGHLAN, Reporter.
Resigned March 5, 1923.

E. J. TAYLOR, Reporter.
Appointed March 5, 1923.

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By E. J. TAYLOR, SUPREME COURT REPORTER
FOR THE STATE OF NORTH DAKOTA.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

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HON. HARRISON A. BRONSON, Judge.[1]
HON. A. M. CHRISTIANSON, Judge.
HON. RICHARD H. GRACE, Judge.[2]
HON. JAMES E. ROBINSON, Judge.[2]
HON. WM. L. NUESSLE, Judge.[3]
HON. SVEINBJORN JOHNSON, Judge.[3]

J. H. NEWTON, Clerk.
JOS COGHLAN, Reporter,
E. J. TAYLOR, Reporter.

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[1] Became Chief Justice Jan. 6, 1923.
[2] Term expired Jan. 1, 1923.
[3] Term began Jan. 1, 1923.

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[1] Resigned Jan. 1, 1923.

[2] Appointed Jan. 1, 1923.

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IN MEMORIAM.

Upon the convening of the September A. D. 1921 Term of the Supreme Court, on the forenoon of September 6th, the following proceedings were had:

By Chief Justice Grace:

Gentlemen: This hour has been set aside by this, the Supreme Court of the State of North Dakota, as a time appropriate to pay and show respect to the memory of those who, during their lifetime, were honorable members of the Bar of this State. Each was a person of highest character and splendid reputation, honorable in his dealings with all men, and reflected great credit on his chosen profession. Two of these, the Honorable Edward Engerud, and the Honorable John Carmody, at one time occupied the high position as a member of this Court, and as such discharged the duties of their high office faithfully and conscientiously. The least that we who remain can do is to accord to the memory of these honorable men the respect due them and to give this small tribute to their memory, which we most heartily do; and as well to the memory and names of the attorneys whose names appear on the list.

I now turn this meeting over to you for such proceedings as you shall see fit to conduct, after which this Court will stand adjourned until twelve o'clock noon, out of respect of the memory of all the deceased.

Comes now Mr. John E. Greene, Secretary of the State Bar Association and presents to the Court the following memorials, resolutions and remarks on the death of Honorable Edward Engerud and Honorable John Carmody, former Justices of this Court and Honorable Robert M. Pollock, Honorable John S. Watson, Mr. William C. Resser, Mr. Charles J. Maddux and Mr. Calvin L. Bradley, and moves that the same be made a part of the records of this court and published in the official reports:

HONORABLE EDWARD ENGERUD.

1868–1921.

Honorable Edward Engerud of Fargo died in that city on January 8, 1921, at the age of fifty-three years. He had been a resident of this state for twenty-five years, and for the last twenty years he was one of the conspicuous figures in the professional and judicial life of the state. From 1902 to August, 1904, he was Assistant United States District Attorney. He was then appointed Judge of the Supreme Court, was elected to that office in November of that year and served until January, 1907. On retiring from the bench he resumed the practice of law at Fargo in the firm of Engerud, Holt & Frame. Some years later Mr. A. G. Divet became associated with him and his partners, and with the firm of Engerud, Divet, Holt & Frame, he continued in active practice until his death.

Judge Engerud's service on the bench, while brief, was notable. The work of a judge of an appellate court was not altogether agreeable to him. There seemed to him a stiltedness and constraint about it to which he could not readily adapt himself. It lacked the mental stimulus afforded by practice at the bar. But the record of his work as a judge shows the rare qualities of mind that he brought to that work. His written opinions were models of brevity and perspicuity, and the judgments which they expressed were almost invariably accepted by all the parties in interest as impartial and just. During the brief term of service on the bench he was the author of many opinions which settled questions of law new in our courts and to the bar at the time, and were of great value in subsequent litigation. Rarely has the soundness of those precedents been questioned by the courts. His retirement from the court was a matter of sincere regret to the bar of the state, and to those who had been associated with him on the bench.

Judge Engerud's career in the law was exceptional. Without the advantages of law-school training, and with but two years of study in a law office, he was admitted to the bar at the age of twenty-one. But his study of the law did not end with his admission to the bar, as is so often the case with those who begin the practice so early in life. To him the "law" was not merely a trade or occupation for the making of money or the attainment of personal distinction; it was a great science which invited his brilliant intellect to constant research, and

to that research his professional life was wholly and conscientiously given. His mental equipment was remarkable. He thought clearly. His analysis of proofs was searching, and he was rarely misled. His conclusions were logical. In every controversy his faculties were alert at all points and his energies turned to the discovery of truth and its expression in the final judgment. That was his conception of the purposes and of the fulfilment of the law. While he was the most modest of men, and was without oratorical skill, he was nevertheless fearless, and to be feared by his opponents when he voiced to the court his conclusions of the law, or in simple words swept all camouflage from the fields of proof and gave court and jury clear vision of the salient features of his cause. But no cause could win his support which did not, on most careful investigation, commend itself to his sense of justice. The measure of compensation for his services was, with him, a secondary consideration, and the fear that he would be accused of excessive charges often led him to fix his fee at half the true value of the service rendered.

His genial disposition showed itself in all his social and professional relations; his generosity was shown not merely in liberal gifts of his time and from his purse, but in his estimation of other men's talents and virtues. The combination in him of these rare qualities of heart and mind, and his steadfast devotion to the noblest principles of the professional life, have earned for him that title which should be marked as the lawyer's noblest prize—a faithful minister of justice.

JOHN E. GREENE.
C. J. FISK.

BY JUDGE PALDA:

It is with a feeling of hesitation and a sense of insufficiency, coupled with lack of ability, that I arise to make a few comments in memory of one of our deceased jurists, the Honorable Edward Engerud. I known of no one in the state engaged in the practice of law, or who sat upon this bench, upon whom I looked with more respect or with a feeling of closer colleagueship and friendliness. There was no time that Judge Engerud could not be approached with the story of a worthy cause; there was no time that even the youngest member of the Bar need hesitate to talk to him frankly, if he had something to say.

I remember well the first time I met Judge Engerud. He was

associated at that time in some important litigation, with one of the present members of this Court. Our friendship commenced at that time and grew from year to year. The longer I knew him, and I know that is true of all who were acquainted with Judge Engerud, the better I liked him and the more I felt that he was a great mind without assuming any false dignity by reason of his superior ability.

He often told me of his early fight for advancement and education. He started in life without those advantages of wealth that grant to some an opportunity to obtain an education without the usual struggle for existence; but with Judge Engerud, all the learning he acquired came only after a struggle for the necessities of life, and after hard work, strict economy and many a great sacrifice. He did by force of his own personality, and a wonderful reasoning power, force his fellow men—not only in North Dakota, but in many of our sister states—to recognize him as a great lawyer in every sense of the word.

His practice extended over a large territory and over a long period of time. No one ever questioned his integrity or doubted his ability, and if they, through lack of acquaintance or poor judgment, miscalculated the extent of the Judge's ability as a lawyer, they did so to their sorrow, and yet none ever charged him with unfair tactics or abuse of power. He was a man who, while acting as prosecutor, was always fair to the accused. I have seen him rise in Court, and, with that chuckle that no one who knew him will ever forget, say to the Court: "If your Honor please: I feel this man is wrongfully accused. I drew the indictment, but I have changed my mind since I have heard the testimony." That was courage; that was one of his great, one of his noble characteristics, that he was not afraid to say: "I was wrong in my judgment on the facts, or I was wrong in my judgment on the law." As to his ability, no one ever questioned that. In a social and business way his manly qualities, his face beaming with true friendship, drew us all to him. I think that I am speaking for every man that became acquainted with Judge Edward Engerud when I say that none of them will ever forget that chuckle of friendliness, that equality which he made you feel, even though you knew but little of law.

I feel that too much could not be said regarding Judge Engerud, and his good qualities; his good fellowship; his good heartedness and thoughtfulness for the feelings of others which were always present and a part of his pleasing character.

This was best demonstrated on the night he passed away on the 8th day of January, 1921, when in his last moments he was seeking to give pleasure to those he loved, and even as he carried posies to commemorate the birthday of his daughter he passed away to rest and glory in the home of his Creator. His last act was one of cheerful remembrance; his last thought was of bringing joy to those around him.

May Judge Edward Engerud's memory be ever fresh in the mind of every member of the Bar, and may his example lead us all to a better understanding of a true lawyer's duties, obligations, and the ethics we have sworn to recognize.

Pursuant to resolution the following Memorial was adopted by the Senate and House of Representatives of the Seventeenth Legislative Assembly of the State of North Dakota, and ordered printed in the Journal of each House:

MEMORIAL.

The North Dakota Legislative Assembly unites with the people of North Dakota in general in deploring the untimely death of Hon. Edward Engerud, a former Justice of the Supreme Court of this state. We view his departure from our midst with profound sorrow, and extend to his devoted widow and children our deepest sympathy. In his death the state has lost a noble man, an upright citizen and a great jurist. He died as he lived, engaged in unselfish service, and departed from earthly scenes as quietly as he was wont to go about in the performance of his daily duties.

We place on permanent record this memorial of our admiration for the successful lawyer, our esteem for the judge, and our love for the man. We

"Loved him because he was human—as human a man as you'll find;
Real to the core of his being with a soul that was blessed and kind;
Friend of the needy in trouble; cheer of the struggler in strife;
Sowing the seeds that bring blossoms all down the way of his life;
Gentle of speech and in manner; modest and simple and true;
Leaving this world of ours better just for his having passed through."

ROBERT M. POLLOCK, LL.D.

On the morning of October 19, 1920, Robert M. Pollock, LL.D.,

a distinguished member of the Cass County Bar, without a moment's warning, passed to the great Beyond. The shock of his sudden departure was felt throughout our entire city and state. Friends refused to believe, when told, that no more in life could they be greeted with his genial smile or feel the gladsome touch of his hearty shake.

It has been said that:

"The oak grows silently in the forest a hundred years; only in the hundredth year, when the woodman arrives with his axe, is there heard an echoing through the solitudes and the oak announces itself when with far-sounding crash it falls."

For forty years, Robert M. Pollock has lived and quietly toiled among us. Without spectacular effect he was so busy doing good that oft-times we failed to observe his mental growth and his constant zeal in labor for others. The fall of the giant oak, which the deceased so aptly typifies, could no more startle the denizen of the forest, than did the going out of our companion and friend from this community.

In whatever field of activity we found him, the results of his toil were quickly felt. As a lawyer, he was faithful to his clients and honorable alike to bench and bar. As a prosecuting officer, he became a terror to evil-doers; always remembering, however, that "justice should be tempered with mercy." As a member of the Constitutional Convention, he wisely sought to lay broad and firm the foundations upon which a state government should rest. As a legislator and presiding officer, he used his wide influence only in the enactment of wise, sane, and safe legislation. As one interested in the education of our youth, he gave liberally of his time and thought, even to the extent of serious self-sacrifice. No accurate history of our state can be written and omit the name of Robert M. Pollock, who so unostentatiously labored for the public good. He thoroughly believed that it requires a sober people to build an enduring state, and throughout a long career, both as a public officer and private citizen, he threw his mighty influence upon the side of moral reforms. Such a man in public life could not fail in the home to be, as he was, a dutiful husband and loving father. What a precious memory he has left for us all! What an honorable name he has left to those whom he most dearly loved!

These reflections, and many more which might appropriately be added, cause us, his companions at the bar, to place upon our minutes

these words, as feebly expressive of our real sentiments; there to remain a lasting memorial of a good, brave and true man.

JOHN CARMODY.

By State Bar Association:

Whereas, John Carmody, always a member and at one time Vice-President and later President of this Association, has departed this life since our last annual meeting, and

Whereas, This Association recognizes in the late John Carmody a man of sterling qualities both as a lawyer and as a citizen, one of high ideals and a wealth of public spirit and patriotism, entitling him to our highest tribute and make it proper for this organization to spread upon its permanent records such data as may be most pertinent and of greatest interest to the profession. We give a brief sketch of some of the important facts in his life.

John Carmody was born in Milwaukee County, Wisconsin, January 6, 1854. He received his education in the common schools of his native state and at Waseca, Minnesota, to which place his parents removed when he was fourteen years of age. He was a law student in the office of James E. Child, of Waseca, and in March, 1880, was admitted to the bar of Minnesota. He practiced at Waseca until August, 1885, when he came to Hillsboro, North Dakota, and made that place his home until his decease.

He served as Mayor of Hillsboro and as City Attorney, and also as State Attorney of Traill County. He was appointed on January 15, 1909, by Governor John Burke, to fill a vacancy on the Supreme Court occasioned by an increase from three to five in the membership of that body. He served as a judge of that court until January, 1911, after which he was for several years Assistant Attorney General of the State, and afterward a member of the Board of Control for two years. Subsequently he was appointed Assistant United States District Attorney by President Wilson, and at the time of his death had been recommended for reappointment.

By reason of impairment of his health he left in December, 1919, for a vacation which he planned to spend in Florida. His health did not improve and he died at Miami, February 19, 1920.

Surviving him are his widow, one son, George C. Carmody, a

practicing attorney at Hamilton, Montana, a daughter, Mrs. George J. (Irene) McClintock, of Rugby, North Dakota, and a sister, Winifred, a member of the Dominican Order, at present in Fribourg University, Switzerland.

Judge Carmody was a man of most extraordinary qualities and possessed of characteristics which may well be the envy of every member of the bar. He had a remarkable faculty of observation, and a memory which retained in its grasp every fact of which his mind had become apprised. Others would read laboriously the record in a case several times in an effort to grasp the material facts; John Carmody needed to go through such a record, no matter how long, but once, for his mind to grasp every element essential to a determination of the issues. His knowledge of the history of our State and Territory was the most minute and comprehensive possessed by any man within our acquaintanceship. It is to be regretted that he did not have an opportunity to reduce to writing the result of his observations of events of historical and other importance.

He was remarkably well grounded in the principles of law and equity, and above all, he was possessed of a mind and conscience to which justice and righteousness appealed, and to which injustice and wrong were repellent. He was a staunch Democrat in politics and his partisanship never over-balanced his love of country and humanity. He took a deep interest in all public questions and in everything which he thought tended to promote human welfare, and above all he never knowingly or intentionally did an injustice, and the interest of the least was as sacred to him as the welfare of the greatest and most powerful. He was a most conscientious and efficient public servant in each of the positions which he held. The people trusted him; they gave him their implicit confidence, and it was never betrayed. The heritage which he bequeathed his children is one of which they may well be proud. His name should be inscribed on the tablets of the history of our state as one who lived through years when temptations abounded, and who, though holding positions to which they were a constant incident, never wavered in his adherence to duty.

In the death of Judge Carmody the Bar has lost an exemplary member, the State and Nation have been deprived of the counsels of a faithful public servant, and all who knew him, of a friend indeed.

THEREFORE, Be It Resolved, that this slight token of appreciation of

our late Brother, John Carmody, be spread upon the permanent records of this Association and a copy transmitted to his widow with the sympathy and kind wishes of its membership.

REMARKS.

By Melvin A. Hildreth, United States Attorney for the State of North Dakota.

The Honorable, The Supreme Court:

In brief, I desire to place a tribute on the records of this state, to the character and fame of John Carmody. A good citizen, good lawyer, faithful public servant, has reached his journey's end, and has left a clean record of life's work. It is but just that they who are to follow after him see to it that it takes permanent form.

Judge Carmody, as we called him, was an ideal citizen; he knew his country and its needs—but he knew its men and its women. His whole life is a fine example of devotion to public service. Plain always in speech, with high ideals, he did the work of life in every way that speaks for truth and justice. Possessing a marvelous memory, as lawyer and judge of this court, he brought to decisions a mind well-stored with the principles of jurisprudence that made his opinions safe and sound. He loved the law and ever kept in its path of righteousness in dealing with his fellowman.

Appointed to various public offices in the state and nation, his high sense of public duty made him always an efficient and sound public servant. With a devotion to the great Democratic party, of which he was always a member, he loved law and order. He stood for good government and this meant to him the enforcement of law, without regard to persons or party. He knew his country was greater than his party, and that he who served his country best served his party best.

Judge Carmody was pre-eminently a Christian man. While others were laying up riches on earth, he was laying up treasures in Heaven.

In all, he was just. Fidelity to his family, fidelity to his country and fidelity to his God.

One of Judge Carmody's strongest characteristics was his love for children and his interest in young people generally. Dozens of the chil-

dren whom he met on the street knew him personally and responded respectfully to his always cordial greetings. He remembered the young men with whom he came in contact, and always retained a friendly interest in their progress and welfare. Such qualities helped to make of him one of the best loved and most widely respected men of the state.

During all the years of my close relations to our friend, in the strife and contentions of politics, in the courts, and in the privacy of public offices, as attorney for the Government of the United States, Judge Carmody was an ideal man. We miss his good counsel, his cheerful and encouraging words, his friendship, his fidelity and his great help in the serious work of life.

This good citizen, good lawyer, and good judge spoke ill of no man —but with charity for all men, he was as lovable as a child; and yet he had the deepest feeling of courage, which gave him always the power fearlessly to do what he thought was right, without fear or favor.

We do not need to look far to find the source of these fine qualities of heart and mind. He had faith that the power of good was greater than the power of evil—he had faith in the capacity of his fellowmen for self-government and to work out every problem of human existence—he had faith in the capacity of his fellowmen in this state for self-government,—and he had faith in their wisdom to protect the rights and liberties of all; but above all these fine elements of his character, he had an absolute faith in the Judge of the world—the faith of a Christian.

This made him a simple, kind, generous, true, brave and devoted public servant; it made him a good husband and father; a fine citizen;—but the end came to him in the land of flowers. He had ever trodden with an unceasing step the path of duty. True to every walk of life, conscious that it had been an open book, he heard the tender voice of the All Wise and Merciful Father calling him from labor to rest, to the well-earned peace of a great soul.

CALVIN L. BRADLEY.

18— 1921.

On the 15th day of May 1921, Mr. Calvin L. Bradley died at his home in North Yakima, Washington. Among the present members of

the bar of this state he was not widely known. He came to Fargo in 1884 and later took up the study of law in the office of Wilson & Ball. He was admitted to the Bar in 1886, and practiced at Fargo, at Hillsboro, and at Wahpeton. He was a partner of Charles F. Amidon, (now U. S. District Judge) for a few years, and later was associated with the law firms of Benton, Amidon & Bradley, and Benton, Lovell & Bradley, and at Wahpeton he was associated in practice with Hon. W. E. Purcell. In the year 1906 he left the practice of law and moved to North Yakima, where he engaged in fruit growing and followed that occupation until his decease. He became a member of this Association very soon after its organization and continued in it until he left the state.

Mr. Bradley was an intellectual and highly cultured man; thorough and systematic in his methods of study and professional work. His exceptional ability as a lawyer was recognized by all the courts in which he appeared and by the profession generally in this state. He assisted in the work of revision and compilation of the Codes of 1895. His methodical mind and capacity for unremitting toil were invaluable to the Commission on Revision, and its members testified to the prodigies of work that he performed in that vast undertaking, and in putting the Codes into book form. That revision was the first systematic recodification of our laws after the adoption of the Codes of 1877, and Mr. Bradley's service to the state in that work was such as to entitle him to grateful remembrance by its people.

Mr. Bradley's nervous organization was a great obstacle to continued success in the legal profession. There was regularly recurrent ebb and flow to his nervous energy. With almost the regularity of ocean tide at ebb his nervous system seemed to drive him in the work of his profession, and for periods of about three years he would work as few men could work, and with marked success. At the end of those periods his nervous system rebelled and drove him from the fields, not only of professional activity, but from work of all kinds. His mind protested against the reaction but the on-coming tide was irresistible, and two years of indolence would fall upon him as a cloud which no power could lift or drive away. Feeling that he could not succeed in a life which so taxed his nervous and mental constitution, and realizing that persistence in it might bring discredit upon a profession which he so highly respected, he decided to seek success in another line. No

higher evidence could be offered of the inward rectitude of any man than that act of renunciation of the professional life by Mr. Bradley.

He loved all nature out of doors, and in the mountains and valleys and forests of the far West he found a life to which he could give himself constantly; one which brought him peace in congenial work, abundant success and honor, and wide and abiding friendships until the end.

JOHN E. GREENE.
C. J. FISK.

Mr. Calvin L. Bradley was born in Cattaraugas County, New York, and educated in its public schools. He entered Hamilton College at Clinton, New York, as a member of the Class of 1882, in the fall of 1878. He and Judge Charles F. Amidon, of the United States District Court, were students in the same class. This began a relation that lasted throughout the life of Mr. Bradley. He and Judge Amidon became intimate friends. Mr. Bradley was a brilliant student. He never undertook to take an honor in college that he did not win. His scholarship was not confined to any one department. He carried off all the honors of his class in mathematics, science and the classics.

Mr. Bradley came to Fargo in 1884 as a clerk in the office of Wilson & Ball. He and Judge Amidon pursued their studies of the law together, Judge Amidon being a student in the office of Colonel Thomas, who afterwards became the first United States Judge in this District. Both Mr. Amidon and Mr. Bradley were admitted to the bar in December, 1886, and opened their office for the practice of law on January 1, 1887, under the firm name of Amidon & Bradley. The firm afterwards became Benton, Amidon & Bradley. When Judge Amidon retired from the firm to assume his duties as judge in 1896, the firm in which he had been a member became Benton, Lovell & Bradley, where, as a member of this firm, Mr. Bradley continued the practice of law for some years. He afterwards withdrew from the firm and went to Walpeton where he became associated with Hon. W. E. Purcell. In the year 1906 Mr. Bradley left the practice of the law and moved to North Yakima, where he engaged in fruit growing, and followed that occupation until his death.

Throughout his legal career Mr. Bradley's qualities in college were true to his life. He was a scholarly lawyer. In the preparation of

cases in the Supreme Court, or the argument of a difficult law question before a trial court, he had no superior in the state.

Judge Amidon was a member of the commission for the revision of the Codes of North Dakota, entering upon that work in 1893. At that time Mr. Bradley was employed in the office of Benton & Amidon. From the first he took a commanding position in the work of revising the laws, having particular charge of the Civil Code and the Code of Civil Procedure, which was the part of the work assigned to Judge Amidon. Mr. Bradley's methodical mind and capacity for unlimited toil were invaluable to the Commission on Revision, and its members testified to the prodigies of work that he performed in that vast undertaking. When the work was submitted to the legislature Mr. Bradley became the clerk of the joint committee of the house and senate in charge of the several bills, each representing one of the Codes embodying the results of the Commission's work. To him more than any other is due the credit that the work of the Commission was not greatly marred by the legislative committee. The bills were kept harmonious, and the work of the Commission was embodied in the Codes of 1895 in substantially the form prepared by the Commission.

Mr. Bradley's nervous organization was a great obstacle to his advancement in the legal profession. His vital energy moved in definite cycles. He could do more work in three years than most men could do in five, but at the expiration of the three years he had to suspend intense mental labor. His mind simply struck and refused to work. No scourgings of the will could disturb it. It was not until 1906 that this feature of his personality became clear even to his best friend, Judge Amidon. Of course, these qualities made it impossible for him to fit into the legal profession so as to be permanently helpful to a firm or to himself. As soon as the facts were discovered a change of life was determined upon.

Mr. Bradley was a lover of nature. His hands were as skillful as those of the best mechanic. He finally decided to go to North Yakima and engage in fruit raising. That met his fine love of nature, and his practical skill in everything pertaining to outdoor life. It would prolong these resolutions unduly to describe his work at North Yakima. It was brilliant and successful. He was beloved throughout the whole Yakima District. He became secretary and treasurer of a large fruit association, and shaped its whole course. Every tree in his own

orchard looked like a racehorse groomed for the race. In the whole orchard itself he applied himself with his usual intensity, but at the same time brought to bear on the problem his fine scientific training. The result was that his orchard was one of the finest in the whole district.

Mr. Bradley had a genius for friendship. He had not an enemy in the world. All his judgments of others were kindly. To those who had an opportunity to know him intimately he was a friend. Few men could have left a memory such as he has left in North Dakota that would be as vivid as the memory of him after an absence of fifteen years.

JOHN S. WATSON.

By the Cass County Bar Association:

John S. Watson, the lawyer, the patriot, the manly man, the good citizen, the cherished friend, the devoted husband and father, has passed to his final reward. His life has been an open book, the pages of which are replete with the record of duty performed, pledges made and kept, devotion to clients, patient consideration of the rights of others, and a wisdom in action seldom equalled by those with whom he associated.

Courts, jurors, lawyers and laymen alike will miss his genial presence at the sessions of court. He was such a superb gentleman that wherever he went an atmosphere of refinement was always present. He came to the bar fresh from a college career. The training thus received stood him well in hand in attempting to solve the intricate problems of the law. While his wonderful ability in stating facts and applying the law thereto made him a dangerous antagonist, yet no one ever charged him with resorting to low and underhanded methods to win a case.

For some years, his intimate friends thoroughly understood why he withdrew from the active trial of cases, but they were much rejoiced to know that his interest in public affairs remained unabated to the last. It was not possible for him upon field and in the trench to fight the battles of democracy, but wherever his voice could be heard, or his influence observed, there results favorable to a free government were constantly felt. He was indeed a true leader of that band

of noble men and women who, in this country during the late war, ever helped "to keep the home fires burning."

He was a companionable man. Access to him, either in his office, upon the street or in his home, was never hedged about by burdensome formalities. By most of his old time friends he was always called "John." This seemingly intimacy never "bred contempt" but expressed simply the near approach to a beloved associate and friend.

No one knew better than he of the thin veil between this life and the life to come. Brave man that he was, he faced the future with an unfaltering trust in Him who doeth all things well.

"His day is come, not gone;
His sun is risen, not set;
His life is now beyond
The reach of death or change,
Not ended, but begun."

It is in memory of such a man that the members of the Cass County Bar Association ask this Court to pause in its deliberations, and place upon its records these imperfect words, in deep appreciation of the love and esteem we held for a departed brother.

CHARLES A. POLLOCK.
A. G. DIVET.
EMERSON H. SMITH.
Committee.

WILLIAM C. RESSER.

BY THE CASS COUNTY BAR ASSOCIATION:

Death has again invaded the ranks of our association. William C. Resser has penned his last pleading. For the last time he has joined issue; the application for a continuance has been denied, and the verdict rendered. His last appeal has been taken and final judgment entered, and the grim reaper has won, as he will at no distant date in his encounter with each of us.

But, nevertheless, the judgment is that Brother Resser lived a worthy life; that he was a man of integrity; a lawyer zealous and skillful in protecting the rights of his clients, yet never violating the stern

and rigid ethics of his profession; as a neighbor ever thoughtful and considerate; as a husband and father, a model; public spirited and genuinely loyal in all things wherein the public welfare and interest were involved, and withal a man of the highest character. He never shirked the performance of duty, but his modesty never permitted him to dictate or intrude.

His practice at this Bar commenced June 7th, 1881, and continued until his retirement a few years since. His courtesy, kindliness, his zeal and his friendship will ever remain fragrant memories to his associates, and his example as inspiration to all who knew him. Be it

RESOLVED, That the Cass County Bar Association extend its sincere sympathy to the widow and members of his family, and that the secretary be instructed to spread these resolutions upon the minutes of this organization and transmit a copy to the widow.

Signed:

B. F. SPALDING.
V. R. LOVELL.
H. F. MILLER.
Committee.

CHARLES J. MADDUX.

CHARLES J. MADDUX, one of the leading attorneys for twenty years or more at New Rockford and later at Fargo, has deceased during the year.

C. J. Maddux died at his home in the City of New Rockford, on Thursday, October 23d, 1919. He was born in Ohio, November 15th, 1851, and was raised in Wabash, Indiana, where he received his education.

At an early age he took up the work of journalism in Indiana, and came to New Rockford in the fall of 1883, soon after the town site was established, and became connected with The Transcript, which was established in that year. In 1885 he purchased an interest in The Transcript, and in 1888 purchased the entire plant and was in active control of the same until 1903, when he disposed of the same on account of his law business having increased to such an extent that it was impossible to devote his time to the newspaper work.

Mr. Maddux was admitted to the bar of the district court in North

Dakota in 1888, and began the practice of law in New Rockford, Eddy County, and was admitted to practice in the supreme court in 1890, and a few years later was admitted to practice before the United States Supreme Court. In 1892 he was elected state attorney for Eddy County and held the position for three terms, and in 1897 he was named as United States Commissioner for this district, which office he held for several years. Mr. Maddux continued his law business until his illness in 1915, at which time his physicians advised retirement. On account of his health he was out of active practice for a little over two years, and for the year before he died he was practising law at Fargo, North Dakota.

Mr. Maddux was a charter member of the Century Lodge No. 60, A. F. & A. M., a member of Zion Commandery, No. 9, and also of El Zagel Temple, Order of the Mystic Shrine of Fargo.

He leaves a wife and three children, Mrs. J. Harvey Johnson, Miss Doris, and Charles, besides his mother, Mrs. Kathryn Melrose, and one brother, Frank Maddux, of Indianapolis, Indiana.

Mr. Maddux was a diligent and skilful practitioner, serving his clients faithfully. He was possessed of a remarkable sense of humor and good fellowship and participated in nearly all activities tending to build up the community in which he resided. Until disease made inroads upon his powers, no one in his community was more active in seeking to promote its interests, and no member of the bar took greater pride in the accomplishment of the profession.

His practice was extensive both in the lower and higher courts and his success most marked. For some years he was a member of the firm of Maddux & Rinker, and on removing to Fargo became the partner of Mr. William Lemke.

We extend our sympathy to the family of Brother Maddux, and direct that this resolution be spread upon our records and a copy sent to the widow.

B. F. Spalding.
G. F. Dullam.
J. M. Hanley.
Committee.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

BANK OF SANBORN, a Corporation, Appellant, v. NELLIE FRANCE, and W. H. France, Respondents.

(177 N. W. 375.)

Fraudulent conveyances — one seeking to set transfer aside must have vested and specific lien therein.

1. Where a creditor seeks to set aside a transfer of property, as one in violation of the provisions of § 7220, Comp. Laws, 1913, it must appear from the pleadings, proof, or facts existing in the case, that one seeking to have such transfer set aside has a vested and specific lien upon the property claimed to have been fraudulently transferred as for illustration, a judgment upon which an execution has been issued and returned, wholly or in part unsatisfied, or a lien acquired by attachment proceedings, etc.

Note.—On effect of participation by purchaser in fraud of vendor which will invalidate transfer for good consideration as against the vendor's creditors, see note in 32 L.R.A. 33, from which it appears that under the statutes of the different states the rule seems to be practically universal that in order to render a sale void as to creditors it is not only necessary that the vendor should have entertained a fraudulent design, but it is also necessary that the vendee should have participated in it.

On necessity of participation by the grantee or transferee in the fraud of the grantor or transferrer in order to avoid a voluntary conveyance or transfer as against creditors, see note in 17 A.L.R. 728.

See also 12 R. C. L. 535; 2 R. C. L. Supp. 1451; 4 R. C. L. Supp. 762.

Fraudulent conveyances — to set transfer aside fraud on part of transferee must also appear.

2. Where the creditor seeks to set aside a transfer of property, on the ground that the transfer is fraudulent, it must appear, not only, that the debtor fraudulently transferred the same, but, as well, it must appear the transferee cooperated and acted with the debtor to consummate the fraud.

Fraudulent conveyances — complaint demurrable.

3. For the reasons stated in the opinion, the demurrer to the complaint is properly sustained.

Opinion filed April 2, 1920.

Fraudulent Conveyances, 27 C. J. § 175 p. 506 n. 95: § 573 p. 723 n. 25; § 657 p. 765 n. 98, 99, 1, 2; p. 766 n. 4; § 682 p. 775 n. 10.

Appeal from an order of the District Court for Barnes County, *Englert*, J.

Order affirmed.

Winterer, Combs & Ritchie, for appellant.

It is not necessary to allege or prove either the bankruptcy or insolvency of the parties making the fraudulent conveyances at the time of the making of the same in a complaint to set aside a conveyance as fraudulent against creditors under our statute. Crary v. Kurtz, 132 Iowa, 105, 105 N. W. 590; Buttz, Trustee, etc., v. James, 33 N. D. 162.

Such transfers are void as to all creditors. Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320.

"Where a transfer is made without valuable consideration, . . . which devests the grantor of all his property . . . and operates to defeat the collection of debts owing by him, such conveyance must be held to have been made in fraud of creditors." Johnson v. Rutherford, 28 N. D. 37, 147 N. W. 390.

A man involved in debt has no right to give away his property at the expense of his creditors. He must be "just before he is generous." 14 Am. & Eng. Enc. Law, 245, 246; Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271.

"By statute in some of the states a new equitable right is created, whereby a simple contract creditor may maintain a suit to set aside a fraudulent conveyance of his debtor without the previous recovery of a judgment at law, and may recover his judgment in the very suit in

which the equitable relief is sought." 20 Cyc. 728; Grunsfeld v. Brownell, 70 Pac. 310; Early Times Distillery Co. v. Zeiger, 9 N. M. 31, 49 Pac. 723; Steener Land, etc., Co. v. King, 118 Ala. 546, 24 So. 35; 5 Enc. of Pleading and Practice, page 476 and cases cited in the notes to the text quoted; Middlebrooks v. Moor Handly Hardware Co. 78 So. 829; Green v. Mobley, 99 S. E. 814.

Relief will be granted without a judgment when to obtain it would be obviously unavailing. Brown v. Campbell, 100 Cal. 635, 35 Pac. 433; Riverside National Bank v. Eastman, 144 Cal. 487, 77 Pac. 1043; 12 R. C. L. page 630.

"The term 'creditors' includes all parties who have demands, accounts, interests, or causes of action for which they might recover any debt, demand, penalty, or forfeiture." Soly v. Aasen, 10 N. D. 108, 86 N: W. 108; West Point Min. etc., Co. v. Allen, 143 Ala. 547, 39 So. 351; Sides v. McCullough, 12 Am. Dec. 519; Foley v. Ruley, 50 W. Va. 158, 40 S. E. 382, 55 L.R.A. 916; Carr v. Davis, 64 W. Va. 522, 63 S. E. 326, 16 Ann. Cases, 1031, 20 L.R.A.(N.S.) 58; Overmire v. Hayworth, 48 Minn. 372, 51 N. W. 121.

"The object of this statute is to protect creditors, and it makes no difference whether their claims have been reduced to judgment or not at the time of the conveyance." Thuringer v. Trafton (Colo.) 144 Pac. 867; Gregory v. Filbeck, 12 Colo. 379, 21 Pac. 489; Mulock v. Wilson, 19 Colo. 296, 35 Pac. 532; Fahey v. Fahey, 43 Colo. 354, 96 Pac. 251, 18 L.R.A.(N.S.) 1147, 127 Am. St. Rep. 118; House v. Johnson, 19 Colo. App. 524, 76 Pac. 743; Lowentrout v. Campbell, 130 Ill. 503, 22 N. E. 744; Fidelity Savings & Loan Association v. Reese (S. D.) 171 N. W. 812; Horstman v. LaFargue, 215 S. W. 729; Murray v. Sioux Alaska Mining Co. 239 Fed. 818; Galloway v. Shaddix, 72 So. 617; Manchuria S. S. Co. v. Donald & Co. 77 So. 12.

C. S. Buck, for respondents.

In suits brought by creditors to set aside fraudulent conveyances alleged that the plaintiff must first have recovered a judgment at law or that the claim must be in such a condition that it would be a lien upon property belonging to the debtor or defendant, if the same was in the name of the debtor or defendant. 5 Enc. Pl. & Pr. p. 468; 4 N. D. 100; Amundson v. Wilson, 11 N. D. 193; 15 C. J. p. 1388.

The South Dakota statute is the same as the statute of this state. Shuler v. Halvor (S. D.) 162 N. W. 389; Griswold v. Sundback, a South Dakota case reported in 57 N. W. 339.

The rule seems to be established beyond any question in all jurisdictions except where a statute has been enacted specifically changing it. O'Day v. Ambau, 15 L.R.A.(N.S.) 484.

GRACE, J. This is an appeal from an order sustaining a demurrer to the plaintiff's complaint.

It is not necessary to a clear understanding of the legal questions presented in this case to set out in full the complaint.

The alleged cause of action is one to recover upon a certain promissory note, in the sum of $800, dated July 19, 1914, executed and delivered by W. H. France, to one R. B. Beeson, and thereafter sold and assigned to Louis Deree, and by him, on the 25th day of October, 1915, sold and assigned to the plaintiff. The date of maturity of the note was November 1st, 1915.

The plaintiff claims to have purchased the note prior to maturity, for valuable consideration, in the regular course of business, and that the same is wholly unpaid.

It is further, in substance, alleged in the complaint, that, at the time of the execution and delivery of the note, W. H. France was the owner and in possession of certain real estate, situate in the village of Sanborn, North Dakota, described as lot fifteen (15), block ten (10), of the original townsite of Sanborn, and that he was the owner in possession thereof, on the 25th day of October, 1915; that the plaintiff purchased the note, relying upon the ownership by France, of said real estate; that, on the 25th day of October, 1915, France, without receiving valuable consideration, or any consideration, for the purpose of cheating and defrauding his creditors, particularly the plaintiff, and for the purpose of depriving them of the means of collecting their just debts, and for the purpose of removing, from legal process, his property, so that the same would not be subject to the payment of his debts, did wrongfully, fraudulently, and unlawfully transfer the real property above described to Nellie France, his wife, by deed, dated October 25th, 1915, which was recorded in the office of register of deeds, for Barnes county, October 30th, 1915.

There is a further allegation in the complaint, to the effect, that said real estate, at the time of such transfer, did not constitute the homestead of the defendants nor of any member of their family.

To the complaint the defendants interposed a demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

On the 28th day of December 1919, the demurrer was argued before M. J. Englert, one of the district judges of the 5th judicial district, and, on the 2d day of January 1920, the court made an order sustaining the demurrer, and ordered the clerk to enter a judgment in favor of the defendants, for costs, in the sum of $15. The making of such order is assigned as an error of law, and it is the only assignment of error.

It is manifest, that the prime purpose and object of the action is to set aside the transfer above mentioned, as being one in violation of the provisions of § 7220, Comp. Laws 1913, which is as follows: "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor, or other person, of his demands, is void against all creditors of the debtor and their successors in interest, and against any persons upon whom the estate of the debtor devolves in trust, for the benefit of others than the debtor."

It is equally manifest, that the action is prematurely brought, in that the necessary, prerequisite jurisdictional facts are not pleaded, nor otherwise shown to exist. The setting aside of the transfer of property, on the ground that it is fraudulent as to creditors, is an act which requires the exercise of the equity powers of the court. Before a court of equity can exercise such equitable powers, it must have jurisdiction so to do; i. e., there must be certain facts pleaded, proved, or existing in the case, sufficient to authorize the court to exercise its equitable powers; and, hence, it must appear, that one bringing such action has a vested or specific lien upon the property alleged to have been fraudulently transferred; otherwise, there is nothing to set in motion the equity powers of the court. In such circumstances there is nothing upon which equity could act.

The setting aside of a transfer of property, from one person to another, on the ground that such transfer is fraudulently made, is ac-

complished by the court by the exercise of its equity power, and for the benefit of one able to show that he has a specific lien against such property so fraudulently transferred; as, for illustration, a judgment upon which an execution has been returned unsatisfied, or a lien acquired by attachment or other lien, to preserve and protect which a court of equity has authority, power, and jurisdiction to exercise its equity powers.

The mere existence of the relation of debtor and creditor does not afford the creditor, under his mere contract right, and in the absence of a judgment, or prior to the time his claim was reduced to a judgment, and an execution thereon issued, and returned unsatisfied, or the securing of a lien, by attachment, or a vested lien acquired in some other manner, the right to attack a conveyance, on the ground of fraud.

To hold that a simple contract creditor would be permitted to attack a conveyance, on the ground of fraud, would render it next to impossible to make or take a conveyance thereof, for a large part of the conveyances are made by those who, at the time of conveyance, no doubt, have other obligations, or debts, unpaid, and the same is true of those who receive the conveyance.

Again, a conveyance of real property may often be made, where that is the only real property possessed by the one who conveys, yet, he may be indisputably solvent.

We think the proper rule is, that the debtor must be held to have complete dominion over his property, against which there is no valid, subsisting, or vested lien, to dispose of or transfer his property as he shall see fit, and where such transfer is by a creditor attacked, on the ground that it was fraudulently made, in order for a court of equity to afford relief, the creditor must be in the position above stated; i. e., he must have a vested lien, in full force and effect at the time the action is brought to set aside the transfer, and this fact must be made clearly to appear from the complaint in the action or otherwise.

It must, also, appear from the pleadings or otherwise, that not only the debtor fraudulently transferred his property, and that he intended to commit fraud when he did so transfer it, but it must also appear that the transferee who received such conveyance, co-operated and acted with the debtor to consummate such fraudulent transfer.

There have been many cases in this court, where the action was

brought to set aside transfers, on the ground that the same was in fraud of creditors, and all of such actions, so far as we have been able to determine, were based upon a vested lien, of the kind above described, as in the case of Paulson v. Ward, 4 N. D. 100, 58 N. W. 792; Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320; Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 83 N. W. 245; Stevens v. Meyers, 14 N. D. 398, 104 N. W. 529.

The question presented in the case at bar, is one of first impression in this state. It has, however, been frequently passed upon in other states, among which decisions may be mentioned the case of Griswold v. Sundback, 4 S. D. 441, 57 N. W. 339; O'Day v. Ambaum, 47 Wash. 684, 15 L.R.A.(N.S.) 484, 92 Pac. 421, and the authority and citations therein.

We think, the rule, as we have stated it, is a correct one, and that it properly interprets our statute above set forth. For the foregoing reasons, we are of the opinion that the court properly sustained the demurrer to the complaint, and that its order, in that respect, should be affirmed.

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

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

IN THE MATTER OF THE APPLICATION OF KITTIE HARRIS FOR A WRIT OF HABEAS CORPUS.

(187 N. W. 140.)

Criminal law — defendant legally incarcerated after lapse of time of sentence, where it had been suspended, but she failed to report.

In the application for writ of habeas corpus where a petitioner was committed upon a sentence of six months in the county jail, and released thereafter under suspended sentence in order that she might receive medical atten-

Note.—On the question of power of to suspend sentence or stay execution of sentence, see notes in 33 L.R.A.(N.S.) 112; 39 L.R.A.(N.S.) 242; L.R.A.1915C, 1169, and L.R.A.1918C, 551; 8 R. C. L. 248; 2 R. C. L. Supp. 582.

tion and upon directions to report thereafter, and where subsequently petitioner, having failed to report, was arrested and committed for the unexpired term of the sentence, it is held following, Re Hart, 29 N. D. 38, that her detention is legal even after the expiration of six months elapsed time from the date of the first commitment.

Opinion filed Nov. 8, 1921.

Criminal Law, 16 C. J. § 3141 p. 1335 n. 73½ New.

Application for original writ of habeas corpus.
Order to show cause dismissed.
E. R. Sinkler, for petitioner.
O. B. Herigstad, for A. P. Scofield.

BRONSON, J. The petitioner, Kittie Harris, seeks the issuance of an original writ of habeas corpus, alleging illegal imprisonment and illegal restraint of her liberty. The facts are as follows: On April 1st, 1921, the petitioner, upon a plea of guilty, was sentenced by the district court to serve a term of six months in the Ward county jail for having in her possession certain prohibited drugs: Then she commenced the service of the sentence. On June 15th, 1921, she was released upon the following order of the district court,—"It is ordered that the sentence of . . . Kittie Harris be suspended from this date until the further order of this court. The defendant is further ordered to report for completion of said sentence upon her return to Ward county, North Dakota, from the hospital." On Sept. 1st, 1921, the district court made a further order as follows: "The court having made its order on the 15th day of June, 1921, suspending the sentence of the above-named defendant, in order that she might go to Minnesota for medical attention which appeared necessary from affidavits of physicians, and the defendant having been ordered to report to this court of her return to Ward county, and she having failed to so report, now, therefore, it appearing that the defendant is present in Ward county at this time, it is hereby ordered that the sheriff forthwith arrest said above-named defendant and commit her to the Ward county jail under this commitment for the full term of her unexpired sentence." Pursuant to this order, she has been confined. She contends that her sentence expired on October 1st, 1921, and that her deten-

tion is now illegal. The answer to this contention is contained in Re Hart, 29 N. D. 38, L.R.A.1915C, 1169, 149 N. W. 568. She contends that this case should be overruled. Assuredly, upon the facts in this case, there arises no occasion for overruling such case. The order is dismissed.

CHRISTIANSON, and BIRDZELL, JJ., concur.

GRACE, Ch. J., concurs in the result.

ROBINSON, J. This is an application for a habeas corpus to release a poor widow from the custody of the sheriff of Ward county. She avers that she is unlawfully imprisoned, and it seems that her plea is true.

In April, 1921, in the district court of Ward county, on her plea of guilty, she was convicted of having in her possession some prohibited drugs of which the name, quantity, or use is not disclosed. By the district judge she was sentenced to "be imprisoned for six months commencing on the first day of April, 1921, at noon." Because of sickness she was released from jail on the order of the judge. Then she was arrested and jailed under an order as follows:

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v.
Kitty Harris, Defendant. } ss.

"The court having made on June 15, 1921, an order suspending sentence of the above-named defendant until the further order of the court in order that she might go to Minnesota for medical treatment, which appeared necessary from the affidavit of a physician, and she having been ordered to report to the court on her return to Ward county, and having failed to report, now, therefore, it is ordered, that the sheriff forthwith arrest said defendant and commit her to Ward county jail for the full term of her unexpired term.

"Jno. C. Lowe, District Judge."

Now surely that is not a valid commitment. It does not run in the name of the state; it is not given under the seal of the court; it does not show that she has been convicted of any offense. It does not

limit the time of imprisonment. It is made by the judge of his own motion without notice to anyone, and it imports that the real offense is that she did not call on the judge.

Of course in case of necessity, such as the burning of the jail, the prevalence of an infectious and dangerous disease and such like, the sheriff might have released her temporarily, either with or without the order of the judge, and afterwards retake her to serve till the expiration of six months from the first day of April. It is said the release or suspension of sentence was made under the Code, § 10959, and under that section "when it appears that the public welfare does not demand or require that the defendant shall suffer the penalty imposed by law, the court or magistrate may suspend the execution of the sentence imposed or may modify or alter the sentence in such a manner as to the court or magistrate seems proper." Assuredly the statute does not authorize the court to extend the term of imprisonment so as to keep it perpetually hanging over the accused. If a judge may at his pleasure for once suspend a sentence and at his pleasure order a rearrest, he may do it a hundred times or more. When the defendant had served one day he might have ordered a suspension of her sentence for six months, and then a rearrest, and continue to do the same every six months for one hundred eighty times or ninety years, if he and defendant lived so long.

The respondent cites as conclusive an opinion by ex-Justice Bruce in Re Hart, 29 N. D. 38, L.R.A.1915C, 1169, 149 N. W. 568. In the Hart Case defendant was accused of keeping a bawdy house. By arrangement and compromise she plead guilty, the sentence being that she pay a fine of $300 and costs and be imprisoned in the county jail six months. She at once paid the fine and was released on suspended sentence. After the lapse of a year the judge made an ex parte order revoking the suspension and directing the arrest and imprisonment of defendant for six months. Now the plea of guilty, the sentence and the suspension, and the payment of $300 and costs were all a part of one transaction. The plea and payment was made in consideration of the suspension or the practical undoing of the imprisonment. The manifest purpose of the transaction was to get the good money without incurring the expense and the uncertainty of a trial, and every judge knows that such transactions are very common. Hence to retain

the money and withdraw the suspension was an act of tyranny and bad faith, an act unworthy of any judge. It cannot be excused by any technical reasoning. The better opinion is by ex-Justice Spalding, 29 N. D. 47, 51. And it accords with the reasoning in the Markuson Case, 5 N. D. 180, 64 N. W. 939. There, the court held thus: "The time at which a sentence of imprisonment begins and ends is a matter of great importance. We know of no authority which will permit a trial court to postpone from time to time the date at which an imprisonment shall go into effect after a valid judgment declaring that the imprisonment shall begin at a definite date." In the case now before the court the sentence was that the defendant be imprisoned for six months commencing on the first day of April, 1921, at 12 o'clock noon. The sentence was for an imprisonment from April 1st, at noon, until October 1st, at noon, and not a minute longer, and hence so far as the order of the judge imposes an imprisonment after October 1st, at 12 M., it is clearly void, and for other reasons above specified the order is void on its face. Defendant should be discharged and allowed her constitutional right to pursue and obtain safety and happiness.

THE STATE OF NORTH DAKOTA EX REL. GEORGE D. LAIRD, E. S. Sheveland, John Bauer, Leonard Bauer, and R. W. Frazier, as citizens, taxpayers, and electors of the State of North Dakota, Petitioners, v. THOMAS HALL, John Steen, D. C. Poindexter, William Lemke, and Minnie J. Nielson, as State Board of Canvassers, Respondents.

(186 N. W. 284.)

Officers — secretary of state exercises duty and discretion concerning sufficiency of recall petitions.

1. In filing recall petitions and calling a special election thereupon, the secretary of state exercises a duty and a discretion concerning the sufficiency of such recall petitions.

Note.—For authorities discussing the question as to constitutionality of the recall, see notes in 50 L.R.A.(N.S.) 227, and L.R.A.1916D, 1102; 22 R. C. L. 578.

Officers — no objection made, presumption is that secretary of state performed duty and exercised discretion as to recall election.

2. Where the secretary of state has received and filed recall petitions and has called a special election thereupon, and, where an election has been held pursuant thereto, without any objection before the secretary of state and without any proceedings in any court prior to such election to review or control the acts of the secretary of state, it must be presumed that the secretary of state has performed his duty and exercised his discretion pursuant to the law and that electors, seeking, after such election, to question the performance of his duty and discretion, have acquiesced in such presumption.

Injunction — state canvassing board not enjoined from performing duties because of insufficiency of petition for recall election.

3. In an application for an original writ to enjoin the state canvassing board from canvassing the returns of a recall election, upon ground of the insufficiency of the recall petitions, it is improper by equitable interposition to enjoin such canvassing board.

Opinion filed Dec. 30, 1921.

Elections, 20 C. J. § 254 p. 200 n. 33; § 255 p. 201 n. 39. Injunctions, 32 C. J. § 403 p. 256 n. 78. Officers, 29 Cyc. p. 1406 n. 5, 6 New.

Application for an original writ to enjoin the state canvassing board.

Application denied.

E. R. Sinkler and *S. E. Ellsworth,* for petitioners.

BRONSON, J. Petitioners apply for an original writ to restrain the state canvassing board from canvassing the returns of the recall election held on October 28th, 1921. As taxpayers and citizens, the petitioners allege that on September 17th, 1921, certain recall petitions were filed with the secretary of state seeking to recall the governor, the attorney-general, and the commissioner of agriculture and labor. That the secretary of state, thereupon, designated October 28th, 1921, as the recall election day; that at the election so held on October 28th, 1921, the governor, the attorney general, and the commissioner of agriculture and labor, sought to be recalled, received less than a majority of the votes cast and that the state canvassing board, unless restrained, will declare other persons to have been elected to such offices at such election. It is further alleged that there were cast at the general election held in November, 1920, 229,606 votes for the office of governor; that the petitions filed were not signed by at least 30 per cent of the

qualified voters who voted at the general election for the office of governor. It is further alleged, and affidavits attached to show, that the recall petitions on an extensive scale were signed by the same individuals twice, or more times; that persons who were not electors or citizens had signed such petitions; that names had been copied upon such petitions in the handwriting of the same person and that these conditions exist to such an extent as to show, from partial investigation made, among other things, that more than 5,000 persons signed their names twice upon such petitions; that more than 1,000 persons signed the same whom were not citizens of the state and more than 10,000 signed such recall petitions who did not vote for the office of governor at the general election, all of which would bring the requisite number of signers upon the petitions below the 30 per cent required by the constitutional amendment. It is the contention of the petitioners that the election held on October 28th, 1921, was void by reason of the insufficiency of the petitions and that, therefore, a writ should be issued to prevent further illegal or void proceedings.

It will be noted that this recall amendment does not provide any machinery, except in a very limited way, concerning the circulation of petitions, the determination of their sufficiency, or concerning the special election to be held thereunder. Necessarily, if such amendment be self-executing and its provisions mandatory, it must call to its aid, in order to facilitate or even to permit its operation, statutory or cognate laws existing. Necessarily, some duty is imposed upon the officer with whom such petition must be filed. The mandatory nature of the amendment under its very terms, specifying by whom the petitions must be signed, the percentage of electors required, and, the duty thereupon imposed upon the officer to call a special election, requires an exercise of a discretion by such officer. The duties of the secretary of state are generally prescribed by statute. The nature of his duties has been often considered by this court. See State ex rel. Linde v. Hall, 35 N. D. 62, 66, 159 N. W. 281; State ex rel. Twichell v. Hall, 44 N. D. 459, 171 N. W. 213. Although he possesses no judicial functions, it is manifest that the self-executing and mandatory features of the amendment require the exercise of a discretion by the secretary of state in passing upon the petitions. Assuredly, in calling such special election, he must call to his aid statutory election laws, so far as ap-

plicable, and other cognate law in order that such discretion may be exercised pursuant to the constitutional amendment. It is certain that if the recall petitions filed, appeared on their face not to have been signed by the requisite percentage required by the constitutional amendment, nor to be signed at all by qualified electors, the discretion of the secretary of state would forbid either the filing of the petitions or the calling of a special election. In the cognate law existing prior to and at the time of, the adoption of the recall constitutional amendment, the duty is imposed upon the secretary of state concerning initiative and referendum petitions to pass upon each petition, and if he finds it insufficient to notify the committee for the petitioners and allow twenty days for correction or amendment. His decision in regard to any such petition is made subject to review by this court. Article 26, Const. Amendment. It is further provided in such article that if the sufficiency of such petition is being reviewed at the time the ballot is being prepared, the secretary of state shall at the time the ballot is being prepared, place the measure on a ballot and no subsequent decision shall invalidate such measure if at such election it is approved by a majority of the votes cast thereof.

The cognate law points out a method for the secretary of state exercising a discretion upon initiative and referendum petitions that are foundational for an election thereupon. Necessarily, pursuant to the constitutional recall amendment, he must exercise a discretion in passing upon the sufficiency of recall petitions unless the mandatory features of the amendment be disregarded and legal safeguards concerning elections be unobserved. The secretary of state, by constitutional amendment, is made the officer with whom the petitions are filed. He is designated as the officer who shall call the special election. Further, pursuant to the recall amendment and statutory election laws, he has been assigned specific duties concerning the nomination and submission of candidates at such recall election, and concerning the election itself. Necessarily, a duty was imposed upon the secretary of state to exercise a discretion concerning, and to pass upon, the sufficiency of the recall petitions, if any force at all be given to the self-executing and mandatory features of the recall amendment. See State ex rel. Little v. Langlie, 5 N. D. 594, 600, 32 L.R.A. 723, 67 N. W. 958; State ex rel. Gongwer v. Graves, 90 Ohio St. 311, 107 N. E. 1018.

The fact that the secretary of state possessed this duty and the right to exercise this discretion and to pass upon the sufficiency of the petitions did not forbid a resort to the courts to review an abuse of discretion by such secretary of state or any fraudulent acts in connection therewith. Accordingly, prior to the election, there existed two methods for questioning the sufficiency of the recall petitions. One, by acts of objection, before the secretary of state, to the sufficiency of such petitions; the other, by proceedings in court to review or control the acts of the secretary of state thereto.

No objection of any kind, nor any appeal, was made to the secretary of state concerning the sufficiency of the recall petitions. No action or proceeding of any kind was taken prior to the election, in any court, to question the sufficiency of such petitions. Without objection or the taking of any proceedings, the secretary of state was permitted to exercise his discretion, to call and to hold the election. It may be conceded, for purposes of this application, that the petition alleges a cause of action to enjoin the calling of a recall election and for a review of the discretion exercised by the secretary of state, if such cause of action had been presented prior to the time of such election, and, further, that the recall petitions must be signed by 30 per cent of the qualified electors who voted at the preceding election for the office of governor. The recall petitions, on their face, purport to be so signed. It may be further conceded that the recall constitutional amendment itself prescribes its mandatory character and the rule of strict compliance to be applied; that, further, it was not intended, through this constitutional amendment, to cast aside all safeguards in election proceedings.

However, the pertinent inquiry, now, is whether, at this time, after the secretary of state has exercised his discretion, without any objection or any appeal to the courts, and after a recall election has been held, this court should invalidate the election and restrain the state canvassing board in the performance of its duties enjoined by law. The petitioners assert that a valid election cannot exist based upon invalid petitions; that the existence of sufficient petitions for a recall are conditions precedent to the calling or holding of a valid special election and any election not so called and held is necessarily void. It remains to be seen whether this premise, asserted by the petitioners, is correct.

based upon the present application and the constitutional amendment concerned.

For purposes of illustration it may be supposed that the sufficiency of the recall petitions, as to the number of qualifications of the signers thereon, had been questioned before the holding of the election, either before the secretary of state or in an appropriate proceeding, and it had been found that by reason of duplications of signatures, lack of legal signatures, and illegalities in procedure such recall petitions contained 1,000, 5,000, or even 10,000 signers less than the number required by the constitutional amendment: Would it be asserted or contended that no recall election could be later held if sufficient and qualified signers additional were submitted and the petitions refiled? Neither the constitutional amendment nor any supplementary legislation provides when such petitions must be signed or filed. Furthermore, for purposes of illustration, it may be supposed that at the recent recall election the officers sought to be recalled were retained by a majority vote of the electors similar to that by which they were defeated. The constitutional amendment provides that, after one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected. Would it be asserted or contended that, subsequently, recall petitions could be filed against the same officer upon the ground that the recall petitions previously filed were invalid and the election held thereupon void? If petitioner's position be correct the election in either event must be set aside; further, additional and qualified signers might be secured, the petitions again refiled, another election called and held, and then, again, the sufficiency of the petitions might again become subject to attack for further insufficiency and, if so found, such election must be set aside and so, ad infinitum. The petitioners do not now question the legality of the election itself or specify any irregularities in the conduct of such election. They question only the sufficiency of the petitions. As hereinbefore stated, it must be apparent that, pursuant to the recall constitutional amendment, the electors of the state have the right to propose and file recall petitions; the electors of the state also have the right to object to the sufficiency of such recall petitions either before the secretary of state or by resort to the courts. These are apparent and concurrent rights. Agencies for the exercise and deter-

mination of these rights anterior to the time of holding a recall election, have been provided. Necessarily, these agencies which have the authority to pass upon the sufficiency of recall petitions prior to a recall election, must be a determining and final authority? Otherwise, it follows that the respective concurrent right of the electors to propose, or, of the electors to object, to recall petitions, may be rendered, in either event, nugatory or useless by the individual action of either after an election, in fact, has been held. Manifestly, where no objection has been made before the secretary of state nor any proceedings taken in court anterior to the holding of a recall election, and where the electors proposing recall petitions are not given any opportunity to exercise their concurrent right, it must be presumed that the secretary of state, in passing upon the recall petitions, has performed his duty. In State ex rel. Little v. Langlie, supra, an action of mandamus was instituted to compel the removal of county offices from Hillsboro to Caledonia upon the ground that the latter was still the lawful county seat. The action was brought after an election had been held and a statutory vote cast for the removal of the county seat to Hillsboro. The validity of the election was attacked upon the ground that the petition presented to the county commissioners was signed by an insufficient number of voters. This court held that, after an election had been held and a sufficient vote had been cast in favor of a place, to work a change of the county seat to such place, the question whether the petition had upon it the requisite number of names was not open to judicial investigation; that, while a sufficient petition was undoubtedly necessary, yet the question lay deeper than that; that the pregnant inquiry was what body was to settle the matter finally; that after an election had been held this court was impelled to the conclusion that the decision of the board was final. See 50 L.R.A.(N.S.) 231, note; L.R.A.1916D, 1107, note; Good v. San Diego, 5 Cal. App. 265, 90 Pac. 44; Conn v. Richmond, 17 Cal. App. 705, 121 Pac. 714, 719; Dunham v. Ardery, 43 Okla. 619, L.R.A.1915B, 232, 143 Pac. 331, Ann. Cas. 1916A, 1148; Laam v. McLaren, 28 Cal. App. 632, 153 Pac. 985. Further, after the holding of such election, it must be presumed that electors objecting to such recall petitions have acquiesced in the presumption that the secretary of state has so performed his duty. To otherwise hold would, in effect, simply make the expressed

will of the electorate at an election a sporative play to be resolved thereafter into a reality by a determination of validity or invalidity dependent upon proceedings that might be had concerning the sufficiency of recall petitions. This could serve no other purpose than to introduce into governmental affairs hopeless confusion and uncertainty in governmental operations. Assuredly, the recall constitutional amendment contemplates no such construction nor may any such construction be gleaned from the statutory or cognate law. It is well recognized in this state that canvassing boards do not possess judicial functions. They are not concerned with the validity or invalidity of an election. Their duty simply comprehends the reception of the returns and the declaration of the results shown thereby. See State ex rel. Sunderall v. McKenzie, 10 N. D. 139, 86 N. W. 231. The state canvassing board does not even issue the certificate of election. This is issued by the secretary of state. Comp. Laws, 1913, § 1020. It is manifest that the action of the state board of canvassers can neither validate or invalidate the special election held. It would be highly improper for this court, by equitable interposition, to determine the validity of the election concerned, in any event, by injunctive process against such state canvassing board, see State ex rel. Byerley v. State Canvassers, 44 N. D. 126, 172 N. W. 85.

For the reasons stated, the application must be denied.

BIRDZELL, J. (concurring). The only question for consideration here is whether or not the petition alleges grounds for interference with the contemplated action of the canvassing board. I am clearly of the opinion that it does not. It is unnecessary to go further into the consideration of article 33 of the amendments to the Constitution, than to determine whether or not a duty is imposed upon the secretary of state, in the first instance, to ascertain the sufficiency of petitions filed in his office and to act upon them in accordance with his determination. Clearly, the sufficiency of the recall petition must be determined in the first instance by the officer with whom it is filed, and, when so determined, a mandatory duty is imposed to call an election. State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958. If the determination is adverse he should refuse to call it. In this instance, the determination was made and the resulting duty performed

more than forty days before the election complained of was held. It is familiar law that voters, no less than parties plaintiff in other capacities, may be estopped to assert their legal rights, if any they have, and that such estoppel arises where they participate in an election thereby seeking to influence its result. It is not alleged that the election did not result in a fair expression of the will of the voters. The facts which preclude the plaintiffs here appear on the face of the petition. Extraordinary relief should therefore be withheld. In my view of the case it is unnecessary to consider the qualifications of a signer to a recall petition. Nor are we required to determine whether the petition herein sufficiently alleges a cause of action if it had been presented prior to the election. It was not so presented. According to my view it does not state facts warranting the relief sought, and I join in denying it.

CHRISTIANSON, J. (concurring). I concur in the principles stated in the syllabus, and in the conclusion reached in the opinion prepared by Mr. Justice Bronson.

The petitioners ask for the issuance of a prerogatory writ restraining the state canvassing board from canvassing the returns and announcing the result of the recall election held Oct. 28th, 1921. The sole ground alleged by the petitioners as a basis for the proceeding sought to be instituted by them is that the petitions, filed with the secretary of state asking for the recall of the three state officers in question, were insufficient. There is no charge, however, that the winning candidates were in any manner responsible for the acts complained of. It is not denied that the petitions were prima facie sufficient; but it is contended that, as a matter of fact, the petitions were not signed by a sufficient number of qualified petitioners.

In my opinion, there are at least two good reasons why the writ should be denied.

(1) It is undisputed that the recall election was called and held; that the election officers of the different election precincts in the state certified their returns to the respective county auditors; that in the different counties of the state the various boards created by law for that purpose met and canvassed the returns from the different election precincts; that the returns from the different counties were duly cer-

tified and transmitted to the secretary of state. All this, without any attempt on the part of the petitioners or anyone else to question the sufficiency of the petitions, or the validity of the election. The only thing that now remains to be done under the election laws is for the state canvassing board to meet, and publicly examine the statements and returns filed by the different county auditors, and make a statement of the whole number of votes given at the election for each of the three officers, and upon each of the different measures, voted upon at such election. The statute makes it the duty of the state canvassing board to meet and canvass the result of an election. Comp. Laws, 1913, § 1018. It seems too clear for argument that a court would not be justified in interfering with the action of this board. No case has been cited and none has been found where judicial power has been so exercised; while many cases hold that it may not be so exercised. See note in 50 L.R.A.(N.S.) 231 et seq.

(2) There is another reason why the writ should not issue. The petition in this case alleges that certain recall petitions were filed with the secretary of state; that pursuant thereto the secretary of state called a recall election; that such election was held with the result that the candidates opposing the officers sought to be recalled received a majority of the votes cast at the election. It is made the duty of the secretary of state, when recall petitions signed by a prescribed number of qualified electors are filed, to call an election. No specific provision is made as to how the sufficiency of the petition shall be ascertained. There can be no question, however, but the duty is imposed upon the secretary of state to determine, at least in the first instance whether the petitions are signed by the number of electors prescribed. In this case the secretary of state must have reached the conclusion that the petitions were signed by the required number of qualified electors for he called the election. State ex rel. Little v. Langlie, 5 N. D. 594–600, 32 L.R.A. 723, 67 N.W. 958. There is no contention that any objection was made before the secretary of state, or that his determination that the petitions were sufficient was in any manner assailed. There can, I think, be no question but that the determination of the secretary of state was at least prima facie correct, and some courts have ruled, under somewhat similar provisions, that the decision of the secretary of state has even greater effect.

No attempt was made to question the correctness of the determination of the secretary of state until after the election had been held and returns made by the local election officers, and such returns canvassed by the county canvassing boards and certified to the secretary of state. All expense incident to the election has been incurred. Not only the relators but the officers whose terms of office were involved not only permitted this to be done, without any objection, but acquiesced and participated in the election. It would seem that the most elementary rules of common justice and common sense would preclude them from asserting at this time that the secretary of state had no legal right to call the election; that his action in so doing and the election held were and are mere nullities, and that in the eyes of the law an election has not been had. And such, as I read the authorities, is the established law. See 9 R. C. L. pp. 1173, 1174.

It is well settled that a wholly different rule applies in considering the effect of noncompliance with the provisions of election laws where it is sought to set aside the result of an election from that which applies where the question of non-compliance is raised before the election is held. Ruling Case Law (9 R. C. L. p. 1173) says: "It is the duty of the courts to uphold the law by sustaining elections thereunder that have resulted in a full and fair expression of the public will, and from the current of authority the following may be stated as the approved rule: All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election, all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void. Voters finding a ticket or the names of candidates on the official ballot are not required to determine whether they are entitled to a place thereon, but may safely rely on the action of the officers of the law, and on the presumption that they have performed their duty. And so an election in which the voters have fully, fairly, and honestly expressed their will is not invalid because the certificate of nomination of the successful candidate is defective through

the omission of some detail. Nor is the title of the successful candidate affected by a subsequent decision holding the law under which the nominations were made invalid. . . . Where there is a neglect on the part of one to avail himself of a right given him by statute, he cannot, when the result of the election is announced and he finds himself defeated at the polls, ask the court to nullify the expressed will of the voters on the ground of the error or wrong of the county clerk, which he could by reasonable diligence have had corrected. If no ante election objection to a nomination is made, the provisions of the statute are to be treated as directory." This is in harmony with the rule announced by this court in State ex rel. Little v. Langlie, supra. That action involved the validity of an election for the removal of the county seat of Traill county. The validity of the election was attacked upon the ground that the petition presented to the county commissioners asking for such election was not signed by a sufficient number of voters. In disposing of this contention, the court said, among other things: *"We do not think that, after an election has been held, and a sufficient vote has been cast in favor of a place to work a change of the county seat to such place, the question whether the petition had upon it the requisite number of names is open to judicial investigation."* The principle stated, and in fact, the very language used is directly applicable here. There is no charge here that there was any fraud or irregularity in the conduct of the election itself, or that a fair and full expression of the public will was prevented by reason of anything that was done or omitted. Nor is there any charge that the winning candidates were in any manner responsible for the acts complained of with respect to the recall petitions. The contention is merely that the petitions were not sufficient, and that the determination of the secretary of state that they were sufficient, is erroneous, and that the election should not have been called. For the reasons stated, I am satisfied that that question may not be raised, and is not one for judicial investigation, after an election has been held.

ROBINSON, J. (concurring). Now, at this late day, twenty-four days after the recall election, held on October 28, 1921, five persons claiming to be citizens and taxpayers, file a petition asking the court to enjoin respondents, the state canvassing board, from canvassing the

votes and certifying the result of the election. The petition is based on alleged defects in the petition filed for the recall of Governor Frazier William Lemke, Attorney General, and John N. Hagan, Commissioner of Agriculture. It is contended that the petitions do not contain a sufficient number of legal signatures to warrant the recall election; that on the recall petitions large numbers of signatures are forged and a large number duplicated and many have signed who did not vote for Governor at the general election in 1920. However, it does appear that at the general election in 1920 the total number of votes cast for Governor was 229,606, of which thirty per cent is 68,882, which is the number of legal voters that should appear on each recall petition. The recall petitions on their face purport to be signed by legal voters which number as follows:

For the recall of Governor Franzier, 73,893; for the recall of William Lemke, 73,237; for the recall of Mr. Hagan, 73,187.

Of course the recall petitions are on file in the office of the secretary of state and are there subject to inspection. It is quite possible that the petitions contain some duplicates and signatures of persons not legal voters, but from an examination of each petition no one can say that it does not contain signatures of at least 68,882 legal voters. The petitions were filed in the office of the secretary of state on September 16, 1921 and the officers against whom the recall was filed promptly caused petitions to be examined and copied and then caused $10,000 of the state emergency fund to be transferred to Secretary Hall for the purpose of the recall election by publishing and distributing the state publicity pamphlets. Accordingly the election was called and held and the votes have been duly certified to the secretary of state and it is generally conceded that the officers recalled have lost by a margin of votes exceeding four thousand. The recall amendment is to this effect:

"The qualified electors of the state or of any county, or of any congressional, judicial or legislative district may petition for the recall of any elective, congressional, state, county, judicial or legislative officer by filing a petition with the officer with whom the petition for nomination to such office in the primary election is filed demanding the recall of such officer. Such petition shall be signed by at least thirty per cent of the qualified electors who voted at the preceding election for

the office of governor in the state, county or district from which such officer is to be recalled. The officer with whom such petition is filed shall call a special election to be held not less than forty or more than forty-five days from the filing of such petition."

It is claimed that under this recall amendment no elector may sign a recall petition unless he has voted at the preceding election for the office of governor and that numerous persons who signed the recall petition had not so voted; but that is not a fair construction of the amendment. Its plain meaning is "The qualified electors may file the petition" and it must be signed by a number of electors equal to thirty per cent of the votes given for the office of governor. The officer who orders a special election must do so on inspection of the petition and neither he nor the canvassing board have any means of determining how a person voted at a prior election. Statutes must be given a construction that is workable and practical. A petition for the recall of state officers must be filed with the secretary of state and he must call an election to be held not less than forty nor more than forty-five days after the filing of the petition. Clearly the sufficiency of the petition must be determined from an inspection of the same, and not from affidavits, and hence, to avoid mistakes quite certain to occur in a lengthy petition, it is common to obtain an extra number of signatures, and that is doubtless a reason why the petitions in this case contain about five thousand additional signatures.

When a referendum or initiative petition is filed with the secretary of state he is required to pass upon the sufficiency of the petition, and if it be found insufficient to notify the committee for the petitioners and to allow twenty days for an amendment. His decisions are subject to review by the supreme court, but if a measure is approved by a majority of the voters, no subsequent decision shall invalidate the votes cast. The decision by the voters becomes final. There is no good reason why the same principle should not govern a recall election. The purpose of a petition is to show a general or widespread demand for a recall, and after such demand has been shown by the votes at the polls, the petition becomes of little consequence. It is then functus officio. Thus it is held: "After a county seat election has been ordered and held, and a sufficient vote is cast in favor of some one place to work a relocation of the county seat, the questions whether

the petition presented to the board of county commissioners praying that such an election be held was signed by a sufficient number of voters is not open to judicial investigation, when the board has found that it was so signed." State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958.

Now the statute does provide for the manner of conducting elections and of certifying the votes to the secretary of state and for the canvass of the votes by the state board of canvassers. The board is required to certify and determine what persons have been, by the greatest number of votes, duly elected to office and to make and subscribe a statement or certificate of such determination and deliver the same to the secretary of state. Code, § 1019. Then the secretary of state shall record in his office such certified statement and determination so made by said board and shall forthwith make and transmit to each of the persons thereby declared to be elected a certificate of election as hereinafter provided, and he shall also forthwith cause a copy of such certified statement and determination to be published in a newspaper printed at the seat of government. Code, § 1020.

Now, by the petition in this case, the court is asked to enjoin the canvassing board from the performance of their plain duty as prescribed by statute. The petition is without equity and without any warrant of law.

GRACE, Ch. J. (specially concurring). This proceeding was brought by the petitioners for the purpose of procuring a prerogatory injunctional writ, to restrain the state canvassing board from canvassing the returns and announcing the result of the recall election of October 28th, 1921.

As a preliminary step in the bringing of the recall election, certain petitions for the recall of the governor, attorney general and commissioner of agriculture were circulated. Each of the petitions apparently contained more than the requisite number of signers, that is, they were signed by presumptively legal voters in numbers greater than required by article 33 of the constitutional amendments. In this condition the petitions were presented to the secretary of state for filing. If the petitions were in proper form and contained the requisite number of signatures, it was his ministerial duty to file them. He could

not know from the face of the petitions whether all signatures on them were genuine, nor could he know from the inspection of them that some were fraudulent, if there were such, but he could properly presume, prima facie that all the signatures thereon were genuine and made in good faith, and, that presumption would continue until positive proof to the contrary is seasonably made to appear. The petitions were filed without any objection having been made to any of the signatures thereon. The secretary of state was required by the provision in question of the constitution to call an election to be held within forty-five days after the time the petitions were filed; he did call the election, and within the forty-five days the election was held. The electors of the state decreed by a majority vote that the officers against whom recall petitions were filed, should be recalled, and at the same election elected in their stead others as their successors.

The recalled officers have in no way contested the election. They thus impliedly conceded the validity of the election. No one legally disputed the validity of the election except plaintiffs, who bring this proceeding in the relation of taxpayers, and this after state wide election has been held, as a result of the filing of the petitions. The petitioners had all of forty-five days which elapsed, between the filing of the petition and the day of election, to have brought a proceeding similar to the one they now bring. They did not do so. They slept upon their rights during all of that time, and now since the election, conducted at large expense, and since every elector has had an opportunity to vote upon the issues of the election, we think the plaintiffs are estopped at this late time to maintain the proceeding which should have been maintained if at all during the period of time between the filing of the petitions and the date of the election.

STATE EX REL. LEMKE, Attorney General, v. DISTRICT COURT OF STUTSMAN COUNTY et al.

YAEGER et al. v. FRAZIER et al.

(186 N. W. 381.)

Courts — supreme court under its power of "superintending control" may control course of litigation so as to prevent injustice.

1. Section 86 of the Constitution vests in the supreme court general superintending control over inferior courts. This power enables and requires it, in a proper case, to control the course of litigation in district courts so as to prevent injustice in cases where there is no appeal, or the remedy by appeal is inadequate.

Courts — injunction — order restraining deposit of state funds in Bank of North Dakota held erroneous; supreme court authorized to vacate order of district court, restraining deposit of state funds as required by law; restraining order against officers vacated in exercise of power of superintending control.

2. In the instant case, a restraining order was issued at the commencement of a taxpayers' suit, which order, among other things, enjoined the state treasurer from depositing state funds, and funds of state institutions in the bank of North Dakota. The laws of the state require the state treasurer to deposit such funds in the bank of North Dakota. For reasons stated in the opinion, it is *held:* That the order so issued is erroneous; that the case presented to this court is one within, and requires the exercise of, the constitutional power of superintending control over inferior courts; and that the facts and circumstances require that the restraining order be vacated and set aside.

Injunction — should not ordinarily be issued on allegations on information and belief.

3. Ordinarily, injunctions should not be issued on allegations made on information and belief, or, if so issued, should be dissolved.

Opinion filed December 30, 1921.

Courts, 15 C. J. § 446 p. 1026 n. 37; § 535 p. 1104 n. 79. Depositaries, 18 C. J. § 67 p. 591 n. 69. Injunctions, 32 C. J. § 383 p. 240 n. 48; § 386 p. 245 n. 6; § 423 p. 270 n. 32 New; § 536 p. 324 n. 83.

Application by the state, on relation of Wm. Lemke, Attorney General, for an appropriate writ to review and reverse an order issued by the District Court of Stutsman County, *J. A. Coffey*, Judge, in an action by Jacob Yaeger and others against Lynn J. Frazier and others,

Note.—See 14 R. C. L. 334.

which among other things restrained the state treasurer from depositing state funds and the funds of state institutions in the Bank of North Dakota. Writ granted.

Wm. Lemke, Attorney General in pro. per.

Ormsby McHarg and *Oscar J. Seiler,* for respondents.

CHRISTIANSON, J. On October 18, 1921, Jacob Yaeger and fifteen other taxpayers instituted an action in the district court of Stutsman county against a number of state officers, including the governor, the attorney general, the state treasurer, the secretary of state, and the state auditor. The complaint is very lengthy, and charges, among other things, that the Bank of North Dakota has never been legally organized; that it is insolvent; that the state treasurer has deposited moneys which have come into his hands in the bank, and will continue to do so unless restrained from so doing. The principal object of the action, as set forth in the prayer for judgment, is:

"That each and every one of the defendants above named be restrained and enjoined during the pendency of this action or until the further order of this court from depositing any funds belonging to the state of North Dakota, or of any political subdivision thereof, or belonging to any educational institution, and particularly any part of the state school fund in the so-called the Bank of North Dakota.

"That the Bank of North Dakota through its operators, managers and controllers, particularly the defendants Frazier, Lemke, Hagan and Cathro, be enjoined and restrained from accepting or receiving for the purpose of deposit any funds from any source, public or private, until the further order of this court.

"That D. C. Poindexter, as auditor of the state of North Dakota, . . . be restrained and enjoined from depositing any funds coming into his possession as the auditor of the state of North Dakota in the Bank of North Dakota until the further order of this court.

"That John Steen, as treasurer of the state of North Dakota, be restrained and enjoined, until the further order of this court, from mixing and confusing funds, arising from the lands and moneys received from the government of the United States or from other sources declared by the Constitution of the state to be trust funds, with other funds of the state; and particularly that he be restrained and enjoined

from depositing any of such funds upon which the said trust is imposed, or any other funds coming into his possession as state treasurer in the Bank of North Dakota until the further order of this court.

"That the Bank of North Dakota be enjoined and restrained during the pendency of this action and by the final judgment to be rendered herein, from representing itself as a bank and a proper depositary of funds as a bank or from representing itself as a corporation.

"That the Bank of North Dakota be adjudged to be insolvent, and thereby unfit to be the depositary of any public funds by reason of its insolvency and inability to pay back funds and moneys deposited with it by banks, public officials having control of the safe-keeping of state funds, and the funds of state penal, educational, and industrial institutions."

Upon this complaint, and upon affidavits of one of the plaintiffs and one of their attorneys, Honorable J. A. Coffey, one of the judges of the fourth judicial district, issued an order returnable before said district court at Jamestown, in Stutsman county at 10 o'clock A. M., November 3, 1921, citing the defendants to show cause at that time and place why they should not be restrained during the pendency of the action from in any manner doing any of the things against the doing of which a permanent injunction is asked for in the action. And in such order it was further provided that—

During the pendency of the action, the "defendants, and each and all of them, individually and officially, be, and they are hereby, restrained and enjoined in the following respects:

"(1) That each and every one of the defendants above named be, and is hereby, restrained and enjoined during the pendency of this action or until the further order of this court from depositing any funds belonging to the state of North Dakota, or of any political subdivision thereof, or belonging to any educational institution, and particularly any part of the state school fund in the so-called Bank of North Dakota.

"(2) That the Bank of North Dakota, through its operators, managers, and controllers, particularly the defendants Frazier, Lemke, Hagan, and Cathro, be, and is hereby, enjoined and restrained, during the pendency of this action or until the further order of this court,

from accepting or receiving for the purpose of deposit any funds from any source, public or private.

"(3) That Lynn J. Frazier as governor, Thomas Hall as secretary of state, John Steen as treasurer, and D. C. Poindexter as auditor of the state of North Dakota be, and they are hereby, restrained and enjoined, during the pendency of this action and until the further order of this court, from preparing for issue, signing, sealing, and indorsing any bond or bonds upon property of state owned utilities, enterprises, or industries.

"(4) That D. C. Poindexter as auditor of the state of North Dakota be, and he is hereby restrained and enjoined, during the pendency of this action or until the further order of this court, from auditing any accounts or paying the same, or recommending the same for payment, other than for the legitimate operating expenses of the state of North Dakota, and that he be, and is hereby, restrained and enjoined during the pendency of this action, or until the further order of this court, from depositing any funds coming into his possession as the auditor of the state of North Dakota in the Bank of North Dakota.

"(5) That John Steen as treasurer of the state of North Dakota be, and is hereby, restrained, during the pendency of this action or until the further order of this court, from mixing and confusing funds arising from the lands and moneys received from the government of the United States, or from any other sources declared by the Constitution of the state to be trust funds, with other funds of the state, and particularly from depositing any of such funds upon which the said trust is imposed, or any other funds coming into his possession as State Treasurer in the Bank of North Dakota. . . .

"(10) That each and every one of the defendants above named, their servants, deputies, attorneys, agents, and employees, and each of them, be, and they are hereby, restrained and enjoined, during the pendency of this action or until the further order of this court from in any manner performing any of the acts complained of in this complaint, which have been described as resulting in irreparable injuries to the plaintiffs and all other taxpayers in the state if permitted to be performed. . . .

"(12) That the Bank of North Dakota be and it is hereby enjoined and restrained, during the pendency of this action or until the further

order of this court, from representing itself as a bank and a proper depositary of funds as a bank, or from representing itself as a corporation.

"(13) That the Bank of North Dakota be, and it is hereby, adjudged to be insolvent, and thereby unfit to be the depositary of any public funds by reason of its insolvency and inability to pay back funds and moneys deposited with it by banks, public officials having control of the safe-keeping of state funds, and the funds of state penal, educational, and industrial institutions, pending this action or until the further order of the court."

On the 20th day of October, 1921, the attorney general made an application to this court for relief against the order issued by Judge Coffey and asked that this court issue an appropriate writ in the matter. The attorney general's application was supported among others, by the affidavits of himself, the state treasurer, and the Manager of the Bank of North Dakota. In his affidavit the state treasurer says that

"He has been advised by the attorney general of the state of North Dakota that the only legal depositary for the funds of the state is the Bank of North Dakota, and that, as state treasurer, he has deposited all funds up to the present time coming into his possession as state treasurer in the Bank of North Dakota. That the funds coming into the office of the state treasurer amount to from $25,000 to $50,000 a day. That a copy of the restraining order of the court in the above-entitled action has been served upon him, restraining him from depositing any more funds in the Bank of North Dakota; and that unless such order is annulled and vacated, or some other depositary designated, it will greatly hamper the work of his department, and, that he has no place where to deposit such funds when they come in; and that in many cases checks coming to his department should be promptly cashed, otherwise loss may be sustained upon them."

Also that

"Owing to the fact that he does not know where to deposit said funds, the work in his department is greatly hampered and delayed and will accumulate very rapidly, unless some relief is given."

In his affidavit the attorney general stated that he had requested both judges of the Fourth judicial district to vacate the restraining order, and had been unsuccessful in obtaining a vacation thereof.

This court thereupon issued its writ, directing the said district court and said Honorable J. A. Coffey, as judge thereof, to certify all papers in said cause, and a transcript of the record and all proceedings had therein, to this court, and directed that no further proceedings be had, and that the restraining order be vacated until the further order of this court.

On the return day the attorneys of record for the plaintiffs in the court below appeared in behalf of the respondents, district court and the judge thereof. The attorney general appeared for all the state officers named as defendants, with the exception of the secretary of state, superintendent of public instruction, and the state treasurer. These officers appeared by other counsel, and filed a motion that the writ be quashed. The motion is based upon two grounds: (1) That the complaint states a cause of action; and (2) that the district court has exclusive jurisdiction of such cause of action. On the oral argument, the state treasurer was represented by counsel other than the one who subscribed the motion to quash, and such counsel stated that the state treasurer had one and only one interest in the litigation, and that was to be permitted to discharge the duties of his office in a regular and lawful manner. The motions to quash presented by the state officers were apparently prepared under a misconception of the scope and purpose of the writ issued. The sole purpose of the writ was to review the action of the trial court in issuing the restraining order. We do not find it necessary to refer to the matters set forth in the return filed by the district judge, for in our view of the case it is controlled by certain legal principles applicable to undisputed facts, or facts of which we must take judicial notice. In other words, we deem the questions arising in this case to be merely questions of law.

The questions so presented for determination are:

(1) Was the action of the district court in granting the order which it issued erroneous?

(2) If so, can this court afford relief in this proceeding?

(3) Are the circumstances in this case such as will justify this court in granting the relief asked?

Logically the question as to the jurisdiction and the remedy should be considered first; but, inasmuch as this in turn depends upon, and necessitates a statement and consideration of, the facts and circum-

stances relating to the order made by the district court, we will consider the questions in the order stated.

1. In 1919 the legislature of this state enacted a law (chapter 147, Laws 1919) establishing a bank under the name of the Bank of North Dakota to be operated by the state. The industrial commission, consisting of the governor, attorney general, and the commissioner of agriculture and labor, were, by the terms of the act, placed in control of the operation and management of the bank, and were given the right of eminent domain to acquire the necessary property. The bank was authorized to make loans to individuals, associations, and corporations when secured by first mortgages on lands, in the state. And in general the act prescribed the functions, and provided for the operation, of the bank. An appropriation of $100,000 was made immediately available to carry out the provisions of the act. Section 7 of the act provided:

"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 this act, subject to disbursement for public purposes on checks drawn by the proper officials in the manner now or hereafter to be provided by law; provided, however, that on a proper showing made by any official having control of public funds, the industrial commission may permit a postponement of the deposit of such funds or any part thereof in the Bank of North Dakota, the period of such postponement not to exceed six months. And provided, further, that if any such funds are now loaned by authority of law under a contract terminating at a future time, then the deposit of such funds in the Bank of North Dakota shall not be required until two months after time of expiration of such contract. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in a county jail for not less than ninety days, and by a fine of not less than one hundred dollars." Laws 1919, § 7, chap. 147.

The act was approved February 25, 1919, and by its terms became effective on and after its passage and approval. Referendum petitions, however, were filed, and the act was submitted to the people of the

state at a referendum election held June 26, 1919, with the result that it was approved by a majority of the votes cast thereon at such election. See Laws 1919, p. 509. Subsequently the foregoing provision was amended, by a law proposed by initiative petition and adopted by the people at an election held March 16, 1920, to read as follows:

"Sec. 7. All state funds, and funds of all state penal, educational and industrial institutions shall be, by the persons having control of such funds, deposited in the Bank of North Dakota." Laws 1921, p. 255.

It will be noted that the original act provided, not only that state funds and the funds of state institutions should be deposited in the Bank of North Dakota, but also that the funds of all counties, townships, school districts and municipalities should be deposited therein. The amendatory act changed the law so that the funds of counties, townships, school districts, and municipalities were excluded from the operation of the act; but it retained and re-enacted the provision requiring that all state funds and the funds of all state institutions be deposited in the Bank of North Dakota. The Bank of North Dakota opened for business shortly after the act creating it had been approved at the referendum election held June 26, 1919, and all state funds were shortly thereafter deposited in the bank by the state treasurer, and have been kept on deposit in that bank at all times since. The constitutionality of the act establishing the Bank of North Dakota was sustained by the decision of this court rendered January 2, 1920, and by the decision of the Federal Supreme Court rendered June 1, 1920. See Green v. Frazier, 44 N. D. 395, 176 N. W. 11; Id. 253 U. S. 233, 64 L. ed. 878, 40 Sup. Ct. Rep. 499. The status of the bank was given elaborate consideration by this court in Sargent County v. State, doing business as Bank of North Dakota, 47 N. D. 561, 182 N. W. 270. That was an action by Sargent county against the Bank of North Dakota for moneys deposited therein under § 7 of the original bank act, and garnishment proceedings ancillary to the main action were brought against a number of national and state banks wherein the Bank of North Dakota had deposited funds, and the right of the county to maintain such garnishment suit was upheld. It is apparent, therefore, that the Bank of North Dakota, its establishment, functions, and status, has received the consideration not only of the courts, but

has received the consideration of the people of the state as well. Since the Bank of North Dakota came into existence and the state funds were deposited therein, it has been the duty of the state treasurer to deposit all state and state institutional funds which have come into his possession in that bank. And no provision is made under existing laws whereby he may, under any circumstances, deposit such moneys in any other banking institutions.

Under the laws of this state "an injunction cannot be granted . . . to prevent the execution of a public statute by officers of the law for the public benefit" (subdivision 4, § 7214, Comp. Laws, 1913), or "to prevent the exercise of a public or private office in a lawful manner by the person in possession." Subdivision 6, § 7214, Comp. Laws, 1913. By the order issued by the district court in this case, the state treasurer was expressly enjoined from depositing state funds and funds of state institutions in the institution in which the law of the state as enacted by the legislature and approved by the people commanded him to deposit such funds. In other words, the order enjoined the state treasurer from performing the duty which the law enjoined upon him with respect to such funds. It is not a case where officers are sought to be enjoined from putting an unconstitutional statute into effect. For acts similar to those which were enjoined by the restraining order issued in this case had been committed continuously by the state treasurer, and his predecessor in office, for more than two years before this action was commenced; and whatever defects, if any, existed in the organization of the Bank of North Dakota, had existed during that period of time. It is a matter of common knowledge that in the recent past many financial institutions have failed. The remittances to the state treasurer, according to his affidavit, aggregated from $25,000 to $50,000 per day, and consisted principally of checks and drafts drawn upon various banks throughout the country. By the order issued in this case, the state treasurer was prevented from depositing these in the Bank of North Dakota. And, as already indicated, the law specifically enjoined upon him as a duty to deposit these items in that institution, and necessarily negatived the right or duty to deposit them elsewhere. It is, we think, self-evident that the order thus issued could not do otherwise than hamper and impede the state treasurer, as well as other state officers and boards in the dis-

charge of their duties. And, if the order was permitted to remain in force and effect, it seems highly probable that numerous legal complications would arise and a multiplicity of suits might result therefrom.

Many of the averments in the affidavits upon which the order was issued, as well as the allegations in the complaint, purport to be based upon statements claimed to have been made by the state treasurer. The state treasurer, in an affidavit submitted by the attorney general in support of the application to this court, denied that he made some of the statements attributed to him. Ordinarily, at least, injunctions should not be issued upon allegations made on information and belief, or, if issued, should be dissolved. High, Inj. 4th ed. § 1525; State ex rel. Register v. Patterson, 13 N. D. 70, 72, 99 N. W. 67. A careful consideration of all the facts and circumstances leads us to the conclusion that the trial court was not justified in issuing the restraining order which it did, and that that order is clearly wrong.

2. Has this court power to grant relief in this proceeding against the order made by the district court? We think it has. On the oral argument it was asserted by the plaintiffs that a writ of certiorari lies only in case the district court has exceeded its jurisdiction, and there is no appeal, nor in the judgment of the court any other plain, speedy, and adequate remedy. Comp. Laws 1913, § 8445. And that a writ of prohibition can be issued against the district court to arrest proceedings therein only when such proceedings are without or in excess of the jurisdiction of the district court. Comp. Laws 1913, § 8470. It was further asserted that, inasmuch as the district court is a court of general jurisdiction, it had and has jurisdiction of the cause or causes of action set forth in the complaint; also, that under the statute the defendants might have moved the district court to vacate the order, and that if such motion was denied the order entered would be appealable. Assuming, without deciding, that these contentions are correct, it by no means follows that this court is without power to grant relief in this proceeding against the restraining order issued by the district court. The Constitution provides:

"Sec. 86. The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state and shall have a general superintending con-

trol over all inferior courts under such regulations and limitations as may be prescribed by law.

"Sec. 87. It shall have power to issue writs of habeas corpus mandamus, quo warranto, certiorari, injunction and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same; provided, however, that no jury trial shall be allowed in said supreme court, but in proper cases questions of fact may be sent by said court to a district court for trial."

It became necessary for this court in the early history of the state to construe these sections. In State v. Nelson County, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33 (decided April 21, 1890), the original jurisdiction of this court was invoked. In the opinion in that case this court said:

"This case furnishes the first instance of an application to this court to put forth its original jurisdiction by issuing a writ except in a single habeas corpus case. We deem it expedient, therefore, to now indicate briefly the circumstances under which this court, in the exercise of a discretion vested in it will deem it its duty to take original cognizance of cases. Section 87 of the Constitution of the state authorizes this court to 'issue writs of habeas corpus, mandamus, quo warranto, certiorari, and injunction.' In the exercise of its appellate and supervisory powers over inferior courts the supreme court may have occasion from time to time to issue certain of the writs above enumerated, but such writs will not issue out of this court, in the exercise of its original jurisdiction, except in a limited class of cases, and such as are not ordinarily of frequent occurrence." 1 N. D. 101.

Here, then, we have a recognition by this court of the fact that these constitutional provisions vest in this court: (1) Appellate jurisdiction; (2) supervisory or superintending jurisdiction; and (3) original jurisdiction.

Shortly thereafter, namely in 1891, the legislative assembly of this state enacted a statute adopting the views announced in State v. Nelson County. The statute provided:

"The supreme court has power in the exercise of its original jurisdiction to issue writs of habeas corpus, mandamus, quo warranto, certiorari and injunction; and in the exercise of its appellate jurisdiction

and in its superintending control over inferior courts it may issue such original and remedial writs as are necessary to the proper exercise of such jurisdiction." Chapter 118, Laws 1891; § 7339, Comp. Laws 1913.

This statute has never been repealed or amended, and the correctness of the rule named in the Nelson County Case and in the statute has never been questioned, but has been reaffirmed. In State ex rel. Moore v. Archibald, 5 N. D. 359, 66 N. W. 234, this court again had occasion to construe these constitutional provisions. In the opinion prepared by Mr. Justice Corliss in that case the court said:

"These provisions, as we construe them, vest in this court—first, appellate jurisdiction; second, general superintending control over inferior courts; third, power to issue the writs specified, not only in furtherance of other jurisdiction, but also in the exercise of original jurisdiction; fourth, authority to issue such other original and remedial writs as may be necessary to the proper exercise of the jurisdiction vested in this court. This last grant was unnecessary, as we shall see, and was doubtless inserted for greater certainty. These ancillary writs are to be employed in furtherance of any jurisdiction possessed by this court, whether appellate, original, or superintending." 5 N. D. p. 361.

In State v. Nelson County, supra, this court called attention to the fact that provisions relating to the powers of the supreme court, substantially similar to our own, were contained in the Wisconsin Constitution; that those provisions had been construed by the supreme court of Wisconsin in certain cases therein cited, and the holding of the Wisconsin court in those cases was approved by this court. 1 N. D. 101, 102. The Wisconsin cases so cited and approved were decided more than a quarter of a century before the North Dakota Constitution was framed. In Atty. Gen. v. Blossom, 1 Wis. 317, the Wisconsin supreme court held that the constitutional provisions of that state contained three separate grants of jurisdiction to the Supreme court, i. e.: (1) Appellate jurisdiction; (2) the superintending control over inferior courts; and (3) the original jurisdiction to be exercised by means of certain perogative writs for the purpose of protecting the sovereignty of the state, preserving the liberty of the people, and se-

curing the rights of its citizens. The language in the Wisconsin Constitution relative to the matter here under consideration is:

"The supreme court shall have a general superintending control over all inferior courts."

In discussing this clause the Wisconsin supreme court, in Atty. Gen. v. Blossom, supra, said:

"This sentence, contains a clear grant of power. We will not undertake to say, that without this grant the power would not be in the court. It is not necessary to discuss that question. We are endeavoring to arrive at the proper construction of the written law. It is a grant of power. It is unlimited in extent. It is undefined in character. It is unsupplied with means and instrumentalities. The Constitution leaves us wholly in the dark as to the means of exercising this clear, unequivocal grant of power. It gives, indeed, the jurisdiction, but does not pretend to intimate its instruments or agencies."

Again, in discussing the third clause of the section (relating to the original jurisdiction) it was said:

"Here is also a distinct grant of power. The first of the section is restrictive, one of limitation merely. The two last are clear grants of the power, the one of which gives the power of a superintending control over inferior courts; the other giving the power to issue certain writs in appropriate cases, and to hear and determine the same."

These constitutional provisions were again considered by the court in a masterly opinion prepared by Chief Justice Ryan, in Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425. The opinion in that case was referred to and specifically approved by this court, both in State v. Nelson County and State v. Archibald, supra. In that opinion the conclusions reached in the Blossom Case, to the effect that there were three separate and independent grants of jurisdiction in the section quoted, were fully approved, and the court said (pages 515 et seq.):

"The framers of the Constitution appear to have well understood that, with appellate jurisdiction, the court took all common-law writs applicable to it; and with superintending control, all common-law writs applicable to that; and that, failing adequate common-law writs, the court might well devise new ones, as Lord Coke tells us as 'a secret in law.' Hence the Constitution names no writ for the exercise of the appellate or superintending jurisdiction of the court."

And again:

"The grant of original jurisdiction is one entire thing, given in one general policy, for one general purpose, though it may have many objects and many modes of execution. So it is of the appellate power. So it is of the superintending control. There are three independent and distinct grants of jurisdiction, each compact and congruous in itself; each a uniform grant of analogous remedies, though to be exercised in several ways, by several writs, in legal and equitable proceedings, on many objects, in great variety of detail. The Constitution wisely, almost necessarily, stopped with the general grants of jurisdiction, carefully distinguished, and left details to practice and experience. . . . The three grants of jurisdiction proceed on one policy; appellate jurisdiction to decide finally all ordinary litigation; superintending jurisdiction over all other courts to control the course of ordinary litigation in them; and, outside of these, original jurisdiction of certain proceedings at law and in equity, to protect the general interests and welfare of the state and its people, which it would not do (to quote Smith, J. . . .) to dissipate and scatter among many inferior courts."

The principles thus announced in Atty. Gen. v. Blossom, and Atty. Gen. v. Chicago & N. W. R. Co. were reaffirmed by the Wisconsin Supreme Court in State ex rel. Fourth Nat. Bank v. Johnson, 103 Wis. 591, 51 L.R.A. 33, 79 N. W. 1081. The opinion in the latter case was written by Judge Winslow. After referring to the decisions in Atty. Gen. v. Blossom, and Atty. Gen. v. Chicago & N. W. R. Co. and quoting with approval the language heretofore quoted from these opinions, the court said:

"It must be regarded as settled, therefore, that by the constitutional grant of 'a general superintending control over all inferior courts' this court was endowed with a separate and independent jurisdiction, which enables and requires it in a proper case to control the course of ordinary litigation in such inferior courts, and was also endowed with all the common-law writs applicable to that jurisdiction. What those writs are, and the manner of their use, are questions which have not as yet been directly presented or decided, but they are necessarily involved in the present case, and hence must now be considered. That the makers of the Constitution used the words in question understandingly,

and with a specific meaning, and not as a mere rhetorical flourish or high sounding form of words, can admit of no doubt. Only a superficial knowledge of the growth and development of the English judicial system is necessary to determine what that meaning was and is. The English Court of King's Bench had a superintending jurisdiction over all the inferior courts of the realm, which it freely exercised by the use of well-defined writs from very early times. The Norman idea was that the king was the fountain of all justice, and hence, when an inferior court exceeded its jurisdiction, or refused to act within its jurisdiction to the prejudice of a suitor, and no other remedy was provided, application could be made by the aggrieved party to the king's court to restrain or compel action. The King's Bench was peculiarly the king's court, in which he sometimes sat himself, and was always supposed to sit when not personally present. It succeeded in this respect the very ancient aula regis when (near the close of the Norman period) that court was divided into the Courts of the King's Bench, Common Pleas, and Exchequer. Being the king's court, it was natural, if not inevitable, that the king's sovereign power of causing justice to be done to his subjects in the course of litigation in inferior courts should be administered by and through that court. Blackstone says of this court (3 Com. chap. 4, p. 42): 'The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove the proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition. It takes cognizance both of criminal and civil cases; the former in what is called the crown side or crown office, the latter in the plea side of the court.'

"It is very apparent that when the makers of the constitution used the words 'superintending control over all inferior courts' they definitely referred to that well- known superintending jurisdiction of the Court of King's Bench. In England it was a branch of the king's power lodged with the king's court; in this country it is a branch of the sovereign power of the people, committed by them as a sacred charge to this court, not to be exercised upon light occasion, or when other and

ordinary remedies are sufficient, but to be wisely used for the benefit of any citizen when an inferior court either refuses to act within its jurisdiction, or acts beyond its jurisdiction to the serious prejudice of the citizen. 2 Spelling, Extr. Relief, § 1388."

103 Wis. 613, 614.

The Constitution of the state of Montana contains a provision identical with § 86 of the North Dakota Constitution. See Montana Constitution, § 2, art. 8. The provision of the Montana Constitution was construed in State ex rel. Whiteside v. Dist. Ct. 24 Mont. 562, 63 Pac. 400. In its opinion in that case, the court said:

"As the appellate jurisdiction was granted for the purpose of revision and correction, and the original jurisdiction under these writs was granted to enable us to render such relief as is appropriate under them, so the supervisory power was granted to meet emergencies to which those other powers and instrumentalities are not commensurate. It is independent of both, and was designed to infringe upon the functions of neither. It has its own appropriate functions, and, without undertaking to define particularly what these functions are, we think one of them is to enable this court to control the course of litigation in the inferior courts where those courts are proceeding within their jurisdiction, but by mistake of law, or willful disregard of it, are doing a gross injustice, and there is no appeal, or the remedy by appeal is inadequate." 24 Mont. 562.

This doctrine has subsequently been reaffirmed by the Montana court in many cases. See State ex rel. Anaconda Copper Min. Co. v. District Ct. 25 Mont. 504, 65 Pac. 1020; State ex rel. Sutton v. District Ct. 27 Mont. 128, 69 Pac. 988; State ex rel. Shores v. District Ct. 27 Mont. 349, 71 Pac. 159; State ex rel. Parrot Silver & Copper Co. v. District Ct. 28 Mont. 528, 73 Pac. 230; Re Weston, 28 Mont. 207, 72 Pac. 512.

The Constitution of our sister state, South Dakota, also contains a provision, the language of which is identical with section 86 of the North Dakota Constitution. See Constitution S. D. article 5, § 2. The supreme court of South Dakota has held that—

"This provision vests the supreme court of that state with authority, to be exercised within its judicial discretion, to review by means of appropriate writs "the proceedings of subordinate courts in cases where

the action complained of is beyond the discretionary powers of such courts, or when there is an abuse of such discretion, and the remedy by appeal is inadequate and the case is urgent, and the circumstances require prompt action on the part of this court, to prevent injustice and injury resulting." Huron v. Campbell, 3 S. D. 309–317, 53 N. W. 185; Vine v. Jones, 13 S. D. 54, 82 N. W. 82.

The records of this court bear ample evidence that this court has not only recognized and declared the existence of the power of superintending control over inferior courts, but that it has had no hesitancy to exercise the power in proper cases. Thus the power has frequently been repeatedly exercised to review orders relating to a change of venue in criminal cases. See Murphy v. District Ct. 14 N. D. 542, 105 N. W. 728, 9 Ann. Cas. 170; Zinn v. District Ct. 17 N. D. 135, 114 N. W. 472; State v. Winchester, 18 N. D. 534, 122 N. W. 1111, 21 Ann. Cas. 1196; Lowe v. District Ct. 48 N. D. 1, 181 N. W. 92. See also State ex rel. Enderlin v. Rose, 4 N. D. 319, 26 L.R.A. 593, 58 N. W. 514; State ex rel. Dorgan v. Fisk, 15 N. D. 219, 107 N. W. 191; Selzer v. Bagley, 19 N. D. 697, 124 N. W. 426; State ex rel. Red River Brick Corp. v. District Ct. 24 N. D. 28, 138 N. W. 988.

In State ex rel. Enderlin v. Rose, supra, the sheriff had attached property in the hands of an assignee for the benefit of creditors. The district court upon affidavit of the assignee made an ex parte order, directing the sheriff to return the property to the assignee. On an original application for a writ of certiorari this court held the order made by the district court to be void, and hence directed that it be set aside. The court further held that the case was not before the court on appeal; that the writ had been issued by the supreme court, not in the exercise of its appellate jurisdiction, but under the power of superintending control over inferior courts vested in it by section 86 of the Constitution. In considering the function of the superintending power, in State ex rel. Red River Brick Corp. v. District Ct. supra, this court said:

"When a proper case arises for the exercise of this power, the writ necessary to fit the case may take the nature of a command or of a prohibition, or, to enable the court to determine its character, it may be found necessary to issue a preliminary writ requiring records to be certified up, and this may be done. We are satisfied that the author-

ities to which reference has been made are applicable here, and that their determination of the purpose of the Constitution framers in granting this superintending control is correct. It has been so intimated in several of the cases decided by this court, to which reference has been made. Whether or not the remedy by appeal is adequate or speedy, must be determined by the exercise of the sound discretion of this court, applied to the facts in each given case. . . . We are satisfied that the power of superintending control is very broad, but in line with the authorities cited, and many more which have been examined, we feel constrained to hold that this power should not be exercised except in case of emergency or exigency, or when made necessary by the lack of other adequate remedy, or when the ends of justice imperatively demand it." 24 N. D. 32, 33.

In State ex rel. Fourth Nat. Bank v. Johnson, 103 Wis. 591, 51 L.R.A. 33, 79 N. W. 1081, relief was granted against a certain order relating to the account of an assignee. The order of the trial court was appealable, but it was held that the remedy by appeal was not adequate.

State ex rel. Anaconda Copper Min. Co. v. District Ct. 25 Mont. 504, 65 Pac. 1020, involved, and relief was afforded against, an order made by the district court, relating to certain mining property, whereby one of the parties to the litigation was granted permission to enter and inspect certain surrounding mines for the purpose of obtaining evidence in connection with the pending litigation.

The decisions of our own state, as well as the decisions of Wisconsin, Montana, and South Dakota, fully sustain the conclusion that this court, by virtue of its power of superintending control over inferior courts, has authority to grant relief against the restraining order erroneously issued in this case.

3. Do the facts in the case require this court to grant the relief asked? We think they do. The restraining order was not appealable. Comp. Laws 1913, § 7841, subd. 5. It is true, if the defendants had moved in the district court, upon notice, that the restraining order be set aside, an appeal would have lain from the order refusing to vacate the restraining order. In the circumstances of the case, however, we do not believe that this relief would have been adequate. In other words, we are of the opinion that the facts and circumstances in the

case are such as to justify the exercise of the supervisory jurisdiction, and to require this court to issue a writ directing the district court, and the judge thereof, to set aside the restraining order issued at the commencement of the action.

We express no opinion as to the merits of the cause, or causes, of action, purported to be set forth in the complaint. What we have said in the opinion is directed solely to the restraining order issued at the commencement of the action.

BIRDZELL and BRONSON, JJ., concur.

GRACE, Ch. J. (concurring specially). Under section 86 of the Constitution, this court has a general superintending control over all inferior courts. The facts and circumstances of this case are of the character to warrant the exercise of the supervisory power of this court and, in the exercise of that power, it is proper to issue a writ, requiring and directing the district court and the judge thereof to set aside the restraining order issued at the commencement of the action.

There is no necessity here to consider the merits of the alleged cause or causes of action.

ROBINSON, J. (dissenting). The plaintiffs bring this action in Stutsman county against the governor and nearly all the state officers and the Bank of North Dakota. The complaint is multifarious in the extreme. It covers seventeen pages of single-space typewriting. In a general way it charges all the defendants with official misconduct, and demands that each and all of the state officers be enjoined and restrained from doing any more wrongs. The demand covers two full pages. Pending the action all the defendants were enjoined from depositing any funds belonging to the state or any political subdivision of the same in the Bank of North Dakota. (2) Frazier, Lemke, Hagan, and Cathro from accepting for the purpose of depositing any funds from any source, public or private. (3) Frazier, Hall, John Steen and Poindexter from preparing, issuing, sealing, or assigning any bonds upon property of the state or state-owned utilities. (4) Poindexter from auditing any accounts or paying the same or recommending the same for payment and from depositing any money in the Bank

of North Dakota. (5) Steen from mixing and confusing funds. (6) Frazier, Lemke, Poindexter, Hagan, and Steen from fixing any state levy to pay interest on bonds of the state-owned utilities. (7) Spitzer-Rorick & Company from selling any bonds of the state. (8) Wallace, tax commissioner, from issuing any orders in respect to the state tax levy, so far as it relates to bonds issued upon property of the state. (9) Frazier, Lemke, Hagan, and Cathro from disbursing any funds in the State Bank other than checks to bona fide depositors.

Well, that is a fair sample. The effect of the injunctional order was to put a brake on all the official business of the state officers. This suit presents matters of strictly public concern, involving questions affecting the rights of the state. It presents an emergency, and so on application to this court an order was promptly issued, revoking the temporary injunction and directing the trial judge to certify the case to this court. The name of the order is of no consequence. You may call it certiorari or what you will. It was issued under the supervisory jurisdiction and the original jurisdiction of this court. Laws 1891, chap. 118. State ex rel. Moore v. Archibald, 5 N. D. 359, 66 N. W. 234. Now the matter is properly before this court for a final determination. The case presents only two questions: (1) Was the action properly brought in Stutsman county; did the court have jurisdiction? (2) Does the complaint state facts sufficient to invoke equity jurisdiction?

The bank defendant is an agency of the state, and is subject to the absolute control of three state officers. The state owns the bank and all its property and effect. The bank is organized under a special act, which provides how it may be sued. Laws 1919, chap. 147. Actions against the bank shall be brought in the county where the bank has its principal place of business, except as otherwise provided by the Code. Sections 7415, 7416, 7418. As those sections do not relate to such an action as this, the exceptions do not apply to it. The plaintiffs sue as taxpayers to control the official action of state officers. They aver no special injury to themselves. If they may bring such an action in Stutsman county, then of course in any other county a few taxpayers may bring a similar action, and thus force the state officers to neglect their official business and pass their time in running around the state for the removal or defense of such actions. Hence, for those reasons,

and by force of the statute, we must conclude that a taxpayers' suit, such as this, to control the official action of the bank and the state officers, must be brought in Burleigh county and not in any other county.

2. The second point is on the sufficiency of the complaint. It is clearly multifarious. It includes as defendants several parties who have no common interest in the action. It improperly unites several causes of action. It is bad for want of equity. While the plaintiff may unite in the same complaint several causes of action for injuries, with or without force, to person or property, or either, the causes of action so united must all belong to the same class, and must affect all the parties to the action. Code, § 7466. As the complaint and the injunctional order show, against each defendant there is a different, though not a separate, complaint or cause of action. There is a different injunctional order. No court should enter upon the trial of such a conglomeration of heterogenous causes of action. If the plaintiffs, as taxpayers, have a meritorious cause of action against either the bank or any of the defendants to restrain them from official misconduct, their proper course is to commence the action in Burleigh county on a complaint stating concisely a cause of action affecting all the defendants and appealing to equity jurisdiction.

For reasons stated the action is dismissed.

SUSIE PICKLES, Respondent, v. JOHN ANTON, Appellant.

(189 N. W. 684.)

Malicious prosecution — action lies for instituting inquisition of lunacy without probable cause.

1. An action will lie in this state for the malicious prosecution, without probable cause, of a proceeding the object of which is to have a person adjudged insane and committed to the state insane asylum.

Notes.—On action for malicious prosecution for instituting lunacy proceedings, see note in 5 A.L.R. 1097.

On reasonable and probable cause of suspicion as mitigating damages for false imprisonment, see note in 45 L.R.A.(N.S.) 64.

On liability for arrest upon suspicion of insanity, see note in L.R.A.1916C, 230.

Malicious prosecution — previous relations between parties admissible to show malice.

2. For the purpose of showing the malice of the defendant in instituting such inquisition of lunacy against the plaintiff, the personal relations previously existing between the parties may be shown.

Malicious prosecution — evidence as to insanity charge held competent.

3. Where the charge of insanity, which forms the basis of an action for malicious prosecution, is based upon the alleged destruction of certain property, it is proper to show any facts and circumstances surrounding such destruction which tend to show the reason for the alleged destruction, or which tend to throw any light upon the mental condition of the person who was so charged with having committed such alleged insane act. It is, also, competent to show whether the defendant in making the charge of insanity to the public officials fully and correctly informed such officers of such facts and circumstances.

Malicious prosecution — probable cause for insanity charge held for jury; $6,000 held not excessive damages.

4. For reasons stated in the opinion it is *held* that in this case it cannot be said as a matter of law that the defendant had probable cause for instituting the inquisition for lunacy, that the prosecution thereof was not malicious, or that the verdict returned by the jury is excessive.

Opinion filed April 1, 1922. Rehearing denied September 9, 1922.

Malicious Prosecution, 38 C. J. § 17 p. 392 n. 50; § 21 p. 394 n. 78, 80; § 59 p. 420 n. 67; § 103 p. 451 n. 84; § 177 p. 490 n. 74, 76; § 180 p. 492 n. 88, 89, 90; § 193 p. 502 n. 19; § 197 p. 507 n. 40.

From a judgment of the District Court of Nelson County, *Cooley*, J., defendant appeals.

Affirmed.

Bangs, Hamilton & Bangs, for appellant.

The gist of the action is not the sanity or insanity of the plaintiff at the time of her arrest, but whether or not there was probable cause for her arrest, and the burden is always on the plaintiff to prove that the proceedings were instituted without probable cause and maliciously. Shong v. Stinchfield, 183 N. W. 268 (N. D.); Griswold v. Griswold, 77 Pac. 672 (Cal.).

The burden of proof is upon the plaintiff to prove both want of probable cause and malice. Merchant v. Pielke, 10 N. D. 48; Rhoads v. First Nat. Bk. 37 N. D. 421.

Even though it be held that a discharge by the county commissioners

of insanity is evidence of want of probable cause, it is only prima facie evidence, and not conclusive, and does not shift the burden of proof. Hiersche v. Scott (Neb.) 95 N. W. 494; Waring v. Hudspeth (Wash.) 135 Pac. 222; Noblett v. Bartsch (Wash.) 71 Pac. 551.

The burden of proof is upon the plaintiff to prove malice; it is not sufficient that it may be inferred from want of probable cause; actual malice must be proved. Waring v. Hudspeth (Wash.) 135 Pac. 22; Ton v. Stetson (Wash.) 86 Pac. 668; Krause v. Bishop (S. D.) 100 N. W. 434; Malloy v. Chicago, Mil. & S. P. R. Co. (S. D.) 148 N. W. 598.

The burden of proof is upon the plaintiff to prove both want of probable cause and malice. Merchant v. Pielke, 10 N. D. 48; Rhoads v. First Nat. Bank, 37 N. D. 421.

Cuthbert, Middaugh & Smythe, Frich, Roberts & Burke, for respondent.

The right to maintain such an action, whether based upon a malicious criminal prosecution or an abuse of civil process, is early recognized in this state in a very able and exhaustive opinion written by Chief Justice Corliss in Kolka v. Jones, 71 N. W. 558, 6 N. D. 461.

It is well settled that the voluntary dismissal of a suit is prima facie evidence of want of probable cause. Wetmore v. Mellinger (Iowa) 14 N. W. 722; Nicholson v. Coghill, 4 Barn. & C. 21; Burhans v. Sanford, 19 Wend. 417; Green v. Cochran, 43 Iowa, 544; Cooley, Torts, side page 185.

Such dismissal, unexplained, is as cogent evidence of want of probable cause as the failure of the prosecutor in a criminal action to make out a sufficient case to satisfy a committing magistrate. And yet it has been repeatedly held that the discharge of the plaintiff in the malicious prosecution action by a committing magistrate is prima facie evidence of want of probable cause. Cooley, Torts, side page 184; Bigelow v. Sickles (Wis.) 49 N. W. 106; Barhight v. Tammany (Pa.) 28 Atl. 135; Brown v. Vittur (La.) 17 South. 193; Smith v. Association (N. C.) 20 S. E. 963; Newell, Mal. Pros. p. 283.

It is necessary not only that there should be ground for believing that there was a cause of action, but also that the person bringing the action should have so believed in good faith. Ball v. Rawles, 93 Cal. 222, 28 Pac. 937; Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574.

"In an action for malicious prosecution where the facts are disputed and reasonable men might differ upon the conclusions to be drawn therefrom, the question of probable cause is for the jury upon proper instructions." Syllabus by the court, paragraph one, Shong v. Stinchfield, 183 N. W. 268.

This court has heretofore held that malice may be inferred by the jury from want of probable cause. Kolka v. Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

That probable cause becomes a question of law alone when the facts are not disputed, and then only when the record discloses that the plaintiff acted in the belief that he had probable cause. Kolka v. Jones, supra; Comeford v. Morwood, 34 N. D. 276, 158 N. W. 258.

PER CURIAM: This is an action for the malicious prosecution of an inquisition of lunacy. The complaint alleges, and the evidence shows, that, on or about March 28, 1919, the defendant filed an information, verified by him, with the commissioners of insanity of Walsh county in this state, charging the plaintiff with being an insane person; that a warrant was issued upon such information and the plaintiff arrested and taken into custody; that while in such custody she was imprisoned for one night in the jail of Grand Forks county and for about three days in the jail of Walsh county; that after a full hearing before the commissioners of insanity, the plaintiff was adjudged by said commissioners not to be insane, and was thereupon discharged.

The plaintiff charges that the proceeding before the commissioners of insanity was instituted maliciously, and without reasonable or probable cause, and that by reason thereof the plaintiff was brought into public scandal, infamy, and disgrace and suffered great anxiety and pain of body and mind to her damage in the sum of $20,000. The defendant interposed a general denial to the complaint. The case was tried to a jury and resulted in a verdict in favor of the plaintiff for $6,000, and defendant has appealed from the judgment.

In his brief on this appeal the defendant says: "The issues on this appeal are: Did the defendant have probable cause for swearing out the complaint charging plaintiff with insanity?

"Did the defendant prosecute the action maliciously?

"Is the verdict for $6,000 in favor of the plaintiff excessive?"

The plaintiff started to work for the defendant as his housekeeper in 1898 and continued to do so until 1912. Shortly after plaintiff entered into defendant's employment they commenced to live together for all purposes and intents as husband and wife. Such unlawful cohabitation commenced according to the testimony of the defendant about two weeks after plaintiff entered his employ, and according to the testimony of the plaintiff about one year after she entered his employment. The plaintiff claims that the defendant proposed marriage, and that the relations arose and continued to exist by reason of and on the strength of the promise of marriage. It appears in the record that a prior action was brought by the plaintiff against the defendant for a breach of promise to marry and that she was awarded a verdict in some amount in that action. In 1912 the plaintiff left the defendant and moved to her homestead some miles distant from defendant's farm and has continued to reside there from that time on. Interim 1912 and 1918, however, the defendant continued to visit the plaintiff at her home and their former intimate relations continued. In 1918 the defendant employed one Miss Ella Minden as his housekeeper. In the summer of 1918 the plaintiff came to defendant's house to see him and, according to the testimony of the plaintiff, she at that time entreated him to comply with his promise to marry her; that she at that time was pregnant as a result of her relations with the defendant and informed him of that fact; that she again came to see defendant in the fall of 1918 during the threshing season; that Ella Minden was at that time employed as a cook in the cook car with the threshing outfit; that on this occasion the plaintiff stayed in the house over night; that Miss Minden and her sister slept in the cook car and that the defendant slept part of the time in the cook car and part of the time in the barn. On March 6, 1919 the defendant was married to Miss Minden in Minnesota. He returned to his home in North Dakota on March 26, 1919. On that day the sheriff of Nelson county served summons and complaint on him in the action commenced by the plaintiff for breach of promise to marry. The evidence shows that prior to defendant's marriage the plaintiff sent Miss Minden certain indecent communications. The evidence also shows that when the defendant was on his way home from Minnesota, after his marriage, he was warned by one or two

persons that the plaintiff was watching the trains for his return and that he had better be on his guard as she would likely do him or his wife some harm. On arriving at his home the defendant was served with the papers in the breach of promise suit. After being so served on entering his house he found that certain clothing belonging to his then wife had been thrown into a trunk and slops poured on them; also, that the upholstery in certain chairs and a davenport had been cut, and he was informed by one of his laborers that these acts had been committed by the plaintiff. The defendant thereupon went to see the state's attorney of Nelson county and asked that the defendant be arrested for the acts that she had committed. He admits that in his talk with the state's attorney he said nothing whatever about the relations that had existed between him and the plaintiff throughout the years nor does it appear affirmatively that he informed the state's attorney of the breach of promise suit which had been brought and was then pending. After some discussion it was decided that the defendant should go and file an information before the commissioners of insanity of Walsh county charging the plaintiff with being insane. This he subsequently did. The defendant admits, however, that in presenting the facts to the county judge of Walsh county he said nothing whatever about the relations that previously existed between him and the plaintiff; nor did he say anything about the breach of promise suit which had been brought against him.

In this state it is settled law that an action will lie "for the malicious prosecution without probable cause of a civil suit, although the person of the defendant therein was not arrested or his property interfered with, and although no other special circumstances are shown to exist." Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558. Manifestly, greater injury is done and greater wrong committed by the malicious prosecution without probable or reasonable cause of an inquisition of lunacy. The right to maintain an action for the malicious prosecution of such proceeding is generally recognized and unquestionably exists, especially in jurisdictions where the rule announced in Kolka v. Jones, supra, prevails. See, 1 Cooley, Torts, 3d ed. 344; Kellogg v. Cochran, 87 Cal. 192, 12 L.R.A. 104, 25 Pac. 677; Smith v. Nippert, 76 Wis. 86, 20 Am. St. Rep. 26, 44 N. W. 846; Smith v. Nippert, 79 Wis. 135, 48 N. W. 253; Lock-

enour v. Sides, 57 Ind. 360, 26 Am. St. Rep. 58. In this case the court submitted to the jury for determination the questions of malice and probable cause. No exception was taken to any of the instructions, and there is no contention that they were in any manner erroneous. In our opinion it cannot be said as a matter of law either that the plaintiff had no cause of action, or that the verdict is excessive. While not controlling, it is significant that defendant's counsel did not move for a directed verdict. Neither did he move for a new trial on the ground that the jury under the influence of passion or prejudice had awarded excessive damages.

What has been said disposes of what defendant in his brief has denominated as the issues on this appeal. However, in the written brief, and also in the oral argument, reference was made to certain testimony which it is claimed was erroneously admitted. It is contended that the court erred in admitting testimony relating to the previous relations between the parties. It is contended that this evidence was not admissible in this action. We cannot agree with this contention. An action for malicious prosecution can be maintained only where the action or prosecution complained of has been instituted maliciously. In other words, malice is an essential element, and whatever tends to show the motive or intent of the prosecutor in instigating or instituting the proceeding complained of is properly admissible. 19 Am. & Eng. Enc. Law, 695. Hence any evidence tending to show that the proceeding or action complained of was instituted for the purpose of accomplishing a personal or private end is admissible. 19 Am. & Eng. Enc. Law, 695.

26 Cyc. 99 says: "Prior transactions occurring, and the personal relations previously existing between the parties to the present action, and feelings of hostility, enmity, and ill-will formerly subsisting may be shown upon the question of malice." The same rule was announced by this court in Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574. In Allison v. Bryan, 50 Okla. 677, 151 Pac. 610, the supreme court of Oklahoma states the rule thus: "In an action for malicious prosecution, evidence of the previous relations of the parties, which led up to the transaction which caused the prosecution to be instituted, is properly admissible, if it tends to throw any light upon the conduct of the parties, or either of them, whereby the jury might judge the mo-

tives that actuated them." See, also, Franczak v. Plotzki, 178 Ill. App. 279; Shanks v. Robinson, 130 Ind. 479, 30 N. E. 516; Clark v. Folkers, 1 Neb. (Unof.) 96, 95 N. W. 328; Bruington v. Wingate, 55 Iowa, 140, 7 N. W. 478; Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574. We are satisfied that it was entirely proper for the plaintiff to show the prior relations between the parties. It is indeed difficult to understand how the jury could have understood the facts in the case or been in any position to intelligently determine the motive which actuated the defendant in bringing the insanity proceeding unless they were informed of the relations which had existed between the parties before the insanity proceeding was instituted. This disposes of the errors assigned and argued.

In a dissenting opinion, however, it is stated that the "defendant was asked if he had not been too intimate with his wife before marriage;" and was required to answer such question over objection. The record on which the statement in the dissenting opinion is predicated is as follows: The defendant while being cross-examined under the statute testified that the plaintiff came to his place during the threshing season of 1918; that at that time his present wife (Miss Minden) was employed as cook in the cook car with the threshing machine then on the place. That upon this occasion the plaintiff stayed over night.

Q. Didn't she and your present wife have some trouble of whether she (plaintiff) should be permitted to stay in the house?

A. Why I told her she could stay in the house.

Q. And did she stay in the house?

A. Yes.

Q. And you and your present wife slept in the cook car?

A. My present wife did.

Q. And did you sleep there too?

A. That is my business.

Q. I am asking you, didn't you sleep there too?

Mr. Bangs: Objected to as immaterial, incompetent, and irrelevant, and having nothing to do with this case, and improper cross-examination.

By the court: Overruled.

A. My wife and her sister were in the cook car.

Q. My question is, did you sleep there too?

A. Do I have to answer that question?

Mr. Bangs: Has that anything to do with it at all?

The Court: I suppose it is hard to draw the line. He is testifying under the statute on cross-examination.

Mr. Cuthbert: It is to show what aroused this woman to commit the acts she did.

The Court: That is what I supposed. . . .

Q. I am asking you didn't you sleep out there too?

Same objection as set out above, and same ruling thereon.

A. I was in the cook car a while and I was in the barn. I had some blankets up there and I stayed there until pretty near morning.

In connection with this testimony it should be borne in mind that the defendant testified that upon this occasion, when the plaintiff slept in the house, she destroyed (smashed) a large quantity of eggs in the basement and also destroyed some canned fruit. The information for insanity purports to be based upon the alleged acts of the plaintiff in destroying such eggs and fruit in the threshing season in 1918, and the destruction of the clothing and furniture in March, 1919.

The defendant claimed that the insanity proceeding was instituted in good faith, upon the advice of the state's attorney of Nelson county, and by the action of the commissioners of insanity of Walsh county, after a full statement by defendant of the material facts. Manifestly the situation developed by the examination set forth above had a direct bearing upon the question whether the actions of the plaintiff in destroying the eggs were due to insanity or to a fit of anger. The existence of these facts known to the defendant, and concealed by him from the officers, had a direct bearing upon the question of his good faith in making the charge of insanity, and endeavoring to have the plaintiff committed to the insane asylum.

Judgment affirmed.

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

ROBINSON, J. (dissenting.) The lesson in this case is beware of widows. In the summer of life the plaintiff, a grass widow, with a boy Archie of seven, became the housekeeper of defendant, an industrious and thrifty farmer. Both were Scotch and their years were nearly the same. The lonely winter nights were passed in each other's company "till twixt the late and early." The result was what the French call a marriage of convenience. During twenty years, with some intermissions, they lived happily together. Then, as it seems, John found monotony in loving one who was past the age of bearing him an heir. He quickly wooed and won a young lassie who became his wife. The result was an action for breach of promise and a judgment against John for nearly $6,000, which he paid as a penance. But that was not all. At the time of commencing the suit the new wife was assaulted with several threatening letters of a vile and obscene character. John's home was invaded and turned into a nuisance. It was a clear case of malicious mischief and a misdemeanor. Comp. Laws, § 10,050. John called Sheriff Peterson, who viewed the damage and testified thus: The chairs of leather and upholstery were cut in different places with a knife. The cuts were from a half inch to 4 or 5 inches. The davenport or lounge was cut in the same manner. The trunk was filled with dirty clothing and slops. There was a hat box in the closet and someone had done a job in it. A fur coat was torn and the lining cut. He said to Anton: *The woman must be crazy to do such a thing as that.* Then, as the sheriff testified, John Anton rode with him to the state's attorney and he, the sheriff, told the state's attorney what he had seen in the house. The conclusion was that she should be arrested on a charge of insanity, though John made the statement that he did not see her do the work and his idea was to have her arrested on a charge of malicious mischief. But on the charge of insanity she was arrested and imprisoned four days and then discharged by the insanity board. She herself spoke to William Nash concerning the matter and said: I might have been a little off, but I was not crazy. And what she said is probably true. And it may well be true that after an imprisonment or restraint during four days on a spare diet she was sobered, and that when she appeared before the insanity board her mind was not in the same condition as when she committed the mischief. Nothing is more certain than that she

did commit the mischief for which she was liable in treble damages and to imprisonment for one year with a fine of $500. To say that she was crazy or "a little off" was the best excuse that could be given for her crime. Assuredly defendant had a right to invoke the protection of the law. He did as the officers of the law advised him. He preferred a charge of insanity when the real cause was malicious mischief. The plaintiff has no reason to complain that on a charge of insanity she was imprisoned four days when on a charge of malicious mischief she might well have been imprisoned for a year. She has no cause of action. Still she obtained a judgment against the defendant for $6,000.

The record evidence covers nearly four hundred pages and shows that from start to finish the trial was conducted as if it were a breach of promise case. On a pretense of showing malice or excusing the mischief, counsel for plaintiff offered evidence showing the amicable relations of the parties and the way they had lived together in harmony, under a promise of marriage, for nearly twenty years. The only purpose of such testimony was to inflame and prejudice the minds of the jurors. And for the same purpose, defendant was asked if he had not been too intimate with his wife before marriage. And against the most strenuous objections the court ruled that defendant must answer the question? It is almost incredible. By Mr. Cuthbert the purpose of the question was stated thus: "*To show what aroused the woman to commit the acts she did.*"

But the woman was not on trial for what she did. It is hard to conceive that such testimony was offered in good faith. Its effect and purpose must have been to influence and prejudice the minds of the jury and to secure an unjust verdict. That is further shown by the mass of irrelevant matter regarding the amours of the plaintiff and the defendant for a period of some twenty years. From the beginning to the end the record of the trial is swollen with such matters. The result is a verdict grossly, fearfully, and monstrously excessive, and it is against a man who has earned his little property by Scotch frugality and hard work. It is the natural result of a nefarious practice which permits a lawyer to prosecute a damage suit for a contingent fee of 50 per cent and at the same time to practice deception and

pose before the jury as a disinterested minister of justice. There should be a law or a court rule to put a stop to such a practice.

The only real question here presented is whether to dismiss the action or to remand it for a new trial. As we think, the action should be dismissed because the evidence clearly shows the plaintiff was the aggressor and defendant had a right to protect himself, his home, and his wife against her wanton depredations. The charge of insanity was made for self-protection and for no other purpose. It was made on the advice of the officers of the law and the advice of the sheriff who had seen the depredations and declared that no sane person would commit the acts she did. It was the mildest charge that could have been made against her. On the charge of a misdemeanor the punishment would certainly have been more severe. The plaintiff has no reason to complain.

On Petition for Rehearing.

PER CURIAM. Defendant has filed a forceful and able petition for rehearing. We have again reviewed the case, and feel impelled to adhere to our former decision.

We are entirely satisfied that an action will lie for the malicious prosecution, without probable cause, of a proceeding the object of which is to have a person adjudged insane. It has been held that the prosecution of such a proceeding without probable cause constitutes cruel and inhuman treatment within the contemplation of the laws relating to divorce so as to afford a ground for a divorce. Reichert v. Reichert, 124 Mich. 694, 83 N. W. 1008; Michels v. Michels, 120 Me. 395, 18 A.L.R. 570, 115 Atl. 161. It would seem that if the baseless prosecution of an insanity proceeding is a wrong of sufficient magnitude to justify the severing of the marriage ties, it ought to furnish a ground for the award of damages. And in our opinion it constitutes a legal wrong for which the party injured is entitled to be compensated. See Comp. Laws, 1913, § 7165.

The principal contention advanced in the petition for rehearing is that the court misapplied the rule announced in paragraph two of the syllabus. In the petition for rehearing it is said:

"We have no quarrel with the general principle enunciated by our

court in this case, nor with the general principle on the admissibility of evidence relating to prior relations as enunciated by the textbooks and decisions, but we do contend that the evidence of *friendly* relations existing between the parties in this action was not admissible to prove malice and by no stretch of the imagination could it prove malice."

As the name implies, malice is an essential ingredient of an action for malicious prosecution, and the authorities are unanimous in holding that there can be no recovery in such action unless it is established that the action or prosecution complained of was instituted maliciously. Existence of malice, however, is not enough to support such action. It must also be shown that the action or proceeding complained of was instituted without probable cause. The plaintiff, of course, has the burden of proving both malice and want of probable cause. Any evidence having a logical tendency to establish, on the one hand, the absence of probable cause, and on the other, the existence thereof, is admissible upon the question of probable cause (19 Am. & Eng. Enc. Law, p. 694); and whatever tends to show the motive or intent of the prosecutor in instigating or instituting the proceeding is properly admissible on the question of malice. Id. p. 695. So the plaintiff may introduce evidence tending to show that the defendant by the institution of the action or proceeding complained of sought to accomplish some personal or private end (id. p. 695). And the defendant may adduce any evidence having a logical tendency to rebut the showing made by the plaintiff. He may even testify "as to his motive and that he was not actuated by malice, ill will, or desire to harass the plaintiff in instituting or conducting the proceedings complained of, and that he honestly believed in the plaintiff's guilt or liability." Id. p. 695.

Malice need not be shown by direct and positive testimony. It may be established by circumstantial evidence, i. e., inferred from circumstances. "Malice, indeed, is a fact which in the nature of things is difficult if not incapable of positive, direct proof, and must therefore rest on inferences and deductions from facts, for which reason a wide range is permitted in adducing attendant circumstances that tend to throw any light upon the subject." 19 Am. & Eng. Enc. Law, 695, 696. The malice necessary to sustain an action for malicious

prosecution need not necessarily be ill will towards the plaintiff. Legal malice will support the action, and any unjustifiable motive constitutes legal malice. Kolka v. Jones, 6 N. D. 461, 473, 66 Am. St. Rep. 615, 71 N. W. 558. Judge Cooley says: "Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or corrupt design be shown." Cooley, Torts, 185. Hence any evidence having any logical tendency to show the reason or motive which impelled the institution of the action or prosecution complained of is admissible. 19 Am. & Eng. Enc. Laws, 695.

The purported purpose of the complaint made by the defendant was to have an alleged insane person apprehended and incarcerated in the state insane asylum. The purported purpose was not only lawful but commendable. One of the principal questions in the case is whether the defendant had probable cause to believe, and whether he honestly believed, that the plaintiff was insane. If he did, of course, he has committed no actionable wrong. If, however, he had no probable cause to, and did not, so believe, then the proceeding was instituted without probable cause, and malice may be inferred from that fact alone. Kolka v. Jones, supra.

How could the jury pass intelligent judgment upon the motive or purpose of the defendant in instituting the proceeding, or upon his belief as to the truth of the charge of insanity made by him if they knew nothing of the prior relations between the parties? Should the action of the defendant be judged by the jury as though he had made the charge of insanity against some strange or unknown woman who, in his absence, had entered his house and committed the acts on which the information in the insanity proceeding was based? To ask the question is to answer it. In order to judge of the mental attitude of the defendant, it was essential that the jury have as much knowledge as possible of any and all facts which had a reasonable tendency to influence his actions. The very existence of the relations which had formerly existed between the plaintiff and defendant, it seems to us, furnished some reason why the defendant might have desired to have the plaintiff incarcerated in the insane asylum, even though he did not believe her to be insane. He had just been sued for breach of promise to marry. He had just returned with his wife, and they were

about to take up their residence on his farm,—where he had lived for so many years with the plaintiff. Was it not much more to his interest to have her thus taken out of the community and placed in an insane asylum than to sue her for damages or have her arrested for injuring his property? The fact that the plaintiff may have committed certain unlawful acts would not justify the defendant in charging that she was insane and attempting to have her incarcerated in an insane asylum. In other words, it would not furnish probable cause for the inquisition for lunacy. Reasonable or probable cause depends upon the honest and reasonable belief of the party commencing the prosecution that the charge made is true. "The question of probable cause applies to the nature of the suit; and the point of inquiry is whether the defendant had probable cause to maintain the particular suit upon the existing facts known to him." Newell, Malicious Prosecution, p. 252. Defendant was permitted to introduce all of his evidence relating to the wrongful conduct of the plaintiff. Not only the facts concerning the destruction of property but all of plaintiff's acts with respect to the defendant and his wife were inquired into at great length. This evidence was all submitted to the jury, and was doubtless considered by them in determining whether defendant at the time he instituted the inquisition for lunacy entertained an honest and reasonable belief that she was insane; also, whether in instituting the proceeding he was actuated by justifiable motives.

As stated in the former opinion, in making his complaint to the state's attorney of Nelson county and to the county judge of Walsh county, the defendant made no reference whatever to the relations which had previously existed between himself and the plaintiff; nor did he inform them of the then pending breach of promise suit. In other words, he did not make to them a full and fair statement of all the facts within his knowledge at that time. On the contrary facts having a material bearing upon the very proposition then under consideration were not related. In view of all the circumstances we are not prepared to say, as a matter of law, either that the defendant had probable cause for instituting the insanity proceedings or that he was not actuated by malice in so doing.

Rehearing denied.

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

ROBINSON, J. (on petition for rehearing). In law there is many a slip which leads to oppression and robbery. This case will serve as an example. According to the decision, it seems the action is based on slips—mere slips—made by the defendant—on slips by his attorneys—on slips by the officers of the law—on slips by the courts—and for such slips, defendant must pay from his hard earnings, $6,000.

This appeal is from a judgment for $6,000, for a breach of promise. On the pleadings, this case appears to be an action for malicious prosecution, but such were the slips of the law, and the cunning of counsel, that on the testimony, and the argument of the case, it became a second action for a breach of promise. In the first action for breach of promise, plaintiff recovered $6,000, which defendant paid, and in this action, for the same identical cause.

There is a judgment against him for another $6,000. It appears that for twenty years prior to the commencement of the action, the plaintiff passed the greater part of her time as the housekeeper and mistress of defendant. Then he married another woman and the plaintiff brought suit for a breach of promise and recovered $6,000, which defendant paid. That was his penance; that was in full settlement of the love affairs, but like a crazy woman, she went to the house of her former lover, cut up the furniture, and turned the house into a nuisance, and wrote scandalous and unprintable letters to the young wife. For that insane procedure, she was arrested on the charge of insanity. The charge was made on the advice of the sheriff, who went to the house of defendant, saw the depredations and declared that no sane woman would be guilty of such conduct. The other officers of the law agreed with him, and so defendant was arrested and was in the custody of the sheriff four days and then discharged. Then this action was commenced, to recover damages for the arrest, but on the trial, it was conducted from start to finish as if it were an action for a breach of promise, and so the first judgment was duplicated. The transcript of the testimony covers 360 typewritten pages, and nearly all pertain to the twenty years of illicit love, and the breach of promise. Defendant was first called as a witness for cross-examination.

His testimony covers 80 pages. It all relates to the story of illicit love. Of course it was all given under objections. It served no purpose only to present a false issue and to influence the minds of the jurors, and so when the case was reargued before this court, counsel for plaintiff dilated on all the details of the illicit love just as though it were a breach of promise case, and of course he argued the case in the same way before the jury. There is not in the case a word of testimony in any way tending to show any feud, malice, or ill-feeling between the parties, until the commencement of the depredations and the commencement of the suit for breach of promise. That was the cut-off. There we must draw the line. All testimony regarding prior friendly relations was clearly irrelevant and prejudicial. It had not the least tendency to prove malice. It was not offered for the purpose of proving malice. It was offered only to prejudice the jury. That is clear and manifest. The argument was not on damages by reason of arrest, in fact, she was in no manner abused or ill-treated, or damaged. Part of the time, her son of twenty-seven years was her custodian and jailer. Her actual damages amounted to practically nothing. In fact, there is good reason for believing that the arrest was beneficial. It seemed to have brought her to her senses and to have made her ashamed of her disgraceful and nefarious conduct.

Now counsel for defendant moved for a rehearing on two principal grounds:

(1) Because of error in the admission of the mass of irrelevant testimony;

(2) Because of excessive damages given under the influence of passion and prejudice.

In denying a rehearing not a word is said concerning the excessive damages and no attempt is made to justify the admission of the mass of irrelevant testimony. It is true that in the original opinion several cases are cited to sustain such testimony, but in the motion for rehearing, it is shown that the cases cited have no relevancy. This is probably the first case in all the law books where a verdict has been sustained when based on such a mass of prejudicial and irrelevant testimony. As shown in the petition for rehearing, the only purpose of such love testimony was to inflame and prejudice the minds of the juries and to appeal to their passion and prejudice. Very much do I

regret the decision and the order denying a rehearing. It virtually gives the plaintiff a reward of $6,000 for the commission of a gross misdemeanor. I cannot but regard it as a gross miscarriage of justice. I hope it may show the pressing necessity for amending the law in regard to such cases, and in regard to the contingent fees of attorneys. In such a case, the attorney who works for a contingent fee of 50 per cent should be made a party to the action and not permitted to pose as a disinterested minister of justice, and his fees should be limited to a reasonable percentage of the amount recovered.

J. B. BOYD, Respondent, v. G. W. LEMMON, et al., Appellants

(189 N. W. 681.)

Trial — clerk's minutes of court's decision do not constitute written decision.

1. In an action for an accounting tried in May, 1911, the court, according to the clerk's minutes, found that there was a balance due the plaintiff, ordered a judgment in his favor and directed the plaintiff's counsel to prepare findings in harmony with the statement of the account as presented to him by the court. Except as the minutes of the court's decision appears, entered by the clerk in his minutes, there was no written decision and no findings of fact, conclusions of law and order for judgment filed with the clerk. In July 1921, after an ex parte hearing, the successor of the judge who tried the case directed the entry of a judgment in favor of plaintiff and judgment was thereupon accordingly entered. Thereafter defendants moved to vacate the judgment and asked leave to file an amended answer setting up, among other defenses, the statute of limitations, a discharge in bankruptcy and laches. It is held:

The clerk's minutes do not constitute a written decision filed with the clerk as required by § 7638, Comp. Laws 1913.

Judgment — refusal of court to vacate judgment, where answer shows good defense improper exercise of discretion.

2. The motion to vacate the judgment in the instant case invokes the exercise of discretion by the trial court, and, inasmuch as the proposed answer excuses defendants' neglect and sets forth defenses which are prima facie good, it is held that the discretion was not properly exercised.

Appeal and error — order within discretion of court, denying motion to vacate judgment, appealable.

3. Where a motion to vacate a judgment is made upon grounds which appeal to the discretion of the court, raising questions not predicated solely upon

errors of law occurring anterior to the judgment, an order denying the motion to vacate is appealable to this court under subdivision 2 of § 7841, Comp. Laws 1913.

Opinion filed July 7, 1922. Rehearing denied Sept. 9, 1922.

Appeal and Error, 3 C. J. § 269 p. 457 n. 31: § 355 p. 523 n. 16. Judgments, 34 C. J. § 524 p. 305 n. 69: § 580 p. 370 n. 73. Trial, 38 Cyc. p. 1951 n. 91.

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

Motion to dismiss denied and order reversed.

John G. Peffer, for appellants.

"Courts of equity refuse relief where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence, in the assertion of adverse rights." Hatcher v. Hall, 77 Va. 573.

"It is a settled doctrine of courts of equity that unexplained delays in the prosecution of a right until it becomes stale, constitutes such laches as forfeit the interference of a court." Matthews v. Wilson (Ind.) 67 N. E. 280.

"Lapse of time, when it does not operate as a positive statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver, and delay in the assertion of a right unless satisfactorily explained, may operate in equity as a waiver of such right, and laches and neglect are always discountenanced by a court of equity." Delly v. McQuinn (W. Va.) 26 S. E. 517.

While some delay in the assertion of a right is always an essential element of laches, unreasonable delay alone, independently of any statute of limitations will often operate as a bar to relief. 21 C. J. 219.

Public policy and the peace and welfare of society are frequently given as reason for rejecting demands because of staleness. Dominquez v. Dominquez, 7 Cal. 424; Perkins v. Cartwell (Del.) 42 Am. Dec. 753; Patterson v. Hewitt (N. M.) 55 L.R.A. 658; Wiseman v. Hunter (S. C.) 14 Rich. Eq. 167; Morgan v. Fisher (Va.) 82 Va. 417; McKnight v. Taylor (U. S.) 11 L. ed. 86; Speidell v. Henrici (U. S.) 15 Fed. 753.

Acts inconsistent with the further prosecution of a pending suit may be deemed an abandonment of the suit. 1 Cyc. 756.

Appellants cannot be said to be guilty of laches. That is beside

the issue. Respondent cannot by claiming laches seek to destroy the force of the principal of law which this court must now determine. The court is not dealing with a judgment in good standing, but a judgment which was entered upon the order of the lower court in plain disregard of the mandatory statutes. Such judgments are always susceptible to attack. Freeman v. Wood, 11 N. D. 1 and 14 N. D. 95; Sjelbred v. Schaefer, 15 N. D. 539; Williams v. School District, 21 N. D. 198; 1 Black on Judgments, § 307 page 383; Gillfillan v. Chatterton, 37 N. W. 583; 1 Black on Judgments, § 313, page 388.

Where a discharge is granted pending a suit the defense of discharge in bankruptcy is regularly permitted to be set up by amendment or supplemental answer or other proper pleading. Richards v. Nixon, 20 Pa. 19; Lyon v. Isett, 34 N. Y. Supp. 41; Holyoke v. Adams, 59 N. Y. 233; Fellows v. Hall, No. 4722, Fed. Cas.; 3 McLean, 281; Kunzler v. Kohaus, 5 Hill (N. Y.) 317; Keene v. Mould, 16 Ohio, 12.

Judgments by default have frequently been set aside to allow a plea of discharge. Savings Bank v. Webster, 48 N. Y. 21; Lee v. Philips, 6 Hill (N. Y.) 246; Cater v. Goodrich, 1 How. Prac. (N. Y.) 239; Shurtleff v. Thompson, 63 Me. 118; Park v. Casey, 35 Tex. 536; Manwarring v. Kound, 35 Tex. 171.

Grimson & Snowfield, for respondent.

"As a general rule an appeal or writ of error will not lie, unless the case comes within some special statutory provision, from a judgment or order opening, vacating, or setting aside a judgment, order or decree previously rendered in the cause, or from an order refusing to open, vacate, or set aside same or imposing terms as a condition precedent to the vacation of a judgment." 3 C. J. 521. See also cases cited in the notes of the above quotation. See also the cases of Travelers Insurance Co. v. Mayer, 2 N. D. 239, 50 N. W. 703; Strechler v. Railson, 19 N. D. 677.

"An order of the trial court granting or refusing to open, vacate, or set aside a judgment will not be reviewed on appeal in the absence of the evidence before the trial court." 3 Cyc. 174. See also case of Angel v. Delmas, 60 Cal. 254; Powell v. Boring, 44 Ga. 169; Read

v. Divilbliss, 41 N. W. 580; and other cases cited in note 1 page 174 vol. 2 Cyc.

"A refusal to open a default judgment cannot be reviewed when the record does not contain the proposed answer." Schmidt v. Bradley, 1 N. E. 267.

"An order of the trial court granting or refusing an application to open, vacate or set aside a judgment will not be reviewed upon ap- to open the absence of the evidence." 4 C. J. 140. See also the cases of Angell v. Delmas, 60 Cal. 254; Angell v. Delamas, 60 Cal. 254; Powell v. Boring, 44 Ga. 169; Vogelsang v. Fredkyn 133 Ill. App. 356; Wheeler Chemical Works v. Alexander, 30 Ill. App. 502; Johnson v. Crane, 22 Ill. App. 366; Weaver v. Kennedy, 142 Ind. 440, 41 N. E. 810; Tomlinson v. Beard, 69 Ind. 309; Covault v. Sanders, 34 Ind. App. 14, 72 N. E. 163; Read v. Divilbliss, 77 Iowa, 88, 41 N .W. 580; Judy v. Newport First National Bank, 38 S. W. 711, 18 Ky. L. 880; Bryant v. Rosenbaum, 62 Miss. 191; Lewis v. Graham, 16 Abb. Pr. 126; Lee v. Benedict, 82 Ohio St. 302, 92 N. E. 492; Taylor v. Fitch, 12 Ohio St. 169; Smith v. Flanders (Tex. Civ. App.) 122 S. W. 80.

"A motion to vacate or set aside a judgment is addressed to the sound legal discretion of the trial court on the particular facts of the case. And consequently its determination will not be disturbed on appeal unless it is plain that its discretion has been abused." 23 Cyc. 895; Cross v. Hillsboro National Bank, 38 N. D. 261; First State Bank v. Krenelka, 23 N. D. 568; Mfg. Co. v. Pavlikeek, 21 N. D. 22.

"Under the express terms of the statute § 7433, Comp. Laws, 1913, an application to vacate a default judgment on the grounds of mistake, surprise, or excusable neglect is addressed to the sound judicial discretion of the trial court on the particular facts of the case and consequently its determination will not be disturbed unless it is plain that its discretion has been abused." Wakeland v. Hanson, 36 N. D. 129; Bucknell v. Archer, 135 N. W. 675; Kinkead v. Mariarty, 136 N. W. 101; Sanford v. Potter, 142 N. W. 469; Western Co. v. Voettcher, 156 N. W. 68.

"A finding that the defendant has a good and sufficient title to property is a sufficient finding of fact." Frazier v. Crowel, 52 Cal. 399.

"That the owner of property was in possession of certain property was held a sufficient finding of fact." Haley v. Nunan, 9 Pac. 523; S. P. Ry. v. Whitacker, 41 Pac. 1083.

It is not necessary that the findings be in any particular form nor is it necessary that they be in the form of the pleadings, the ultimate facts being all that is required. Upon this point see the following cases. Millars v. American Legion of Honor, 22 Pac. 864; 61 Pac. 360, 372; 91 Pac. 360.

BIRDZELL, Ch. J. This action was tried in May, 1911. The clerk's minutes show that in June, 1911, the trial court determined that there was a balance due to the plaintiff from the defendants of $8,561.27, and judgment was ordered in favor of the plaintiff for the amount. Plaintiff's counsel was directed to prepare findings in harmony with the order and with the statement of the account as presented to him by the court. Nothing further was done in the action until July, 1921, when an ex parte hearing was had before the successor of the judge who tried the case, resulting in the entry of judgment for $8,561.27, with interest from October 1, 1911, at 6 per cent. Six months later a motion was made and heard to vacate the judgment. The motion was denied and this is an appeal from the order denying it. The facts necessary to be stated are in substance as follows:

In April, 1909, the plaintiff commenced an equity action against the defendants, in which a receiver was appointed. Before the trial an involuntary petition in bankruptcy was filed, asking that the defendants be adjudged bankrupts. The defendants were adjudged bankrupt and received their discharge August 21st, 1911, the claim of the plaintiff in this action being listed among the liabilities in the bankruptcy proceedings as an undetermined claim. The discharge in bankruptcy was not pleaded in the action, nor was the pendency of the bankruptcy proceedings suggested. The minutes of the clerk of the district court for June 17, 1911, contain the following:

"After hearing the parties and due consideration of the respective claims, the one against the other and upon a full accounting the court finds that there is a balance due to the plaintiff from the defendants, including interest to date of the sum of $8,561.27, and orders judg-

ment in favor of the plaintiff for that amount, and counsel for plaintiff is directed to prepare findings in harmony with the order made at this time and with the statement of the account as presented to him by the court."

Nothing further was done in the action until July 28, 1921, when, upon an ex parte application of the plaintiff, the successor to the district judge before whom the case had been heard entered an order for judgment which, so far as material to the questions here presented, is as follows:

". . . that at the conclusion of the taking of said testimony the case was argued by counsel to the court and that the court then took the case under advisement and on the first day of October, 1911, gave oral notice to the attorneys for the plaintiff to prepare an order for judgment in favor of the plaintiff and against the defendants, G. W. Lemmon and J. J. Coliton for the sum of eight thousand five hundred sixty-one and 27/100 dollars; and it further appearing that no written order for judgment was in fact ever made or signed by the Hon. Charles A. Pollock, or any other judge of said court, and that no judgment has been entered in said case in accordance with the oral directions of said Charles A. Pollock, the then judge of this court; and

It further appearing that plaintiff is entitled to judgment against the defendants as heretofore directed by this court; now therefore,

It is hereby ordered that the plaintiff have and recover judgment against the defendants G. W. Lemmon and J. J. Coliton for the sum of eight thousand five hundred sixty-one and 27/100 ($8,561.27) dollars, with interest thereon from October 1, 1911, at the rate of six per cent per annum.

Let judgment be entered accordingly.

Dated July 28, 1921.

(Signed) A. T. Cole
Judge of the District Court."

At the ex parte hearing before the judge on the date the above order bears, the testimony of the former district judge and of the plaintiff's attorney was taken. The district judge testified that after ordering judgment to be entered he told the plaintiff's attorney to draw his order. He says:

". . . At that time clearly the defendants were bankrupt and

my information was that they had taken the Bankrupt Act, and I did not press Mr. Holt to furnish me with the order because of rush of business and other matters, and in view of the fact that the judgment was probably worthless, it wholly escaped my further attention. I now hold in my hand plaintiff's exhibit 'I.' which contains the following memorandum,—'Judgment authorized for Boyd for $8,561.27.' This memorandum is in the handwriting of Daniel B. Holt, one of the attorneys for the plaintiff, and the attorney whom I authorized to draw the order for judgment. . . . As to the date when this order was made, I cannot with exactness determine but I am quite sure that it was after August 25, 1911, and probably before January first of the following year. The direction which I gave to Mr. Holt to prepare the order for judgment was given orally and in my best judgment was made on or about October 1st, 1911."

The attorney, Mr. Holt, testified that after the trial the case was taken under advisement and that thereafter the judge notified him orally that he had decided to enter judgment for the plaintiff Boyd in the sum of $8,561.27; that his recollection of the amount was refreshed by a memorandum in his own handwriting which he found in his office files; that no order for judgment was prepared.

". . . for the reason that Mr. Boyd at the conclusion of the trial and the receivership proceedings was satisfied that Lemmon & Coliton were bankrupt and in fact bankruptcy proceedings had been started by them in the year 1910 and were then pending in the United States court, in which Lemmon & Coliton had been adjudged bankrupt, and Mr. Boyd stated to me that he did not care to proceed any further with the litigation, that nothing was to be gained thereby and to take no further proceedings and to do nothing further in the case, which doubtless explains why order for judgment was not entered as directed by Judge Pollock and judgment entered thereon. My recollection as to the date when this oral order was given to me by Judge Pollock is that it occurred some time after the 15th of September, 1911, and probably not before the first of October. . . ."

Judgment having been entered upon the ex parte application as above stated, on July 29, 1921, the defendants by motion, dated November 25, 1921, moved that the same be vacated. The motion was grounded upon several propositions, all of which it will not be neces-

sary to state. The principal contentions and grounds are that no written findings of fact and conclusions of law were prepared and filed as required by statute; that the court was without jurisdiction to order entry of judgment on July 29, 1921, or if the court had ordered judgment nunc pro tunc as of June 17, 1911, the date of the oral order of the former district judge, as it appears in the clerk's minutes the statute of limitations would have run against the judgment before the date of its actual entry, July 29, 1921; that plaintiff was guilty of laches; and that plaintiff had full knowledge of the pendency of the bankruptcy proceedings. In connection with the motion an amended answer was served, showing reliance upon the statute of limitations and the discharge in bankruptcy, dated August 21, 1911. The affidavit of merits, signed by the defendant Coliton, is to the effect that in 1911 he was not versed in the law and that he relied upon his attorney to protect his rights in the premises, and that he had no knowledge that his rights had not been fully protected until he learned of the entry of this judgment some time subsequent to July 29, 1921.

The sole specification of error is that the court erred in denying the motion to vacate the judgment and in ordering that the plaintiff recover costs in the sum of $10.

Upon this record we are of the opinion that the trial court erred in denying the motion to vacate the judgment. If, as contended by the respondent, it was proper that a judgment be entered upon the oral findings of the trial court, as noted in the minutes dated June 17, 1911, laches would be a good defense to any attempt to enforce the obligation, just as the statute of limitations would have barred an action upon the judgment had it been duly entered. Had the plaintiff done that which he neglected for more than the period of the statute of limitations to do, namely, cause a judgment to be entered, the defendants would have had a complete legal defense to its enforcement before any subsequent steps were taken in this action by the plaintiff. Certainly the failure for so long a time to take such action was laches.

On the other hand, if the minutes did not amount to a written decision filed with the clerk and containing findings of fact and conclusions of law, constituting a compliance with the mandatory provisions of the statute (Comp. Laws. 1913, §§ 7638, 7639; Crane v. First

Nat. Bank, 26 N. D. 268, 144 N. W. 96), no findings have as yet been made and the judgment cannot stand. So if this view be adopted the judgment should be vacated and the subsequent proceedings in the action rendered open to the defenses of laches and bankruptcy.

We are of the opinion that the minutes do not evidence a written decision filed with the clerk as required by § 7638 and the authority cited above. Obviously the trial court was not finally committed to any such decision, as the minutes clearly indicate that findings were to be prepared by plaintiff's counsel in harmony with the decision announced. In our opinion the annoucement of the decision, as noted in the minutes, was merely a preliminary step looking toward the ultimate disposition of the case by the rendition of such a judgment as the court would later authorize to be entered upon the signing of the findings and conclusions and order for judgment. The decision could be altered at the will of the trial judge to conform to such views as he would entertain at the time of signing an order for judgment. We cannot hold that a written memorandum made by the clerk in his minutes is a decision "reduced to writing and filed with the clerk," within the statute.

The respondent attempts to demonstrate that the defendants are guilty of laches in not earlier moving to interpose the bar of bankruptcy; but we are of the opinion that the affidavit of merits, showing reliance upon their counsel, accompanied by the protracted delay of the plaintiffs in pursuing their rights in the action, if any, amply excuses the failure of the defendants to take the initiative. The defendants might well have acted upon the old adage "Let sleeping dogs lie." Laches is chargeable to the plaintiff rather than to the defendants, especially in view of the testimony of the plaintiff's attorney, wherein he said that the plaintiff had stated to him that he did not care to proceed any further with the litigation, that nothing was to be gained thereby, and directed that he take no further proceedings. This is an abandonment of the suit short of the rendition of judgment such as would warrant a dismissal for lack of prosecution.

Respondent has moved to dismiss the appeal on two grounds; first, that the errors, if any, occurring anterior to the entry of the judgment are errors of law which can be reviewed on an appeal from the judgment and consequently should not be reviewed upon an appeal from an

order after judgment; and second, that the record certified to this court is not complete. We are of the opinion that the motion to dismiss should not be granted. The motion to vacate the judgment, it will be observed, was not based solely upon grounds affecting the validity of the judgment as a matter of law. If the sole attack had been upon the ground that the judgment was not based upon findings and conclusions as required by the statute, the errors of law would have required the reversal of the judgment upon appeal. See Prondzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23. There would then have been much force to counsel's contention that the appeal should have been from the judgment; for the motion to vacate would then have presented no question other than that which would arise upon an appeal from the judgment; and to allow an appeal from the order might, in effect, operate to extend the time for appealing from a judgment. See Olson v. Mattison, 16 N. D. 231, 112 N. W. 994; Mantel v. Mantel, 135 Cal. 315, 67 Pac. 758. But such is not the situation here. The motion to vacate was predicated upon the ground of the plaintiff's laches and the bar of the statute of limitations and bankruptcy, which, through excusable neglect, were not interposed in the action; and the judgment was rendered after the ex parte hearing making the proceeding at the date it took place, quite analogous to a default (as in Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102). At any rate, we are of the opinion that the defendant, in presenting the motion to vacate the judgment, appealed to the discretion of the district court and that the exercise of that discretion can be best reviewed here upon an appeal from the order denying the motion to vacate. See De la Montanya v. De la Montanya, 112 Cal. 101, 32 L.R.A. 82, 53 Am. St. Rep. 165, 44 Pac. 345; Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48. The appeal comes within subdivision 2 of § 7841, Comp. Laws, 1913, in that it is a final order affecting a substantial right made upon a summary application in an action after judgment.

As to the objection that the record is not complete, we note that the original motion to vacate was made, among other things, upon the records and files in the action, and that the record certified to this court does not contain the pleadings. The statement of the case, however, was settled before the district judge who certified that it con-

tained the only papers filed or used by either party, with reference to which the order denying the motion to vacate was made. In view of the fact that in so far as the exercise of discretion is concerned, which is the matter reviewable upon this appeal, the affidavit of merits is not controvertible, we are of the opinion that the record is adequate to show the error of the trial court in denying the motion.

The motion to dismiss is denied and the order appealed from is reversed.

ROBINSON and CHRISTIANSON, JJ., concur.

BRONSON, J., concurs in result.

GRACE, J. (specially concurring). I concur in the reversal of the order denying defendant's motion to vacate the judgment and this largely on the principles of law and statements contained in subdivision two (2) of the syllabus.

MARY KELLER, Respondent, v. PETER REICHERT, Mrs. James J. Ryan, Mrs. Sidney Mitchell, Mrs. Alvin Enders, Mrs. Leslie D. Colton, Rev. J. J. Raith, Appellants.

(189 N. W. 690.)

Witnesses — law excluding testimony of transactions with deceased not applicable in proof of wills.

1. Section 7871, Comp. Laws, 1913, which provides that in a "civil action or

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Note.—In construing statutes in effect disqualifying at a witness in his own behalf one of the parties to a transaction when the other party thereto has deceased, the courts seem to be largely influenced by the general purpose of the statute to protect estates of decedents. Accordingly these statutes are frequently held to be applicable only when the witness is interested in establishing a claim against or defeating a claim of an estate, and proceedings among the heirs or legatees affecting the distribution of the estate including the probate of a will offered as that of the deceased, are held not to be within the purview of these statutes, as will be seen by an examination of the cases in a note in 51 L.R.A.(N.S.) 188.

On effect of statute prohibiting a party from testifying in his own behalf where opposite party is dead, see note in 56 Am. Rep. 527.

See also 28 R. C. L. 510, et seq.; 5 R. C. L. Supp. 1542; 28 R. C. L. 405; 4 R. C. L. Supp. 1823; 5 R. C. L. Supp. 1535.

proceeding by or against executors, administrators, heirs at law, or next of kin in which judgment may be rendered or ordered entered for or against them, neither party shall be allowed to testify as to any transaction whatever with or statement with or statement by the testator or intestate, unless called to testify thereto by the opposite party," is not applicable in proceedings for the probate or contest of a will.

Wills — law, forbidding witness to take under will unless two other competent witnesses, applies only to witnesses.

2. Section 5680, Comp. Laws 1913, which provides that "all beneficial devices, legacies, or gifts whatever made or given in any will to a subscribing witness thereto are void unless there are two other competent subscribing witnesses to the same," applies only to subscribing witnesses to the will.

Wills — testamentary capacity, fraud, and undue influence held for jury.

3. For reasons stated in the opinion it is held that questions of fraud and undue influence were for the jury.

Opinion filed July 12, 1922. Rehearing denied September 9, 1922.

Wills, 40, Cyc. p. 1062 n. 34 New; p. 1331 n. 42; p. 1332 n. 46; Witnesses, 40 Cyc. p. 2266.

From a judgment of the District Court of Ward County, *Moellring*, J., defendants appeal.

Affirmed.

Messrs. Fisk, Murphy & Nash, for appellants.

In Starkweather v. Bell, 12 S. D. 146, this statute is construed. The facts are substantially the same as in the case at bar. Judge Corson, speaking for the South Dakota court holds directly against the respondent in this case.

The following cases support the construction placed upon this statute by the South Dakota court. Bardell v. Brady, 172 Ill. 420, 50 N. E. 124; Waugh v. Moan, 20 Ill. 298, 65 N. E. 713; Smith v. James, 72 Ia. 515, 34 N. W. 309; Blake v. Rourke, 74 Iowa, 519, 38 N. W. 392; Goldthorp's Estate, 94 Iowa, 336, 62 N. W. 845, 58 Am. St. Rep. 400; Ross v. Ross, 140 Iowa, 51, 117 N. W. 1105; Rich v. Bowker, 25 Kan. 7; Tucker v. Whitehead, 59 Miss. 594; Whitehead v. Kirk (Miss.) 61 So. 737; Lewis v. Aylott, 45 Tex. 190; Watts v. Rolland, 56 Tex. 54.

Declarations of a beneficiary under the will, though made in the presence of the testator and after the execution of the will have been held to be inadmissible to show that she did not exert undue influence

over the testator. Roberts v. Trawick, 22 Ala. 490; McQueen v. Wilson, 131 Ala. 606, 31 So. 94; St. Leger's Appeal, 34 Conn. 450, 91 Am. Dec. 735.

It becomes, then, upon proof that the will was written or procured to be written by a beneficiary, the duty of the proponent, in order to uphold the will, to produce evidence to remove the suspicion. Billinghurst v. Vickers, 1 Phill. Ecc. (Eng.) 187; Adams v. McBeath, 3 British Columbia 513, affirmed in 27 Can. Sup. Ct. 13; Dudley v. Gates, 124 Mich. 446, 86 N. W. 959, 8 Detroit Leg. N. 415, 83 N. W. 97; Miller v. Livingstone, 31 Utah, 428, 88 Pac. 338.

Or to rebut the presumption said by many courts to be engendered by this circumstance in connection with the fact that the draftsman was a confidential agent of the testator. Lyons v. Campbell, 88 Ala. 470, 7 So. 250; Coghill v. Kennedy, 119 Ala. 658, 24 So. 459; Bancroft v. Otis, 91 Ala. 291, 8 So. 286, 24 Am. St. Rep. 904; McQueen v. Wilson, 131 Ala. 606, 31 So. 94; In re Cooper (N. J.) 71 Atl. 678; Yorke's Estate, 6 Pa. Dist. Ct. 326.

"Subscription by a witness to a will, made before a testator who is unconscious of the act performed before him, cannot be said to have been made 'in the presence of the devisor,' as that phrase is used in the statute." Right v. Price, 1 Dougl. 241.

The presence contemplated by the statute is not simply the bodily presence of the testator; it is essential that the testator be mentally capable of recognizing and actually conscious of the act performed by him. If this power be wanting, mere corporeal presence will not suffice. Watson v. Pipes, 32 Miss. 451; Violette v. Therriau, 17 N. B. 389; Hill v. Barge, 12 Ala. 687; Hall v. Hall, 18 Ga. 40; Orndorff v. Hummer, 12 B. Mon. (Ky.) 619; Jackson v. Moore, 14 La. Ann. 209; Etchison v. Etchison, 53 Md. 348; Aikin v. Weekerly, 19 Mich. 482; Spoonemore v. Cables, 66 Mo. 579; Vernam v. Spencer, 3 Bradf. (N. Y.) 16; Aurand v. Wilt, 9 Pa. 54; Baldwin v. Baldwin, 81 Va. 405; Chappell v. Trent, 90 Va. 849, 19 S. E. 314; Muerer's Will, 44 Wis. 392.

McGee & Goss, for respondents.

"Cases may be found where less mental capacity is needed intelligently to give effect to a purpose already formed as to the final disposition of an estate than would be necessary for ordinary business."

Hutchinson v. Hutchinson (Ill.) 38 N. E. 926. And in this note to 27 L.R.A.(N.S.) page 98, under the above heading, the author cites and quotes from the above cases cited in 2 B. R. C. 41, and note, viz: McMasters v. Blair, 29 Pa. 298; O'Brien v. Dwyer, 17 Atl. 777; Hathorn v. King, 5 Am. Dec. 106; Clifton v. Clifton, 21 Atl. 333; Re Wilde, 77 N. Y. Supp. 164; Stevenson v. Stevenson, 33 Pa. 471, and the English cases cited above of Parker v. Delgate, L. R. 8 Prob. Div. 171, and Perera v. Perera, A. C. 354.

And in the syllabus to the case annotated, Slaughter v. Heath (Ga.) 27 L.R.A.(N.S.) page 1, the syllabus reads: "A person has testamentary capacity who understands the nature of a testament or will, viz., that it is a disposition of property to take effect after death and who is capable of remembering generally the property subject to disposition and the person related to him by the ties of blood, and of affection, and also of conceiving and expressing by words, written or spoken, or by signs, or by both any intelligible scheme of disposition. If the testator has sufficient intellect to enable him to have a decided and rational desire as to the disposition of his property, this will suffice."

See L.R.A.1915A, 452, subd. D. 5, that: "The facts that the testator, at the time of making his will, was eighty-two years old, was in his last illness, was partially paralyzed, and extremely weak, and at times flighty, and died on the morning following the execution of the will, which occurred at 2 o'clock in the afternoon, do not necessarily show testamentary incapacity." Lindsey v. Stephens, 229 Mo. 600, 129 S. W. 641.

And the principal case annotated—that of Re MacCrellish, 167 Cal. 711, 141 Pac. 257, L.R.A. 1915A, 443, from the syllabus we quote: "That one is occasionally in a sort of stupor, forgets what she is talking about, denies ownership of property when what she possesses is disappointing and not very remunerative, and that she has hallucinations that men are hiding near her, spying on her, and wishing to rob her, do not show absence of testamentary capacity."

CHRISTIANSON, J. This is an appeal from a judgment of the district court of Ward county admitting a will to probate. The facts necessary to a proper understanding of the questions presented on the

appeal will be briefly stated: On February 24th, 1920, one Joseph Reichert died at St. Joseph's Hospital in the city of Minot, in this state, leaving certain real and personal property. He also left two wills, one signed on February 23rd, 1920, and the other on February 24th, 1920. The will admitted to probate by the judgment appealed from is the second will. The deceased was an unmarried man and left surviving him a brother and four sisters. The respondent in this case claims and the evidence adduced by her upon the trial is to the effect that she and the deceased were engaged to be married and that the date of the marriage had been fixed for some time in April, 1920. Under the first will Reichert left $100 to his priest for masses for his soul; $500 to St. Leo's Church; $500 for the education of worthy catholics to the priesthood and $200 to the respondent, Mary Keller; the remainder of his property to be divided, equally among his brother and sisters. Under the second will he left $100 to his priest for masses for his soul and left all of his real property to the respondent, Mary Keller. No provision was made for the distribution of the personal property, hence the same, according to the law of succession of this state, would be distributed among the brother and sisters.

There is no question that Joseph Reichert was a very sick man both at the time he executed the first and the second will. He had received the last sacrament before he executed the first will. After he had made the first will he asked one of his attending physicians to write the respondent, and in compliance with this request, the physician, on February 23d, 1920, wrote her as follows: "Minot, N. D. Feb. 23, 1920. Miss Keller: Joe Reichert is very sick with pneumonia and he wants you to come on first train. He is in St. Joseph's hospital in Minot, (signed) Dr. A. Carr."

Thereafter on February 24th, 1920, at his request the following telegram was sent to her: "Joseph Reichert seriously ill at St. Joseph's hospital, Come at once. St. Joseph's Hospital."

She received both the telegram and the letter on the morning of February 24th, 1920, and took the first train to Minot. The train was late and she did not arrive until about 4 o'clock in the afternoon. She at once went to Reichert's room in the hospital. He informed her that he had made a will, and according to her testimony, stated that he wanted to change the will which he had made, and she, in accordance

with his request, went down town and had the second will prepared. The second will was prepared by the same attorney who prepared the first one. The execution of the second will is attested by the two attending physicians. There is square conflict in the evidence both as to the mental condition of the testator and the conditions surrounding the execution of the second will. There is no question, however, but that the signature attached to the will was written by the testator. The serious questions in this case are whether the will was executed as the result of fraud or undue influence practised or exercised by Mary Keller; and whether at the time he signed the will the testator had mental capacity to do so. These questions involve a consideration of the competency and probative force of the testimony of the respondent, Mary Keller. If her testimony was competent, and if the facts are as she purported to detail them, then the will in controversy here is valid, and the judgment appealed from here the correct one. It is contended, however, that her testimony was inadmissible under § 7871, Comp. Laws, 1913, which prohibits a party "in any civil action or proceeding by or against executors, administrators, heirs at law or next of kin in which judgment may be rendered for or against them from testifying as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party."

It is further contended that the testimony of the respondent was incompetent under § 5680, Comp. Laws, 1913, which provides that "all beneficial devices, legacies, or gifts whatever made or given in any will to a subscribing witness thereto are void unless there are two other competent subscribing witnesses to the same." It is further contended that the respondent failed to sustain the burden of proof; that this court should say as a matter of law that the testator was without mental capacity to make a will, and that there was no legal publication of the will. These propositions will be considered in the order stated.

The first question presented for determination is whether § 7871, Comp. Laws, 1913, inhibited the respondent Mary Keller, from testifying with respect to the preparation, signing and publication of the will in question. That section so far as material here reads as follows: "No person offered as a witness in any action or proceeding in

any court, or before any officer or person having authority to examine witnesses or hear evidence, shall be excluded or excused by reason of such person's interest in the event of the action or proceeding; or because such person is a party thereto, or because such person is the husband or wife of a party thereto, or of any person in whose behalf such action or proceeding is commenced, prosecuted, opposed, or defended, except as hereinafter provided. . . . 2. In any civil action or proceeding by or against executors, administrators, heirs at law or next of kin in which judgment may be rendered or ordered entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party; and where a corporation is a party in proceedings mentioned in this section, no agent, stockholder, officer, or manager of such corporation shall be permitted to testify to any transaction had with the testator or intestate."

After a careful consideration of this question, we are of the opinion that this statute did not render Miss Keller's testimony inadmissible. The general policy of the statute is to make all persons competent witnesses in all actions and proceedings in any of the courts of this state. There are certain exceptions to this general policy which are enumerated in the statute. The only way in which we can ascertain the scope of the exceptions is to look beyond such language, and enlarge the exception which the lawmakers have prescribed, St. John v. Lofland, 5 N. D. 140, 143, 64 N. W. 930. The statute by its express terms applies only to a "civil action or proceeding by or against executors, administrators, heirs at law, or next of kin in which judgment may be rendered or ordered for or against them." Mowry v. Gold Stabeck Co. 48 N. D. 764, 186 N. W. 865. The probate of a will clearly does not come within the terms of the statute. That is not a claim or demand which arose out of any transaction with the testator during his lifetime, existing at his death, and which might be enforced against him if living, and which his executors, administrators, heirs at law, or next of kin are compelled to prosecute or defend in his place. That is a judicial inquiry whether the instrument before the court is the last will and testament of the deceased, and en-

titled to be admitted to probate as such. 40 Cyc. 2266; 28 R. C. L. p. 510; Re Veasey, Ann. Cas. 1914A, 982, note.

Much of what has been said with respect to § 7871, supra, is also applicable to § 5680, Comp. Laws, 1913. That section by its terms applies only to "a subscribing witness" to the will. The respondent, Mary Keller, was not a subscribing witness. Hence, the section does not apply. Sellards v. Kirby, 82 Kan. 291, 28 L.R.A.(N.S.) 270, 136 Am. St. Rep. 110, 108 Pac. 73, 20 Ann. Cas. 214. See also Mackin v. Mackin, 37 N. J. Eq. 528.

There is some conflict in the authorities as to the force of the implication resulting from the fact that one who is a beneficiary under the will is active in procuring the execution thereof. The various authorities dealing with this question are collated in a note appended to Kirby v. Sellards, 28 L.R.A.(N.S.) 270. See also 28 R. C. L. 144. It is unnecessary to determine which line of authorities should be followed in this state, for the court in its instructions herein in effect stated that Mary Keller had the burden of proving that the will was not executed by the testator as a result of fraud or undue influence on her part. Hence, the instructions given were as favorable to the appellants as they were entitled to under any of the legal theories applicable where the beneficiary under a will is also active in the preparation thereof. The jury guided by these instructions, in answer to specific questions, said that no fraud or undue influence had been exercised. They, also, said that the will was prepared in accordance with instructions given by the testator on the afternoon of February 24th, 1920; that at the time he gave such instructions he fully understood what he was doing and knew what property he possessed and to whom he desired to leave it under his will; that he knew and understood the nature of the business in which he was engaged; that the will in suit was prepared in accordance with and pursuant to the instructions he so gave; that it was read over, and the contents thereof fully explained, to him an hour before he signed it; that at the time he signed it or immediately prior thereto or thereafter he declared to the two attesting witnesses that it was his last will and testament, and he signed the same in the presence of such two subscribing witnesses, and that they thereupon in his presence and in the presence of each other signed their names thereto as subscribing witnesses.

Under our law the parties, having demanded a trial by jury, were entitled to have the questions of fact in the case submitted to and determined by a jury. Comp. Laws, 1913, § 8620. This, of course, included the questions of credibility of witnesses and weight of their testimony; and the court is not at liberty to review or revise the action of the jury, unless the verdict is without substantial support in the evidence. And in our opinion it cannot be said that these findings of the jury are without substantial support in the evidence. There is nothing to indicate that the disposition of the testator's property as made by the will was an unnatural one. The evidence clearly shows that Miss Keller was the one person that was uppermost in his mind. Reference has already been made to the letter which he caused his physician to write and the telegram which he caused the hospital to send her. The undisputed evidence further shows that on February 24th, 1920, he wrote here a letter which, according to the post-office mark was mailed at Minot, N. D., at 2:30 o'clock P. M., on February 24th, 1920. The letter is in his own handwriting and reads as follows:

"Minot, N. D. Feb. 24, 1920. My dear Mary: Will write you a line to let you know that I am considered to be quite low. I got a private room now. Well, Mary, I wish you could come up and spend a few days. I have got all the sacraments. Well must close. Your true love. Joseph Reichert. Room 1 on 2 Floor."

The evidence further shows that during the night preceding the execution of the will, that is during the night intervening February 23d and February 24th, 1920, he caused his nurse to telephone the various hotels to ascertain if Mary Keller had arrived. And the Mother Superior, whose testimony otherwise was not favorable to Mary Keller, stated that when she was in Reichert's room on February 24th, 1920, he told her that he was waiting for Miss Keller and expected her to arrive. The evidence further shows that at the time he executed the first will he stated to the attorney who prepared it that he might want to change the will and that he particularly indicated that he might want to eliminate one of the sisters entirely as she had not written to him for a long time. The evidence shows that after Miss Keller arrived he suggested to her that they get married at once and that this plan was abandoned because it was found that

the priest was out of the city; that he informed her of the will which he had made the day before; that she obtained this will and that they went over and discussed the provisions thereof; that he expressed a desire to make a new will and directed her to go to see the attorney who had prepared the first will and have him prepare a new will making such disposition of the property as is made in the will in suit. In addition to these serious matters, they talked about many other things; he asked her how the wrist watch, which she was then wearing which he had sent her as a Christmas present the preceding Christmas was keeping time; he told her about having accompanied her father to a local eye specialist a short time before, and described the condition of her father's eye; he referred to certain horses belonging to her father, and stated that he expected to buy one of these horses in the spring. The attending nurse testified that after the will was signed and as she was picking up Miss Keller's hat which was lying on a chair in the room, Reichert called her attention to the fact that the hat belonged to Miss Keller by saying "That is Mary's hat." So far as the publication of the will is concerned, there is, in our opinion, no reason whatever to justify this court in saying, as a matter of law, that the will was not published. The two physicians who signed the will as subscribing witnesses, both testified they so signed it in the presence of the testator and in the presence of each other. They also testified that the testator signed it in their presence. The attestation clause is in due form and reads as follows:

"This instrument was on the day of the date thereof, signed, published and declared by said testator Joseph H. Reichert to be his last will and testament in our presence, who at his request have subscribed our names thereto as witnesses in his presence and in the presence of each other. A. Carr, of Minot, N. D. Frank E. Wheelon, of Minot, N. D."

In short there is no dispute in the evidence but that the testator signed the will himself, holding the pen in his own hand, without any assistance except on the part of the nurse who held a magazine or some other hard substance under the document when he signed it. According to the testimony of Mary Keller, there was a specific declaration by the testator that this was his last will and testament and a request by him that the two physicians sign the same as subscribing

witnesses. This testimony, of course, is strictly in accord with the attestation clause to which the physicians affixed their signatures; and when the testimony is considered as a whole, we are of the opinion that the questions of mental capacity, fraud and undue influence were all questions of fact for the jury, and that the findings of the jury on these questions are binding upon this court. What has been said disposes of all the controlling questions presented on this appeal and it follows that the judgment appealed from must be affirmed and it is so ordered.

BIRDELL, Ch. J., *concurs.*

ROBINSON, J. (concurring specially). On February 24, 1920, at the Catholic Hospital, in Minot, Joseph Reichert, aged thirty-three, died of pneumonia. He left land worth $15,000, personal property, $6,000. For two years prior to his decease he was engaged to Mary Keller. He loved her very sincerely and regarded her as his wife. Yet, on February 23, he made a will leaving Mary Keller, $200, to the church, $1,100, to his four married sisters, the rest of his property, $20,000. Then, next day, February 24, he made a second will leaving to Mary Keller all the land, $15,000, to his four sisters, the personal property, $6,000, to his priest, $100. The last will is contested on the ground of undue influence and lack of mental capacity. On the trial in the district court of Ward county the jury found a verdict in favor of Mary Keller. Judgment was duly entered and contestants appeal. It is certain the verdict is well sustained by the evidence. It is certain the first will was made under undue influence, and that after making it Joseph Reichert had no peace of mind until he met his affianced and made the will in her favor and received her last kiss of love. Then he was happy, as he gave up the struggle for life and expired in a few minutes. After making the first will he at once caused Dr. Carr to write for Mary, who was at Carrington, North Dakota. Then he sent her a telegram to come at once, and with the greatest impatience he watched and waited for her coming during the long night of February 23 and 24, and in the night sent his nurse

around the city to inquire for her at every hotel. But the Soo train was late and did not arrive until near 4 P. M. of the 24th, when Mary rushed to his room. He at once told her of the will that he had made, requested her to get it from the Mother Superior and read it, then to go to his attorney and have him draft a will leaving her all the land. She went to the attorney, stated the wish of the deceased. He drafted the will, brought it to the sick man, read it to him and said that it should be signed in the presence of two witnesses. After a time his two doctors arrived and in their presence he sat up in bed, reclining on pillows, signed the will, and in his presence they signed the attestation thus:

"This instrument was on the day of the date thereof, signed, published and declared by said testator Joseph H. Reichert to be his last will and testament in our presence, who at his request have subscribed our names thereto as witnesses in his presence and in the presence of each other.

A. Carr, of Minot, N. D.
Frank E. Wheelon of Minot, N. D."

The attestation is short and regular and it is signed by intelligent professional gentlemen. It is fair to assume that they did not subscribe to a false statement. The will is very brief. It is in all respects duly executed. It was drafted in accordance with the directions of the testator by his lawyer, who read the will to him and left it with him two hours before his decease. The testator read the will himself and put it under his pillow. Though his mind was failing, his every thought was on his Mary and on the will. Well might he have said to her:

"One feeling alone to my bosom was true;
Need I say dearest Mary 'twas centered on you."

Here is a copy of his last letter, mailed at Minot, February 24, at 2:30 P. M., as shown by the clear stamp of the postoffice. It is in his own handwriting:

"Minot, N. D., Feb. 24, 1920.

My dear Mary:

Will write you a line to let you know that I am considered to be quite low. I got a private room now. Well, Mary, I wish you could

come up and spend a few days. I have got all the sacraments. Well must close.

Your true lover,
Joseph Reichert.
Room 1 on 2 Floor."

While the will in question was executed somewhat in extremis, it was read to him and by him and approved in strength and when he clearly understood it. And he did understand it at the time of signing. The jury found specifically that the will was prepared in accordance with instructions given by Joseph Reichert when he fully understood what property he possessed and to whom he desired to leave it. Certain it is there was no complication. The matter was entirely simple. There was no deception nor undue influence. Aside from the very convincing testimony of Mary, the circumstantial and other evidence do show a valid execution of the will.

Objection was made to her testimony as incompetent under this statute:

Section 7871, Comp. Laws, "In civil actions or proceedings by or against executors, administrators, heirs at law or next of kin in which judgment may be rendered or ordered entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with or statement by the testator or intestate unless called to testify thereto by the opposite party, etc. . . ."

Such a disqualifying statute should be given a literal and strict construction. This is an action to prove a will. It is not an action against any person. It is in the nature of an action in rem. 40 Cyc. 2266, with citations from twenty states; 28 R. C. L. 510. The minority rule to the contrary shows the natural tendency of some courts to adhere to old rules and disqualifications, even though the effect be to suppress the truth and to do a great injustice. This case shows the superior wisdom and justice of the majority rule, because the circumstantial and the direct evidence submitted shows beyond doubt that the judgment is correct and right.

Bronson, J. (dissenting). The majority opinion finds the testimony of the legatee, Mary Keller, covering conversations with the deceased, admissible; that a proceeding contesting the probate of a will

does not fall within the prohibitory terms of § 7871, Comp. Laws, 1913. With this view, I cannot agree. The express terms of the statute must be considered in connection with the cognate law and the legislative policy involved therein ever since statehood. The statute existed in territorial days. Terr. Code Civ. Proc. 1877, § 446. It has not been changed except by a restrictive provision concerning officers of a corporation. Chap. 119, Laws of 1907, and another provision permitting a surviving husband or wife, in certain cases, to testify. Laws of 1909, chap. 109. This court, in numerous cases since statehood, has stated that the general purpose of the statute involved is to prevent any party from securing an undue advantage in establishing by his testimony what transaction or conversation took place when the lips of the other party are sealed by death. Druey v. Baldwin, 41 N. D. 473, 479, 172 N. W. 663, 182 N. W. 700, Williams v. Clark, 42 N. D. 107, 172 N. W. 827 and cases there cited. This court has also held that the statute does not apply where none of the parties, as such, appear in the relationship stated in the statute. In other words, the estate of the deceased must be concerned and the parties affected by reason of their relationship thereto. Mowry v. Gold Stabeck Co. 48 N. D. 764, 186 N. W. 866; Clarke v. Ross, — Iowa, —, 60 N. W. 629; St. John v. Lofland, 5 N. D. 140, 64 N. W. 930; Lake Grocery Co. v. Chiostri, 34 N. D. 386, 400, 158 N. W. 998.

In the pending matter, the estate of the deceased is directly involved. The relationship stated in the statute is affected. The parties are parties only by reason of such relationship.

The statute states "in civil action or proceeding by or against executors, administrators, heirs at law or next of kin in which judgment may be rendered or ordered entered for or against them." In the original act the statute read in the plural, namely, "in civil actions or proceedings" etc. The contest concerning the probate of a will is a special proceeding. It is so designated by statute. Comp. Laws, 1913, § 8634; Rev. Code 1895, § 6289, art. 2. In the county court the contestant is termed the plaintiff and the contestee, the heirs at law or next of kin, the defendants. The contest is tried like an action. Findings are made and a judgment rendered. Comp. Laws 1913, § 8579. The proceeding falls within the statutory classification of remedies either as actions or as special proceedings. Comp. Laws,

1913, § 7329. The right of appeal is provided for. Comp. Laws, 1913, § 8599. In the district court it is tried before the jury the same as any civil action. Comp. Laws, 1913, § 8620. It is a proceeding in which a judgment may be rendered or ordered against the heirs. It was so ordered against the heirs in this action. The majority opinion states that the probating of a will is a judicial inquiry as to whether it is entitled to be admitted as such. This is granted. And, further, the statute provides a method for conducting this inquiry the same as any civil action or proceeding, for it is a civil action or proceeding. Further, the question presented, in my opinion, is not one of principle concerning which there is a diversity of judicial opinion. See Re Veazey, 80 N. J. Eq. 466, 85 Atl. 176, Ann. Cas. 1914A, 982. Rather is the question one of statutory interpretation and direction. If the question were one of principle, it would appear that the statute should apply equally as well to the pending matter, which may operate to divest the heirs of the decedent's property, as to the question of the delivery of a deed by a deceased through the determination of which the heirs or legatees are divested of the decedent's property. Druey v. Baldwin, 41 N. D. 473, 172 N. W. 663. Accordingly, in my opinion, the construction adopted by the majority opinion simply serves to engraft, by judicial legislation, an exception to the statute. The judgment should be reversed and a new trial granted.

GRACE, J., concurs.

On petition for rehearing.

CHRISTIANSON, J. Appellants have petitioned for a rehearing. They contend: (1) that the testimony of Mary Keller was inadmissible under subdivision 2 of § 7871, Comp. Laws, 1913, and that this court erred in its former opinion in holding to the contrary; and (2) that the testimony of Mary Keller is untrue, should be so considered by this court, and the verdict returned in this case set aside on the ground that it is unsupported by the evidence. We will consider these propositions in the order stated.

1. We have again considered the statute and are entirely satisfied that the construction placed thereon in the former opinion to the effect

that it does not apply in a proceeding for the probate or contest of a will is correct. As pointed out by this court in St. John v. Lofland, 5 N. D. 140–143, 64 N. W. 930, the general policy of § 7871, supra, is to make all persons competent witnesses in all actions and proceedings in any of the courts of this state. The proviso under consideration here made certain exceptions to this general policy. The purpose of the proviso was to guard against the temptation to give false testimony in regard to a transaction in question on the part of a surviving party, and, further, to put the two parties to the action or proceeding upon terms of equality as regards the opportunity of giving testimony. 4 Blue Book of Evidence, p. 628. While the statutes in the different states dealing with this subject are quite variant, Michigan has a statute which so far as concerns the particular question under consideration here is quite similar to our own. The Michigan statute (How. Anno. Stat. § 7545) provided "that when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify as to matters which if true must be equally within the knowledge of such deceased person." The supreme court of Michigan has repeatedly held that this statute does not apply to proceedings to probate or contest a will. See Brown v. Bell, 58 Mich. 58, 24 N. W. 824; Schofield v. Walker, 58 Mich. 96, 24 N. W. 624; Re Lautenschlager, 80 Mich. 285, 45 N. W. 147; McHugh v. Fitzgerald, 103 Mich. 21, 61 N. W. 354; Re Lambie, 97 Mich. 49, 56 N. W. 223. In construing this statute in an action contesting a will, Brown v. Bell, supra, the court said:

"We do not think the statute quoted applies to this case. The contest is not between the estate, or the representative of the estate, and the proponent. . . . The application for the probate of this will is made neither by an executor named in the will, nor by any one acting as the legal representative of the estate of the deceased. This contest is between two persons who claim an interest in the estate, and, as to the estate proper, are third persons, and represent no one but themselves. In that regard they stand in no different situation from what they would had a creditor made application for the probate of the will. The only questions involved in this application are: Did the

deceased in his lifetime make this will, and was he of sound mind and memory at the time? The disposition made of the property therein is of no consequence except as it may throw some light upon the fact whether he was of sound mind when he made it. The will does not increase or decrease the estate. The object of this statute is to prevent fraud and false swearing whereby estates became unjustly depleted in cases where no person on the part of the estate, except the deceased, has any knowledge of the facts necessary to sustain the claim in favor of the estate, or to make good the defense of the estate, when unjust claims are attempted to be enforced against it, and we see no occasion for extending the scope of the statute by judicial construction. It is limited in its reason and spirit by fair construction to contests on litigation upon claims between other persons and the deceased, existing prior to his death; to such suits and proceedings as the deceased would have been, if living, a necessary party, and since which his heirs, devisees, and legatees, personal representatives, or assigns, are compelled to prosecute or defend for him in his place;" Brown v. Bell, supra. This opinion was concurred in by all of the then judges of the Michigan court including the celebrated jurist Judge Cooley. And the principle therein announced was reaffirmed in the subsequent decision cited above.

The Michigan case was followed and approved by the supreme court of Nebraska in McCoy v. Conrad, 64 Neb. 150, 89 N. W. 665. See also Williams v. Miles, 68 Neb. 463, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306.

Arkansas has a statute, in all matters material here, identical with our own. The Arkansas statute, Kirby's Digest, § 3093, provides that "in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify by the opposite party." In construing this statute the Arkansas supreme court said: "This statute has no application in a case involving a contest over the probate of a will. It was intended to protect the estates of deceased persons from the attacks of persons who had, or claimed to have had, business transactions with the deceased prior to his death, and who are seeking to establish claims against his

estate. This is clearly shown by the language which declares that it is in actions where judgments may be rendered for or against the executors, administrators, etc. In other words, where a party seeks to obtain a judgment against the representatives of the estate of the deceased, and thus to impair or reduce the estate, the statute applies. But it cannot apply to controversies between devisees among themselves over a will, or between devisees or legatees and the heirs, as to the distribution of the estate by will or otherwise; for in such case the corpus of the estate is in no manner affected. There can in such cases be no judgment rendered for or against the administrator or executor as such by which the estate is impaired or reduced." Taylor v. McClintock, 87 Ark. 243, 286, 112 S. W. 416.

The supreme court of Utah originally held the statute of that state applicable to a will contest. Re Atwood, 14 Utah, 1, 60 Am. St. Rep. 878, 45 Pac. 1036. Subsequently the Utah court overruled the decision in the Atwood's Case, and held the statute inapplicable to a will contest. Re Miller, 31 Utah, 415, 88 Pac. 338. In the last cited case the Utah court said:

"The statute in this regard is intended to protect the estates of deceased persons from assaults, 'and relates to proceedings wherein the decision sought by the party so testifying would tend to reduce or impair the estate, and does not relate to the relative rights of the heirs or devisees as to the distribution of an estate in a proceeding by which the estate itself is in no event to be reduced or impaired.' Citation of Cases. These authorities, and others which can be cited, hold that the controversy such as here is between living parties, who, on the one side, are the devisees or legatees under the will, and on the other, the heirs at law of the testator. The former claim to take the estate under the will, the latter, under the statute regulating the descent of estates, insisting that the alleged will is a nullity. The act of the testator in making the alleged will is the only subject-matter of the investigation. The estate of the testator is not interested. The interests of these claiming to succeed to it either by operation of law or by operation of the will are alone involved. The estate remains intact and undiminished whatever may be the result of the controversy, and the subject-matter of the investigation is not a transaction with nor a statement by the decedent. As to such an investigation, the parties to

the suit and those interested in the result thereof are upon terms of equality in regard to the opportunity of given testimony. Our conclusion, therefore, is that all the parties interested are competent to testify to any fact which is relevant and material to the issue involved, and that the court erred in excluding the proffered testimony. We are aware of some cases which hold contrary to this ruling, and that the conclusion reached by us is in conflict with the case of Re Atwood, supra, where the statute was given application in the contest of a will. But the question as to its application in such a case was not there discussed nor considered. The only question considered was whether the witnesses claimed to be disqualified were such persons as are named in the statute. However, the Atwood Case, so far as in conflict with the holding in this case, is overruled."

The language and reasoning of the Michigan, Arkansas, and Utah courts are, in our opinion, applicable to our statute. See also Re Anderson, 114 Wash. 591, 195 Pac. 994; State v. Nieuwenhuis, 43 S. D. 198, 178 N. W. 976; Lamb v. Lamb, 105 Ind. 456, 5 N. E. 171.

2. So far as the sufficiency of the evidence is concerned, little or nothing can be added to what was said in the former opinion. Upon this proposition there has been no difference of opinion among the members of this court. The difference of opinion has been and is solely as to the admissibility of the testimony of Mary Keller. Upon that question the views expressed by the different members in the former opinions remain unchanged. The members of the court who signed the majority opinion herein adhere to all the views therein expressed.

Rehearing denied.

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

ED. W. JOHNSON, Respondent, v. JOHN KITTLESON, Appellant.

(189 N. W. 837.)

Druggists — evidence held insufficient to show hogs died from cholera medicine furnished plaintiff by defendant.

In a neighborhood where pig cholera prevailed to an alarming extent the plaintiff and defendant were in a kind of pig partnership. In a neighborly way,

and not for any reward, and to save his own pigs as well as those of the plaintiff, defendant gave the plaintiff some dope which he had bought and used for pig cholera. The plaintiff gave it to nineteen pigs and one sick sow, and within three days they all died. This action was commenced on the claim that the cholera dope had poisoned the pigs, and defendant appeals from a judgment against him.

Held: That the testimony clearly shows that the pigs died of the cholera, and not of poison; and as it appears that plaintiff has no chance to prevail on a second trial, the judgment is reversed and the action dismissed.

Opinion filed July 14, 1922. Rehearing denied September 9, 1922.

Appeal and Error, 4 C. J. § 3223 p. 1186 n. 61; Druggists, 19 C. J. § 68 p. 785 n. 58.

Appeal from a judgment of the District Court of Cass County; *Cooley*, J.

Reversed and action dismissed.

Chas. A. Lyche, for appellant.

There is absolutely no competent proof in this case to sustain plaintiff's claim and that the verdict should be set aside as a matter of discretion. Voge v. Penney (Minn.) 77 N. W. 422; C. L. 1913, § 7656; Ross v. Robertson, 12 N. D. 27; Dinnie v. Johnson, 8 N. D. 153.

"It does not necessarily follow that a verdict rendered should stand, if it is unwarranted by the evidence, although the court has omitted or refused to direct it." Drew v. Lawrence, 37 S. D. 620, S. C. 159 N. W. 274.

A new trial will always be granted where the verdict is plainly and manifestly against the weight of the evidence and a statute which authorizes a new trial for insufficient evidence confers power to grant a new trial where the verdict is against the weight of the evidence; but in this case there is no evidence supporting essential allegations of the complaint. McDonald v. Walter, 40 N. Y. 551; Inland etc. Co. v. Hall, 124 U. S. 121, 31 L. ed. 369, S. C. 8 Sup. Ct. Rep. 397; Met. Ry. Co. v. Moore, 121 U. S. 558, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334; Fuller v. Northern Elevator Co. 2 N. D. 220; 29 Cyc. 832; S. C. 50 N. W. 359; Reynolds v. Lambert, 69 Ill. 32, Comp. Laws 1913, § 7660.

W. J. Courtney, for respondent.

Robinson, J. In September, 1919, near Galesburg, in Traill coun-

ty, the plaintiff was a tenant on a farm of defendant. Both parties had pigs on the farm. The pigs all ran together and drank from the same creek. The plaintiff owned one sow and eight spring pigs; defendant three sows and eleven spring pigs, in common with the plaintiff. That is, each party had a half interest in eleven of the spring pigs. Cholera was prevailing in the neighborhood. One Mr. Miller had lost sixty pigs. Defendant had lost one sow and another was sick of cholera. Plaintiff put the nineteen pigs into their house and sent defendant a message of distress. He quickly arrived with some dope for the prevention or cure of pig cholera. He had bought it from Pollins in Rolla and had used it several times. It was in a can with directions thus: "Mix a teaspoonful of the dope in a gallon of water and drink freely of it and let the animals drink freely of it." Defendant put some of the dope into a beer bottle and gave the same to plaintiff, telling him how to use it, as per said instructions. Plaintiff Johnson testifies that defendant told him to put a cupful of the medicine into three pails of water and to give it to the nineteen pigs and the sick sow three times a day; that he did so three times, and in three days the pigs were all dead. Then he put what remained of the dope into a can marked "maple syrup" and sent it for analysis to the Agricultural College.

At the trial Johnson called two professors of the A. C. One testified that the dope contained 4.6 per cent of phenol which is carbolic acid. The other professor, a veterinarian, testified that it contained 10.4 per cent "cresol compounds." Neither professor seemed to know much of phenol or its use or the amount of a poisonous dose. Now as we learn from the United States Dispensatory, a poisonous dose is a half ounce and in two hours the poison causes death.

"Creosote is a mixture of phenols and phenol derivatives." Cresol is used as a surgical disinfectant. It is also a gastro-intestinal antispectic. Dose 2 to 3 minims. Phenol is a locally irritant anesthetic and mildly caustic in dilute solution of 3 to 4 per cent. It is only mildly irritant but is actually anesthetic and germicidal. Phenol is widely used as a disinfectant not only for sanitary but for surgical purposes. It is frequently used as an antiseptic in gastro-intestinal affections. Dose is 1 to 3 grains."

Now a cupful of the dope contains about six ounces and as each

ounce contains 4.6 per cent of phenol, we find the phenol contents of a cup to be six times 4.6 per cent, or .276 of an ounce, which is only half a poisonous dose. The phenol was the principal part of the compound cresols which the veterinary says amounted to 10.4 per cent. In a six ounce cupful the amount would be .624 part of an ounce. That is barely enough to poison one pig if the whole cupful were given and taken at one swallow, but when diluted in three pails of water the strength is divided by three hundred, so that a person or a pig might safely drink it. Surely to drink it, every drop, would not injure twenty pigs.

Aside from that the testimony of the plaintiff and his wife shows that from the start the pigs exhibited all the marks and symptoms of hog cholera. They all became crooked like a rat with its back up, and huddled together in the pig house, ceased to eat, lost all strength and died within the usual time of death by cholera.

2. But if the dope had been poisonous and had caused the death of the pigs, that would not make defendant liable. He was a common farmer, not a chemist. He was not bound to know or to guarantee the dope. He was only bound to use good faith and honesty the same as if he had owned all the pigs and not merely two sows and a half interest in eleven of the spring pigs. There is no reason for thinking that the defendant acted in bad faith or that he wilfully poisoned his own pigs or those of his neighbor and tenant.

Were there any reasonable chance for plaintiff to prevail on a second trial the opportunity should be given him, but as there is no such chance the judgment is reversed and the action dismissed.

BRONSON and GRACE, JJ., concur in the result; we are of the opinion that the evidence is insufficient to justify the verdict.

CHRISTIANSON, J. (dissenting). I am unable to agree with the disposition made of this case or the grounds on which the majority members base their decision. This case was one properly triable to a jury. It was so tried. This court reviews only the errors assigned upon the proceedings had in the trial court. N. D. Const. § 86; Thompson v. Cunningham, 6 N. D. 430, 71 N. W. 128; State v. Knudson, 21 N. D. 562, 132 N. W. 149; Erickson v. Wiper, 33 N. D. 193, 225,

157 N. W. 592. And the appellant has the burden of proving error, and must present a record affirmatively showing it. Erickson v. Wiper, supra.

In this case there was no motion for a directed verdict and no motion for a new trial and the sufficiency of the evidence was not challenged at all in the trial court. This court has ruled that in such case the sufficiency of the evidence cannot be questioned in this court. See, Horton v. Wright, Barrett & Stilwell Co. 43 N. D. 114, 174 N. W. 67, and authorities cited therein.

I believe, however, that the trial court erred in its instructions to the jury. The court instructed the jury: "There is no direct evidence that they (the hogs) were sick of hog cholera, *or were not in a healthy condition,* and it is for you to determine whether they died of poison if poison was administered to them, or whether they died of some other disease." Error is assigned on this instruction. And in my opinion the assignment is well founded. There was a square conflict in the evidence as to the condition of the hogs. The plaintiff testified that at the time the defendant brought the medicine, all the hogs belonging to plaintiff, which later died, were well. Defendant on the other hand testified positively that the hogs which later died were all very ill at the time he delivered the medicine to the plaintiff. In my opinion the judgment should be reversed and a new trial ordered.

BIRDZELL, Ch. J., concurs.

JOHN LOFTHOUSE, Respondent, v. GALESBURG STATE BANK, a Corporation, Appellant.

(190 N. W. 177.)

New trial — overruling motion for new trial not particularizing grounds held not error.

The defendant made a motion for a new trial. The trial court made an order denying the motion. In this the trial court did not err.

Opinion filed September 30, 1922.

Appeal and Error, 3 C. J. § 1522 p. 1373 n. 42; 4 C. J. § 1522 p. 1373 n. 43; § 3092 p. 1111 n. 85; New Trial, 29 Cyc. p. 942 n. 95; p. 952 n. 23.

Note.—On appeal from order denying motion for new trial, see 2 R. C. L. 188; 1 R. C. L. Supp. 431; 4 R. C. L. Supp. 90; 5 R. C. L. Supp. 79.

An appeal from an order of the District Court of Traill County denying the defendant's motion for a new trial, *Cole,* J.

Order affirmed.

I. A. Acker, for appellant.

"Naming one as consignee in, or indorsing and delivering to him a bill of lading, may be shown by parol to have been intended as evidence of an absolute sale, a trust, a mortgage, a pledge, a lien, or a mere agency." Leuthold v. Fairchild (Minn.) 27 N. W. 509; Bank v. Jones, 4 N. Y. 497; Bank v. Daniels, 47 N. Y. 631; Bank v. Wright, 48 N. Y. 1.

In the case of Hodgson v. St. Paul Plow Co. 80 N. W. 956, 78 Minn. 172, the court held: "Where a servant received a trust fund from his master and distributed under his orders, the servant is not liable for converting such fund." The case of Leuthold v. Fairchild (Minn.) 27 N. W. 509, is to the same effect.

Spalding & Shure, for respondent.

"A demand followed by refusal is only evidence of a conversion." More v. Burger, 15 N. D. 345; Taugher v. N. P. Ry. Co. 21 N. D. 11; 2 M. A. L. 95, 93.

"Demand was unnecessary under the well-established principle that it would have been unavailing. Demand and refusal need not be made before the commencement of the action in case a demand would be obviously unavailing, as when, by pleading and proof, the property is shown to be detained under a claim of absolute right." More v. Burger, 15 N. D. 345; Consolidated Land & Invest. Co. v. Hawley, 7 S. D. 229; Tapley v. Forbes, 84 Mass. 20; Crampton v. Valido Marble Company, 60 Vt. 291; Hahn v. Sleepy Eye Mill Co. 21 S. D. 324.

Demand is not necessary when conversion can otherwise be shown. Crampton Case, 2 M. A. L. 93; 26 R. C. L. 1123, note 10; 21 Enc. Pl. & Pr. 1083; 38 Cyc. 2071; 38 Cyc. 2032, notes 76 and 84.

And the sale constitutes a conversion.

If the defendant wrongfully delivers the property in question to a third party that such delivery passing it out of his control constitutes conversion, and that the date of the conversion is the date of the delivery. Taugher v. N. P. Ry. Co. 21 N. D. 111; Bank v. Osborne-MacMillan Elev. Co. 21 N. D. 335; 2 M. A. L. 81; Elev. Co. v. Dawson, supra; Dammann v. Schibsby Implement Co. supra.

GRACE, J. This is an appeal from an order of the district court of Cass county, denying defendant's motion to vacate the verdict rendered in the above-entitled action, and the judgment entered thereon, and for a new trial.

In order to give clarity to the present appeal, it may be well to give a short history of the litigation. The plaintiff brought an action against the defendant, alleging conversion by it of certain of plaintiff's wheat. Upon proper pleadings, issues were formed and tried to the court and a jury. The jury returned a verdict in plaintiff's favor for $204, and interest and costs; in all $258.80. A judgment was entered on the verdict and defendant appealed from it.

The case was argued orally before this court. An opinion was prepared by Mr. Justice Christianson (48 N. D. 1019, 188 N. W. 585) and in so far as it disposed of the merits of the case, all the members of this court concurred in it. This opinion affirmed the judgment. It however, affirmed the judgment without prejudice to the right of the defendant to present a motion for a new trial in the lower court. The defendant did present a motion for a new trial, which though not argued, was heard before the trial court, and it made an order denying the motion for a new trial. From that order, this appeal is taken.

The only assignments of error are:

1. Error based upon the giving of certain instructions of law by the court.

2. Insufficiency of evidence to justify the verdict, and that the verdict is against law.

The instructions complained of are as follows:

1. "In order for the plaintiff to have a right to recover against the defendant in this case he must prove by a fair preponderance of the evidence that crops were raised upon the premises described; he must further prove by a fair preponderance of the evidence that the crops raised on the premises, or the proceeds from the crops, came into the hands of the defendant, and that by the defendant the proceeds or the crops either one, was handled and used and converted, if it was crops into money and if not the crops, the money used in the business of the defendant whether that business be with Eggers or others."

2. "But if you should find from determining upon the whole of the evidence that the off-set for the thresher's lien was equal to, or perhaps

beyond the value of the crop on the premises that came into the possession of the defendant, either by way of crop or by way of proceeds thereof, then you would find in favor of the defendant and not for the plaintiff."

3. "I charge you further that in determining what was the proceeds of the crop from the premises in question that came into the hands of the defendant bank, if any, would be the proceeds as actually received by the bank, or came into the hands of the defendant bank. Of course, when I speak of proceeds of grain, I mean the proceeds of the grain raised upon the Lofthouse land, that is, the land in question, and I so charge you."

An examination of the record in the prior case discloses that certain errors were assigned which were based on erroneous instructions of law by the trial court, and it further discloses that those instructions are identical with those upon which error is predicated upon this appeal. In the opinion in the former case, the court said, referring to the instructions: "And the instructions to which exception is taken were not erroneous under the rule announced in the case last cited." It is clear from the opinion that the court found no error in the instructions complained of. The alleged errors in the instructions were, we think, properly and rightly disposed of in that appeal. In other words, the opinion reached the right conclusion in determining that there was no error in the instructions, hence, there is no reason for re-examining the same instructions in this appeal. Such matter was disposed of in the prior appeal.

The second assignment of error is based upon the insufficiency of the evidence to sustain the verdict. The appellant, in no way, points out wherein the evidence is insufficient to sustain the verdict. If it desired seriously to assert that there is no substantial evidence to support the verdict, or that the evidence is wholly insufficient, it should have specified the particulars of such insufficiency. This is a requirement provided for by § 7656, Comp. Laws, 1913. The appellant having failed in this respect, this attempted assignment of error amounts to nothing.

There is no error in the record and the order appealed from is affirmed. Respondent is entitled to his costs and disbursements on appeal.

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

BRONSON, J. (specially concurring). For the reasons outlined in my opinion in the former case, see 48 N. D. 1019, 188 N. W. 586, I concur in the affirmance of the order.

PEOPLES STATE BANK OF HILLSBORO, NORTH DAKOTA, a Corporation, Respondent, v. S. G. STEENSON, Appellant.

(190 N. W. 74.)

Trial — duty of court to rule on objections to evidence.

1. In any action tried to the court without a jury, pursuant to chap. 8, **Laws** 1919, amending the so termed "Newman Act" it is the duty of the trial court, where objection is made, to rule upon evidence offered.

Vendor and purchaser — period for redemption should be accorded under foreclosure of land contract.

2. In an action to cancel a contract for a deed where a strict foreclosure has been ordered without granting to the vendee any redemption period, it is held, for reasons stated in the opinion, that a period for redemption should be accorded.

Opinion filed September 30, 1922.

Trial, 38 Cyc. p. 1944 n. 31 New; Vendor and Purchaser, 39 Cyc. p. 1876 n. 59 New.

Action in District Court, Traill County, *Cole*, J.

Defendant has appealed from a judgment of foreclosure.

Judgment modified.

Theo. Kaldor, for appellant.

I. A. Acker, for respondent.

Statement.

BRONSON, J. This is a proceeding to foreclose a contract for a deed. The facts are: One Wilhelmsen owned two lots and a barn in Hillsboro, North Dakota. The defendant, desiring to reconstruct the barn into a garage, negotiated with Wilhelmsen for their purchase. On

April 7th, 1920, a contract for a deed was executed between the parties whereby the defendant agreed to pay $3,000 for the property; $918 at the execution of the contract, $1,300 by assuming a mortgage theretofore given by Wilhelmsen to plaintiff upon the property, and the balance, $782 in monthly payments of $40 commencing June 1st, 1920, with 8 per cent interest on unpaid balances. On April 19th, 1920, Wilhelmsen assigned this contract and deeded the property to plaintiff. The defendant made to Wilhelmsen twenty notes aggregating $782, all dated May 1st, 1920, and each falling due in consecutive months thereafter. These notes were indorsed and transferred to plaintiff. The defendant went into possession and reconstructed the barn into a garage. The improvements which he made, pursuant to his testimony, increased the value of the property about $2,500. Since making such improvements, the defendant has conducted on the property a garage. Defendant paid, upon the contract, $918, and, about June 1st, 1920, the further sum of $22. He has made no other payments upon the notes or contract; neither has he paid any taxes. On December 4th, 1920, plaintiff served a statutory notice of cancelation. A mistake of time was made in the notice of cancelation. The efforts of the plaintiff being abortive under this statutory notice, this action was instituted. In the testimony it appears that plaintiff paid taxes for 1920 and 1921 upon the property and the premium for $3,000 insurance. The defendant admits that he has made no payments upon the contract, excepting those specified and the making of the notes, which he deems to be payments upon the contract. It further appears that, on December 7th, 1921, the amount due upon the notes was $857.85 and upon the mortgage $1,595.77. The trial court found that on December 4th, 1921, there was due the plaintiff from the defendant, $2,598.38. During the course of the trial, the trial court stated, in effect, that this is a case where all evidence offered is received and goes into the record without ruling by the trial court. The court ordered the contract to be cancelled and immediate possession given to the plaintiff. Judgment was so entered on February 16th, 1922.

Decision.

The defendant maintains that the nonpayment of the mortgage is

not a default, pursuant to the contract, and that the making of the notes operated to pay the balance of the purchase price. These contentions are without merit. The $1,300 note and mortgage were produced by plaintiff and received in evidence. Upon the record, the plaintiff is the owner and holder thereof. Further, it is well settled that, upon making a contract for a deed, where the vendee goes into possession, the vendor, in equity, holds merely a vendor's lien as security for the debt due him. The debt is the principal, and the lien, the incident. Early v. France, 42 N. D. 52, 172 N. W. 73; Semmler v. Beulah Coal Min. Co. 48 N. D. 1011, 188 N. W. 310. Plaintiff owns and possesses the whole debt and the whole lien.

In order that the action of the trial court, in receiving all evidence offered without ruling, may not be continued as a proper rule of practice and, by the silence of this court, receive tacit approval, it is deemed proper to say that, in any case tried without a jury, pursuant to chap. 8, Laws 1919, amending the so termed "Newman Act," § 7846, Comp. Laws, 1913, it is the duty of the trial court, where objection is made, to rule upon evidence offered.

In this case the trial court ordered strict foreclosure without any time for redemption. Under the circumstances presented by this record, we are of the opinion that the trial court erred in this regard. The defendant has paid $940 on the contract. He has made improvements on the property which he claims has increased its value $2,500. Pursuant to his testimony, he has an equity of about $3,400 in the property. Plaintiff's claim is about $2,600. Defendant desires an opportunity to make redemption. This should be accorded to him if it be in the interests of justice so to do. We are of the opinion, upon the record, and pursuant to the voluntary statements of the parties made upon oral argument, that such opportunity should be afforded the defendant. See Ryan v. Bremseth, 48 N. D. 710, 186 N. W. 822.

Accordingly, it is ordered that the judgment be modified as follows: Defendant shall pay to the plaintiff $100 within ten days after the receipt of the remittitur by the trial court, and the sum of $100 on the 15th day of each and every month thereafter for ten months. Defendant shall also pay the taxes for 1922 on or before the time the same becomes delinquent. Defendant shall keep the premises insured at his own expense for at least $3,000 with a loss payable clause payable

to the plaintiff. Defendant shall deliver such policy to plaintiff upon the expiration of insurance now held by plaintiff. Within one year from the date of the remittitur is received in the trial court, defendant may pay the balance then due upon the judgment rendered herein. Upon default in any of the payments herein mentioned, at the time so specified, or in the payment of taxes or insurance, the judgment rendered shall become absolute and the plaintiff thereupon shall become entitled to immediate possession of the premises. It is so ordered without costs of this court to either party.

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

J. A. CORBETT, Respondent, v. ULSAKER PRINTING COMPANY, a Corporation, Appellant.

(24 A.L.R. 1047, 190 N. W. 75.)

Tender — negotiable instrument payable at certain city, not payable at "special place," making ability and willingness to pay at special place equivalent to tender.

A negotiable instrument made payable at a certain city is not payable at a "special place" within the meaning of § 6955, Comp. Laws, 1913 (§ 70, Uniform Negotiable Instruments Law), which makes ability and willingness to pay at the special place equivalent to a tender of payment.

Opinion filed October 3, 1922.

Tender, 38 Cyc. p. 143 n. 80 New.

Action in District Court, Cass County, *Cooley*, J.

Affirmed.

Brickner & Knox, for appellant.

The burden of establishing a sale or contract for sale of goods is on the plaintiff. He must prove all the essential elements, sale and de-

Note.—As to when instrument deemed payable at a "special place" within the provision of the Uniform Negotiable Instrument Law making ability and willingness to pay at such a place equivalent to tender, see note in 24 A.L.R. 1050.

See also 26 R. C. L. 635.

livery, acceptance, value, amount and price, terms and conditions. Ulmer v. McDonnell, 11 N. D. 391; Morris v. Occident Elev. Co. 33 N. D. 447, 157 N. W. 486.

"Where no place of payment is expressed in a bill or note the general rule in the absence of any agreement or circumstances fixing or indicating a different intention, is that the place of presentment is the place where the acceptor or maker resides or at their usual place of business." Cox v. National Bank, 100 U. S. 704, 25 L. ed. 739; Bailey v. Birkhofer, 123 Iowa, 59, 98 N. W. 594; Oxnard v. Varnum, 11 Pa. 193, 2 Atl. 224, 56 Am. Rep. 255; Strawberry Point Bank v. Lee, 117 Mich. 122, 75 N. W. 444; Hunt, Tender, § 313; Dan. Neg. Inst. 4th ed. p. 612; approved in Davis v. Epler, 38 Kan. 631.

John G. Pfeffer, for respondent.

"Where a note provides that it shall become due on default, in the payment of any instalment of interest, such default renders it due immediately, and entitles the holder to maintain an action at once for the entire debt. The same is true where a series of notes provides that all shall become due on default in the payment of anyone, and where a note payable in instalments provides that the whole shall become due on default in the payment of any instalment." 8 C. J. 416; Gregory v. Marks (U. S.) 10 Fed. Cas. No. 5802; Hewitt v. Dean (Cal.) 27 Pac. 423; Whitcher v. Webb, 44 Cal. 127; Heath v. Achey (Ga.) 23 S. E. 396; Kilcrease v. Johnson (Ga.) 11 S. E. 870; Buchanan v. Berkshire, etc. Co. 96 Ind. 510; Stephens v. Hunting, etc. Ass'n. 76 Ind. 109; Billingsley v. Dean, 11 Ind. 331; Ausen v. Byrd, 6 Ind. 475; Van Bechten v. Jones (Iowa) 73 N. W. 1032; St. Paul, etc. Co. v. Thomas (Minn.) 61 N. W. 1134; Vette v. La Barge (Mo.) 64 Mo. App. 179, 2 Mo. App. 907; McCorckle v. Miller, 64 Mo. App. 153; Newbern, etc. Co. v. Duffy (N. C.) 68 S. E. 915; Mallon v. Stevens (Ohio) 9 Am. L. Rec. 702; Rogers v. Watson (Tex.) 17 S. W. 29; Sea v. Glover, 1 Ill. App. 335; Morling v. Bronson (Neb.) 56 N. W. 205; Halwood, etc. Co. v. Heffernan, 29 Pa. Co. Ct. 300; Carlon v. Kenealy, 12 M. & W. 139.

"But in the absence of such provision, no notice to the mortgagee is necessary nor any demand of payment before suit; the commencement of a suit for foreclosure of the entire mortgage is a sufficient declaration of the mortgagee's intention and is all the notice to which the

mortgagor is entitled." 27 Cyc. 1542; Clements v. Luce (Cal.) 35 Pac. 1032; Sichler v. Look (Cal.) 29 Pac. 220; Hewitt v. Dean (Cal.) 27 Pac. 423; Monroe v. Fohl (Cal.) 14 Pac. 514; Leonard v. Tyler, 60 Cal. 299; Whitcher v. Webb, 44 Cal. 127; San Gabriel, etc. Bk. v. Lake, etc. Co. 86 Pac. 727; Austin v. Burbank (Conn.) 2 Am. Dec. 119; Hodgdon v. Davis, 6 Dak. 21, 50 N. W. 478; Broadbent v. Brunback (Idaho) 16 Pac. 555; Smith v. Billings (Ill.) 49 N. E. 212; Swearingen v. Lahner (Iowa) 26 L.R.A. 765; Hawes v. Detroit, etc. (Mich.) 67 N. W. 329; National etc. Co. v. Butler (Neb.) 85 N. W. 437; Fowler v. Woodward (Minn.) 4 N. W. 231; Quackenbush v. Lane (U. S.) 20 Fed. Cas. No. 11191; Hothorn v. Louis (N. Y.) 62 N. E. 1096.

BIRDZELL, Ch. J. This is an action to foreclose a conditional sale contract. The plaintiff recovered a judgment, and the defendant appeals. The facts are that the defendant, in August, 1920, purchased of the plaintiff a Mahlstedt Multi-Color Printing Press for the sum of $1,000, paying $175 in cash and agreeing to pay $175 September 5th following. The balance of $650 was covered by notes of $50 each, the first one due October 5th, 1920, and one falling due each month thereafter until the whole would be paid. The sale contract reserved title in the plaintiff until payment of all notes, and contained a provision that in case default should be made in the payment of any of them, the whole of the balance of the purchase price and the unpaid notes should become immediately due and payable. The notes were dated Fargo, North Dakota, August 17th, 1920, and each one was expressed to be payable to the order of the plaintiff "at Fargo, North Dakota." The notes falling due prior to April 5th, 1921, were paid, but that note and subsequent notes, with interest, were not paid when due. This action was begun by the service of summons and complaint in June, 1921. In the complaint the plaintiff declared an election to treat the whole of the balance as due. Judgment was entered for the full amount unpaid and special execution awarded.

The principal error argued on this appeal is that up to the time the action was brought there had been no default in the payment of the purchase price notes to justify the bringing of an action, or, at any rate, the entry of a judgment covering the amount of the purchase price

embraced in notes not yet matured. This contention is founded upon § 6955, Comp. Laws, 1913 (§ 70, Uniform Neg. Inst. Act) which provides that presentment for payment is not necessary in order to charge a person primarily liable on an instrument, but if the instrument is, "by its terms, payable at a special place and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part." It is argued that as the note was payable "at Fargo, North Dakota," it was payable at a "special place" within the meaning of this statute and, hence, that the trial court should have allowed the defendant to establish its ability and willingness to pay the notes as they fell due in order that it might be considered to have tendered payment; and, having in legal effect tendered payment, to have rendered inoperative the express condition in the contract authorizing the vendor to declare the balance due.

We are clearly of the opinion that the designation of a city in which the instrument is payable is not the designation of a "special place" within this provision of the statute. The purpose of the statute seems to us to be obvious. It subserves the convenience of both parties in that it contemplates the designation of a particular place where the holder of the instrument, on the one hand, may go with the expectation of receiving the amount due or of ascertaining that the instrument will not be met, thus obviating the necessity of seeking out the obligor; while, on the other hand, it enables the obligor to make provision against default or dishonor by having the funds at such place, thereby stopping interests and obviating costs. The clear purpose of the statute would not be carried out, in our opinion, by giving to the expression "a special place" a meaning which would make it coextensive with the borders of a city.

The appellant relies upon the case of Bardsley v. Washington Mill Co. 54 Wash. 553, 132 Am. St. Rep. 1133, 103 Pac. 822; but in that case, while the instrument was payable "at Spokane, Washington," the court declined to hold that the note was, by its terms, payable at a special place within that section of the Neg. Inst. Act heretofore quoted in part, and it declined to base its decision upon the statute. It was held, however, that the law, aside from the statute, fixed a special place for its payment, so that if the obligor were able and will-

ing to pay it at such place he was not in default to the extent that the holder could exercise his option to declare the balance of principal and interest due. We are not aware of any rule of law that so fixes a place of payment where the parties have not agreed on a special place. Authorities which merely establish that the residence or place of business of the obligor, or primary party, is the proper place at which to make presentment to charge a secondary party do not go so far as to declare that the ability and willingness of the primary party to pay at such place is equivalent to a tender. Where the payee has not agreed upon "a special place" and is content to seek redress against the primary party alone, he is under no duty to make presentment and the statute so declares. It is, therefore, incumbent upon the primary party to relieve such default by payment or tender. There being no specified place of payment in the notes involved here, the failure to pay at maturity was a default within the contract. We are, therefore, of the opinion that the main contention of the appellant must be denied. Such of the remaining specifications of error as have merit are dependent upon the principal contention hereinbefore discussed and require no additional consideration. The judgment appealed from must be affirmed. It is so ordered.

CHRISTIANSON, ROBINSON and GRACE, JJ., concur.

BRONSON, J. (specially concurring). I concur in an affirmance. I agree that the notes involved were not payable at a special place within the meaning of § 6955, Comp. Laws, 1913; Uniform Neg. Inst. Law, § 70. In my opinion the case of Bardsley v. Washington Mill Co. 54 Wash. 553, 103 Pac. 822, 132 Am. St. Rep. 1133, does not express a contrary view. It does not necessarily follow that the mere failure of the maker to pay the notes due at maturity is such a default as entitles the payee to absolutely declare the whole debt due and payable if circumstances might otherwise show equitably that the defendant was ready, willing, and able to make payment of the notes that were due. This is an equitable action. But the defendant has relied entirely upon the law defense of failure to make presentment at a special place. No other defense was presented. Furthermore, at the

time of the rendition of the judgment all of the notes had become due. It was proper for the trial court to render judgment for the amount then due. Comp. Laws, 1913, § 8100. The judgment, accordingly, must be sustained.

THE STATE OF NORTH DAKOTA EX REL. THE BOARD OF EDUCATION OF THE CITY OF DEVILS LAKE OF THE STATE OF NORTH DAKOTA, Respondent, v. J. A. KRAMER, as County Auditor of the County of Ramsey, North Dakota, Appellant.

(190 N. W. 271.)

Schools and school districts — electors of school district may by majority vote increase tax levy above limit prescribed.

1. Chapter 122 of the Session Laws of 1921, is construed, and it is held that it authorizes electors of school districts by a majority vote to increase the tax levy above the limit otherwise prescribed.

Schools and school districts — law providing for certification of tax to the county auditor not applicable to additional tax authorized by electors.

2. Chapter 144 of the Session Laws of 1915 is construed, and held, not applicable as to the time of certification to an additional tax authorized by the electors under Chapter 122 of the Session Laws of 1921.

Opinion filed October 4, 1922.

Schools and School Districts, 35 Cyc. p. 1003 n. 12 New; p. 1016 n. 27.

Appeal from judgment of the District Court of Ramsey County, *Buttz*, J.

Affirmed.

S. W. Thompson, State's Attorney of Ramsey County, for appellant.

Flynn, Traynor & Traynor, for respondent.

BIRDZELL, Ch. J. This is an appeal from a judgment in favor of the plaintiff in a mandamus proceeding.

The plaintiff and petitioner alleges, among other things, that prior to the 15th day of August, 1922, a special election was held in the

Devils Lake special school district for the purpose of authorizing a tax levy of 25 per cent in excess of the limit otherwise provided by chap. 122 of the Session Laws of 1921, and that an election held on August 15th resulted in a favorable vote on the proposition. That the board of education, thereupon, by resolution, directed the levy of $17,000 for school purposes, which sum was within the 25 per cent increase authorized at the election. That upon certification of the levy to the county auditor, the latter refused to extend the taxes. As above stated the trial court awarded the mandamus.

Upon this appeal there are but two questions presented, i. e., whether or not the taxes, so authorized, are within the limitation prescribed by chap. 122 of the Laws of 1921, and whether or not the levy was made within the proper time. Section 2, of chap. 122 of the Session Laws of 1921 reads as follows:

"The total amount of taxes levied for any purpose, except special levies for local improvements and for the maintenance of sinking funds in any county or political subdivision thereof in any village, town or city within the state shall not exceed an amount equal to one-third of the total combined levies, which were made for the years 1918, 1919, and 1920, except that school districts may levy not to exceed 30 per cent in excess of such amount, and provided that any county or political subdivision thereof or any village, town or city may increase such levy in the same proportion as the assessed property valuation increases or has increased over that of the year 1919. Provided, however, that the electors of any county or political subdivision thereof or any village, town or city within the state, may by a majority vote authorize a levy of 25 per cent in excess of this limit."

The contention is that the proviso stated in the last sentence of the above section does not include school districts. This contention is based upon the fact that in the preceding sentence school districts are excepted from the limitation prescribed and are allowed to levy "not to exceed 30 per cent in excess" of the average levy for the years 1918, 1919, and 1920. It is argued that the exception manifests an intention to prescribe a wholly separate and independent limitation for school districts, and that the proviso stated in the second sentence is not intended to apply to them. However forcible the argument might be from the standpoint of policy, it is not a valid contention, in view

of the language of the statute. The legislature doubtless intended to cover a school district by designating it as a political subdivision of a county; for, in the first sentence, the only term that is used in imposing a limitation which could, with any degree of propriety, include a school district, is "any county or *political subdivision thereof*," and from the limitation of the average of combined levies, an express *exception* is made that school districts may levy not to exceed 30 per cent in excess of this amount. The exception clearly implies inclusion in the antecedent expression. When, therefore, in the next sentence, provision was made for increasing the limitation by a majority vote and the term which had been used as embracing school districts in the previous sentence was again employed, it would seem obvious that, as a matter of grammatical construction, school districts would be included within the proviso as they were within the limitation. The act furnishes no indication of a contrary intention. It follows that the statute must be applied according to its literal meaning.

The contention that the levy was not made within proper time for certification to the county auditor is based upon chap. 144 of the Session Laws of 1915, which provides that the board of education shall on or before the 20th day of July in each year levy a tax for the support of the schools of the corporation for the fiscal year next ensuing. The tax so levied is required to be certified to the county auditor by the clerk of the board. No time is fixed for the holding of the election authorizing the additional tax under the proviso of § 2, chap. 122, of the Laws of 1921, and neither is any time fixed in chap. 144 of the Session Laws of 1915, for the certification of the taxes by the clerk of the board to the county auditor. We are of the opinion that chap. 144 of the Laws of 1915 has no application to an additional tax under chap. 122 of the Session Laws of 1921, and, furthermore, that the provisions of chap. 144, of the Laws of 1915 as to time are directory. It is not contended here that the taxes were not certified within sufficient time to enable the county auditor to extend them in the tax lists, and it appears that they were, in fact, certified before the equalization of the assessment was completed.

Judgment appealed from is affirmed.

CHRISTIANSON, BRONSON, GRACE and ROBINSON, JJ., concur.

P. S. CHAFFEE, in Behalf of Himself and All Others Similarly Situated, Appellant, v. MATT CROWLEY, Herman Fahlsing, Joseph Erickson, Chas. Murray, and Fred J. Link, as the Board of County Commissioners of Mercer County, North Dakota, Paul Leupp as County Auditor of said Mercer County, Herbert Roberts as County Treasurer of said Mercer County and Norbert J. Joyce, Respondents.

(190 N. W. 308.)

Counties — county commissioner accepting lowest responsible bid for repair to county building may consider responsibility of bidder, "lowest responsible bidder."

1. The board of county commissioners in accepting the lowest responsible bid exercise a discretion which may consider the ability, capacity, experience, efficiency, and reputation of the bidders.

Counties — contract held properly let to lowest responsible bidder as required by law; sufficient funds held available for payment at time of letting contract.

2. In an action to enjoin repairs to a courthouse, pursuant to the award of a contract, it is held, for reasons stated in the opinion, that the contract was properly let and that there are sufficient moneys available for its purposes.

Opinion filed October 7, 1922.

Counties, 15 C. J. § 235 p. 542 n. 7; § 247 p. 551 n. 32.

Injunction proceeding in District Court, Mercer County, *Nuessle*, J., to restrain repairs to a courthouse.

Plaintiff has appealed from a judgment of dismissal.

Affirmed.

Sullivan, Hanley & Sullivan, for appellant.

An arbitrary determination by such board to accept the highest bid without any facts justifying it cannot have the effect of a judicial

Note.—The general rule as deduced from the cases is that, in awarding contract for public works, public authorities are vested with discretion in determining who is the lowest and best bidder, and their decision will not be interfered with by the courts, even if erroneous, provided it is based on a sound and reasonable discretion, as will be seen by an examination of the authorities collated in a note in 38 L.R.A.(N.S.) 655.

On letting of public contract to lowest responsible bidder, see note in 50 Am. St. Rep. 489.

See also 7 R. C. L. 943; 3 R. C. L. Supp. 479; 5 R. C. L. Supp. 431.

determination and must be designated as a palpable violation of the law. People v. Gleason, 121 N. Y. 631; Times Publishing Co. v. Everrett, 9 Wash. 518; Faist v. Hoboken, 72 N. D. L. 361; People v. Buffalo, 84 N. Y. Supp. 434.

If it is asserted that the lowest bidder is not responsible, it has been held that he is entitled to be heard on that question, and there must be a distinct finding against him upon proper facts to justify it. McGovern v. Trenton, supra; Faist v. Hoboken, supra; State v. Commissioners, 39 Ohio St. 188.

In the case of Ross v. Board of Education, 42 Ohio St. 374 (see page 378), it was argued that the board had discretion because it reserved the right to reject any and all bids where it did not accept the lowest responsible bid.

"The discretion given by the clause is to reject all the bids. This is the only discretion. If it is determined to accept a bid there is no discretion as to which bid must be accepted. If the lowest responsible bid is rejected, and any other be accepted, the action of the board may be controlled by mandamus without violating the rule that a matter of discretion is not subject to control by proceedings in mandamus."

If the lowest bid is not accepted, there must be a readvertisement. 27 N. W. 122 (Neb.); Mueller v. Eau Clair Co. 84 N. W. 430 (Wis.).

There must be an adjudication that Niedermeyer and Schmidt were not responsible. Inge v. Board of Public Works, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 21.

The question of the responsibility of the bidder is not left to the general judgment and discretion of the board where a bond or certified check accompanies the bid. State v. Cornell, 71 N. W. 961 (Neb.) see page 965, 2nd col.

The lowest responsible bidder is one who complied with all the requirements of the statute. Boseker v. Wabash Co. 88 Ind. 267; Jefferson v. Anghi, 54 Miss. 668.

David Schwartz and *Norton & Kelsch,* for respondents.

Statement.

BRONSON, J. This is a proceeding to enjoin the execution of a

contract for repairs to a courthouse. The material facts are: The county commissioners of Mercer county, deeming it necessary to make alterations and repairs to the courthouse, advertised for bids therefor. On July 5th, 1922, they considered the bids submitted. There were four bids: Schafer, $6,389, Joyce, $6,013, Niedermeyer, $5,768, Schmidt, $5,760. The board accepted the bid of Joyce and immediately made a contract with him. The plaintiff, as a citizen and taxpayer, instituted this proceeding. A temporary restraining order was secured.

When the contract was let there was a balance of $3,280 in the building fund, and $3,200 in the emergency fund. Three of the commissioners voted for the awarding of the contract to Joyce; two commissioners voted in the negative, for the reason that they were opposed to any building or construction at that time. It does not appear from the evidence that any protest was made against awarding the contract to Joyce, or that any objection or demand for a rehearing was made by those whose bids were not accepted. It further appears that the principal reasons for awarding the contract to Joyce were: The commissioners were acquainted with Joyce. He had previously done some public work in the county. They knew him to be a responsible and good contractor. They did not know anything about Niedermeyer or Schmidt concerning their responsibility or ability. They accepted the bid of Joyce because it seemed the most desirable under the circumstances. It otherwise appears that Joyce had previously made a bid for the same work upon a call which was not consummated through injunctional proceedings. He made the same bid again. Niedermeyer and Schmidt had not previously bid. Further, it appears that Niedermeyer had never had a contract of this size; that when he made this bid he had some talk with the plaintiff whereby he received assurance of some protection on his bid if plaintiff should institute action to stop this proceeding. Further, it appears that the commissioners, or some of them, knew about some other work that Schmidt had done and it did not appear to be satisfactory.

The trial court found that the board, within its judgment, properly awarded the contract to Joyce as the lowest responsible bidder and that there were funds available for the purposes of paying such contract. Judgment was rendered dismissing the action. The plain-

tiff procured a stay of proceeding and appealed from the judgment.

It is the contention of the plaintiff that the board, pursuant to the law, did not award the contract to the lowest bidder and that there were not sufficient funds available for purposes of its payment.

Decision.

Concerning such contracts, the law provides that the lowest responsible bid must, in all cases, be accepted. Chap. 49, Laws of 1921. It is well recognized that a responsible bid involves the elements of the ability, capacity, reputation, experience, and efficiency of the bidders. Responsibility must be determined as well as the pecuniary amount. 36 Cyc. 876; Butler v. Darst, 38 L.R.A.(N.S.) 655, note. The county commissioners have a discretion to exercise in this regard. 15 C. J. 551; 7 R. C. L. 943; 1 Abbott, Mun. Corp. § 268. There is no showing that they did not exercise their best judgment within the discretion they possessed in selecting the lowest responsible bidder; nor that they acted in bad faith or other than for the best interests of the county. In their judgment the small difference in dollars between the bids offered might be far out-weighed by the ability, efficiency, and facilities of the contractor to whom the award was made. It is now shown in the record that either Niedermeyer or Schmidt possessed a responsibility in this sense equal to that of Joyce. Clearly, there are funds available. See Boetcher v. McDowell, 43 N. D. 178, 174 N. W. 759. The transfer from the emergency fund was not made by reason of the injunctional proceedings. We are of the opinion that the findings of the trial court should be sustained. The judgment is affirmed with costs.

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

GRACE, J. (specially concurring). Under the facts in this case, it appears to me that the county commissioners in accepting the lowest responsible bid, acted in good faith and exercised their discretion.

I, therefore, concur in the conclusions reached by the principal opinion on the grounds stated in paragraph 1, of the syllabus, which are decisive of the case.

MATHIAS GREWER, Respondent, v. KASPER SCHAFER, Appellant.

(190 N. W. 176.)

New trial — granting new trial where verdict contrary to evidence held not abuse of discretion.

In an action upon a note for a portion of the purchase price of a tractor the defendant answered alleging that rescission had taken place for breach of warranty and claimed damages. Verdict for the defendant awarding damages and a new trial granted.

Held, the record shows that the trial court did not abuse its discretion in granting a new trial.

Opinion filed October 10, 1922.

Appeal and Error, 4 C. J. § 2813 p. 830 n. 45.

Appeal from District Court, Morton County, *Pugh*, J.

Affirmed.

Halpern & Rigler, for appellant.

The question whether the offer to return the tractor was made within a reasonable time is one for the jury, and by its verdict the jury found that the offer was made within a reasonable time. Avery Co. v. Peterson (S. D.) 171 N. W. 204; B. F. Sturtevant Co. v. Le Mars Gas Co. (Ia.) 175 N. W. 338; Fox v. Boldt (Wis.) 176 N. W. 467; International Harvester Co. of America v. Thomas et al. (N. Dak.) 176 N. W. 523.

Norton & Kelsch, for respondent.

Where the appellant appeals from an order of the district court granting a new trial, the sole and only issue presented to the supreme court is whether or not the district court manifestly abused its judicial discretion in granting a new trial. 6 N. D. 276; Pengilly v. Case Machine Co. 11 N. D. 255; Aylmer v. Adams, 30 N. D. 514; 35 N. D. 125; Wagoner v. Bodal, 37 N. D. 794.

BIRDZELL, Ch. J. This is an appeal from an order of the district court of Morton county granting a new trial. The action was brought

Note.—On granting new trial where verdict contrary to evidence, see 20 R. C. L. 275; 3 R. C. L. Supp. 453; 4 R. C. L. Supp. 1349; 5 R. C. L. Supp. 1094; 2 R. C. L. 217; 1 R. C. L. Supp. 453; 4 R. C. L. Supp. 94; 5 R. C. L. Supp. 93.

upon a note for $1,225 representing a portion of the purchase price of a tractor. The defendant answered claiming that he had rescinded the contract of sale for breach of warranty and also claiming damages for such alleged breach. The action was tried to the court and a jury, and a verdict returned finding for the defendant and awarding him $200 damages on the counterclaim. Thereafter the plaintiff moved for a new trial and the motion was granted.

In the spring of 1919 the defendant bought of the plaintiff one Happy Farmer Tractor for the agreed price of $1,425. Two hundred dollars was paid in cash and the defendant gave his note for the balance, due October 1st, 1919. Plaintiff, through his agent, gave a written warranty of the tractor to the effect that it would pull three stubble bottoms in old land and two breaker bottoms in prairie land, on kerosene fuel, and undertaking that in case it should fail to fulfil the warranty, the purchase price would be returned and the tractor taken back. The tractor plowed about 75 acres during the season of 1919 and various repairs were required. In the spring of 1920 the plaintiff overhauled the tractor, supplying considerable new materials, placing it in good working condition. That season the defendant plowed about 170 acres. On October 16th, 1920, the defendant wrote to the plaintiff as follows:

"I do not want any trouble and will settle for the engine, but I would like for you to be reasonable. The first year the engine was not in working condition and as you know you replaced the engine this spring and I am willing to pay interest from this spring until date of settlement. I can promise that I can pay the note in full as you know I have had considerable expense.

"I am just beginning to haul some wheat and as soon as I have some sold I will be in position to pay some on the note. Kindly let me know if this arrangement is satisfactory, and I think I am as reasonable with you as you were with me. I did not bring the engine when it did not work."

In a memorandum opinion the trial judge specifically calls attention to the fact that the tractor was never actually returned; that it was sold on approval and no time fixed for the return if not satisfactory; that the reasonable time within which a contract of this character must be rescinded by return of the property, or the prop-

erty returned under the option in the contract, is a question of fact for the determination of the jury; but that when the goods are returned or offered to the seller they must be in substantially as good condition as when taken, making reasonable allowance for trial; also that the evidence fails to show the condition of the tractor when it was offered to the plaintiff in the spring of 1921. The court further comments upon the fact that the defendant had expressed himself as satisfied with the tractor after it was overhauled in the spring of 1920 and that he had actually agreed to pay for it in full, as shown by the foregoing letter. He stated that there was some question as to whether the defendant understood what was in the letter, but that the facts and circumstances point strongly to the conclusion that he did know.

We are entirely satisfied from a perusal of the record that the deductions of the trial judge are well supported and that he did not err in exercising his discretion by the granting of a new trial. It is well established that an order granting a new trial will not be reversed except for a manifest abuse of discretion. See Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707; First International Bank v. Davidson, 36 N. D. 1, 161 N. W. 281; Reid v. Ehr, 36 N. D. 552, 162 N. W. 903; Wagoner v. Bodal, 37 N. D. 594, 164 N. W. 147. Order affirmed.

ROBINSON, GRACE, CHRISTIANSON and BRONSON, JJ., concur.

THE STATE OF NORTH DAKOTA, Respondent, v. OSCAR PETERSON, Appellant.

(190 N. W. 309.)

Judges — district judge disqualified on affidavit of prejudice not authorized to designate another judge to sit in his place.

Under chapter 129 of the Session Laws of 1921 the district court judge, against whom an affidavit of prejudice is filed in a criminal action, has no authority to designate another district judge to act in his stead at the trial.

Opinion filed October 10, 1922.

Judges, 33 C. J. § 221 p. 1031 n. 74.

Note.—On authority of disqualified judge to designate another judge to preside in his place, see 15 R. C. L. 515; 3 R. C. L. Supp. 465.

Appeal from District Court, Williams County, ***Lowe, J.***
Reversed.
Wm. G. Owens, for appellant.
F. W. McGuiness, for respondent.

BIRDZELL, Ch. J. This is an appeal from an order entered by the Honorable John C. Lowe, judge of the district court of the county of Williams ordering that the Honorable George H. Moellring, another judge of said court, be designated as the trial judge in the action. The facts are that an information was filed charging the defendant with a criminal offense. Thereafter he filed an affidavit of prejudice against the presiding judge, the Honorable John C. Lowe, whereupon the latter entered the order appealed from, which is as follows: "Affidavit of prejudice having been filed in this court against the undersigned as presiding judge.

"Now, therefore, it is hereby ordered that the Honorable George H. Moellring be and is hereby designated as the trial judge herein."

"Dated at Williston, North Dakota, this 4th day of March, 1922."

The appellant contends that the above order is void for lack of authority in the district judge to make it, and he relies upon chap. 129 of the Session Laws of 1921. That chapter provides that when a defendant in any criminal action pending in any of the district courts of the state shall, after issue joined and before the opening of any regular, special, or adjourned term at which the cause is to be tried, file an affidavit stating that he has reason to believe, and does believe, that he cannot have a fair and impartial trial or hearing before the judge by reason of the prejudice of such judge, the court shall proceed no further in the action and shall be disqualified to do any further act in said cause. It further provides for the forwarding of the affidavit to the clerk of the supreme court and for the supreme court designating a district judge to act in the place of the judge disqualified. There is no contention that the affidavit does not conform to all the requirements of this statute, and it is conceded that if the statute is constitutional the district judge had no authority to enter the order appealed from. The brief on behalf of the state consists merely of thirteen lines of typewritten matter in which the constitutional question is merely stated. It is said that the act is unconstitutional in that it does not conform to sec. 61 of article 2 of the Constitution which provides that

no bill shall embrace more than one subject which shall be expressed in its title. It is claimed that the title of the act in question is defective by reason of its failure to set forth the following: "Affidavit of prejudice. By whom made. Affidavit to be filed. The supreme court to designate trial judge." There is obviously no merit in the contention that the act is unconstitutional for the reasons assigned. The title need not be an index. In this instance it shows that it is an amendment to an existing statute and that it relates "to change of judges in civil and criminal actions in the district court, for prejudice or bias of judge thereof." Every section of the act relates to the procedure incident to affidavits of prejudice and we see no force in the contention that the subject is not expressed in the title or that it is duplicitous. The order appealed from is reversed.

CHRISTIANSON, ROBINSON, GRACE, and BRONSON, JJ., concur.

J. E. BURKE, Respondent, v. T. WELO, Appellant.

(190 N. W. 269.)

Pleading — allowance of amendment to complaint presenting new cause of action error.

1. The trial court erred in allowing an amendment of the complaint, which presented a new cause of action.

Trial — denial of motion by defendant to strike out incompetent evidence held error.

2. For reasons stated in the opinion the trial court erred in refusing on motion of defendant to strike out certain incompetent evidence and in receiving over defendant's objection, certain other incompetent evidence.

Limitation of actions — action held not accrued within six years prior to commencement.

3. For reasons stated in the opinion, it is held that plaintiff's cause of action had not accrued within six years prior to the time of its commencement, the

Note.—On rule allowing amendments to pleadings, see 21 R. C. L. 580, et seq.; 3 R. C. L. Supp. 1172; 4 R. C. L. Supp. 1421; 5 R. C. L. Supp. 1165. On denial of motion to strike out incompetent evidence, see 26 R. C. L. 1055; 3 R. C. L. Supp. 1490; 5 R. C. L. Supp. 1437. On running of statute of limitations from accrual of cause of action, see 17 R. C. L. 748; 3 R. C. L. Supp. 727.

action purporting to be one to recover upon an open, mutual, and current account.

Opinion filed October 14, 1922.

Limitation of Actions, 37 C. J. § 232 p. 868 n. 17; Pleading, 31 Cyc. p. 410 n. 89; Trial, 38 Cyc. p. 1404 n. 47 New.

An appeal from the District Court of McHenry County, *C. W. Buttz, J.*

Judgment and order reversed and dismissal of action directed.

Albert Weber, and *John Thorpe,* for appellant.

E. T. Burke, for respondent.

GRACE, J. This is an appeal from a judgment entered in favor of plaintiff in the sum of $369.15, and from an order denying defendant's motion for a judgment notwithstanding the verdict or for a new trial.

The facts in the case necessary to be stated follow: Plaintiff is a lawyer who at one time resided at or near Velva, and who did some farming on the side, and defendant was engaged in the merchandize and farm implement business at Velva. Plaintiff as an attorney rendered certain services for T. Welo, and the Velva Implement Company, the charges for which, it is claimed, were entered in plaintiff's books of account. The first item was entered July 30th, 1903. Several charges were made for each of the years from 1903 until 1907, both inclusive. These items were set forth in a statement of account served upon defendant by plaintiff on defendant's demand. There were in fact two of such statements of accounts so served. The first did not include any charges or items for the year 1908 the last purported to include two items for that year. These accounts purport to show charges of plaintiff against the defendant and the Implement Company and certain credits allowed them. Defendant had an account against plaintiff for $162.77, incurred by certain men working upon plaintiff's farm and for which the latter gave his note in settlement to the defendant on July 7th, 1910.

Thereafter defendant brought suit in justice court upon the note, and recovered judgment by default. Burke, the defendant in that suit, appealed to the district court and there attempted to plead as a counterclaim, the account upon which he now sues, but was denied the privilege of doing so by the trial court. In February, 1914, he brought this

action, service of process being had on March 17th, 1914. The original complaint after alleging that for more than twelve years plaintiff had been a duly licensed and practising attorney in the state of North Dakota, further alleged: "That during that time and until four or five years ago plaintiff had, upon the request of the defendant, performed legal services of the reasonable value of $252.90," and demanded judgment accordingly, and interest. After the service of the summons and complaint upon him, defendant demanded an itemized statement of the account sued on, and was given the first account above mentioned. He thereafter interposed an answer, which included the following defenses:

1. A general and specific denial of the allegations of the complaint.

2. That the cause of action did not accrue within six years of the commencement of it and is barred by the provisions of paragraph 1 of § 6787, Revised Codes of 1905 of the state of North Dakota.

3. That he had long since fully paid plaintiff for all services due and owing from defendant to plaintiff and, in addition, added a denial that he had employed plaintiff in any capacity since October 31st, 1906.

After the answer was interposed, but only the day prior to trial, plaintiff made a motion to amend his complaint and was permitted to do so over defendant's objection. The amended complaint, in substance, states that for twenty years last past the plaintiff was licensed and authorized to practise law in the state of North Dakota. Paragraph 2 of the amended complaint is as follows:

"That from and between the years 1903 and 1908 inclusive the defendant had an open, mutual, and current book account, and that the plaintiff performed services for the defendant as his attorney and at his request at various times during said years, as is more particularly set forth on the itemized statement which is hereto attached and made a part of this complaint, and that an open mutual account existed during all of said time up to and including the 23d of March 1908, and that the balance due on the said 23d day of March 1908, from the defendant to the plaintiff was the sum of $252.90, on account of reasonable and agreed value of said services." Judgment was demanded for this amount. To this complaint is attached the second itemized statement and is made a part of it. The answer interposed to the original complaint was the answer to the amended complaint, except that it was

amended to state in substance that the items in the amended statement of account in which charges were made against anyone, except T. Welo, are not charges against the defendant, and further pleads settlement of all accounts on about July 7th, 1910, at the time the promissory note hereinbefore referred to was executed. Upon a trial to court and a jury plaintiff recovered a verdict upon which a judgment was entered in the amount above mentioned.

Defendant made a motion for judgment notwithstanding the verdict or for a new trial, specifying certain errors in connection therewith. This being denied he appeals from both the judgment and order denying a new trial and specifies numerous errors. It is not necessary to set them all out, but all will be considered and those discussed which merit discussion. It is claimed the court erred in allowing the amended complaint for the reason that it changed the cause of action and thus presented a new issue. We think the court in this respect did err. The first cause of action, if any, was based upon the contention that plaintiff had performed certain legal services for the defendant of the reasonable value of $252.90. The amended complaint, if it stated a cause of action, stated one for the recovery of a balance of $252.90, of an open, mutual, and current account between plaintiff and defendant. This was a wholly different cause of action than one to recover the reasonable value of certain services; it involved different methods of proof and dissimilar principles of law; while the trial court has a wide discretion in allowing amendments, and in the interest of justice should be liberal in the allowance of them, yet where an amendment states a wholly different cause of action and operates to create an entirely new issue, as was the case here, it is an abuse of discretion to allow it.

It is asserted that the court erred in refusing to strike out testimony adduced on behalf of plaintiff where the effect of the same was to charge defendant for services, which if rendered, were to the Velva Implement Company. We think the court did err thus. The Velva Implement Company was a corporation; it was not made a party to this suit. Defendant in the absence of proof to that effect, was not chargeable with its debts, and there is no such proof. It is claimed the evidence is insufficient to support the verdict. The evidence is insufficient to support the verdict unless plaintiff is permitted to charge defendant with the pretended item of March 23d, 1908; if this item is excluded it is

clear that the balance of the account was not properly received as evidence, as more than six years have elapsed since the last item thereof and the commencement of this action. This item includes neither a charge against nor a credit in favor of defendant. It is not an item. It neither increased nor decreased the total of the account as it existed prior thereto. Its inclusion, therefore, in the account amounts to nothing. Clearly, then, plaintiff's alleged cause of action is barred. The evidence received in proof of it was in admissible and incompetent, and affords no support of the verdict. The court on the motion of defendant should have directed a verdict in his favor, since there was no competent evidence to support plaintiff's alleged cause of action. It is not necessary to the determination of this case to decide whether plaintiff's alleged account was a mutual, open, and current account. It is clear that plaintiff's alleged cause of action is barred.

The judgment and order appealed from are reversed and the cause remanded to the trial court with directions to enter an order dismissing the action. Appellant is entitled to his costs and disbursements on appeal.

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

BRONSON, J., concurs in result.

CHRISTIANSON, J., disqualified, did not participate.

ANGELINE MALHEREK, Appellant, v. THE CITY OF FARGO, a Municipal Corporation, Respondent.

(190 N. W. 176.)

Appeal and error — appeal does not lie from order dismissing action.

An appeal does not lie from an order dismissing an action.

Opinion filed October 16, 1922.

Appeal and Error, 3 C. J. § 332 p. 499 n. 28 New.

Note.—On appeal from order dismissing action, see 2 R. C. L. 42; 1 R. C. L. Supp. 372; 5 R. C. L. Supp. 66.

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

Appeal dismissed.

Taylor Crum, for appellant.

W. H. Shure (*B. F. Spalding,* of counsel), for respondent.

ROBINSON, J. In this action plaintiff sues the city of Fargo to recover damages for a personal injury sustained by plaintiff by reason of falling on a slippery sidewalk. The plaintiff appeals from an order dismissing the action and directing the entry of judgment accordingly.

Counsel for defendant objects that an appeal does not lie from such an order. He cites the statute, Comp. Laws, § 7481. Dibble v. Hanson, 17 N. D. 21, 114 N. W. 371, 16 Ann. Cas. 1210; Lough v. White, 13 N. D. 387, 100 N. W. 1084; Re Weber, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523; Field v. Great Western Elevator Co. 5 N. D. 400, 67 N. W. 147.

Those cases are directly in point and show that according to the settled law an appeal does not lie from an order dismissing an action. Hence the appeal is dismissed and the case remanded forthwith.

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

A. STONEHOUSE and E. Stonehouse, Copartners, Respondents, v. GEORGE SMITH, Appellant.

(190 N. W. 314.)

Justices of the peace — service of undertaking with notice of appeal to district court jurisdictional.

Following Richardson v. Campbell, 9 N. D. 100, it is a jurisdictional prerequisite in appeals from justice's court that the undertaking be served with the notice of appeal.

Opinion filed October 16, 1922.

Justices of the Peace, 35 C. J. § 449 p. 762 n. 13.

Action in District Court, Grand Forks County, *Englert, J.*

Note.—On necessity of filing undertaking with notice of appeal in justice's court, see 16 R. C. L. 404; 3 R. C. L. Supp. 565.

Defendant has appealed from a judgment dismissing an appeal from the Justice's Court.

Affirmed.

P. A. McClernan, for appellant.

J. A. Walsh, for respondents.

BRONSON, J. This is an appeal from a judgment dismissing an appeal from the justice's court. Upon a trial had in the justice's court judgment was rendered for the plaintiffs. Defendant appealed, but did not serve his undertaking upon plaintiffs or their attorney. For such failure the trial court dismissed the appeal. Defendant requests a construction of §§ 9163, 9165, and 9169, Comp. Laws. 1913, and their application to a litigant not in default. These sections were, respectively, §§ 6771, 6772, and 6776, Revised Codes 1895, forming a part of chapter 6, Justice's Code, relating to appeals in civil actions. Section 6776 provides: "The undertaking given on appeal and appellant's pleading, if the judgment appealed from was taken by default, must be served with a notice of appeal." This section was amended by chap. 6, Laws of 1897, so as to read "The undertaking for appeal must be served with the notice; also appellant's pleading when the judgment appealed from was taken by default." Plainly, the statutory provision requires that the undertaking for appeal must be served in all cases with the notice. It is a jurisdictional prerequisite. This court has expressly so held in Richardson v. Campbell, 9 N. D. 100, 81 N. W. 31.

The judgment is affirmed with costs.

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

C. R. HODGE, Respondent, v. MAUD H. DUNLOP and Charles N. *Wells, Appellants.*

(190 N. W. 551.)

Subrogation — one who acquires title in ignorance of defects and pays mortgage, being subrogated to mortgagee's rights, held entitled to have release canceled.

1. It is a general rule that acquiring title and causing the lien of a mort-

Note.—On right to reinstatement of mortgage released or discharged by mistake, see notes in 58 L.R.A. 788; 26 L.R.A.(N.S.) 816; and L.R.A.1917E, 1055.

See also 19 R. C. L. 740–742; 3 R. C. L. Supp. 950; 5 R. C. L. Supp. 1036.

gage to be canceled by payment, in ignorance of defects in the title will afford ground of equitable relief for cancelation of the release and for subrogation to the lien of the mortgage released, where there is no element of estoppel, the rights of bona fide parties are not affected, and the restoration of the released mortgage will place the holder of the junior lien in no worse position than he was at the time the mortgage was released.

Subrogation — purchaser who in good faith paid first mortgage entitled to restoration thereof and subrogation to rights of holder as against a junior lienor on discovery of defective title.

2. In the instant case the plaintiff purchased a tract of land from one who represented that he was the owner of the tract in fee simple, subject alone to two certain mortgages. After acquiring such title the plaintiff, in good faith and in reliance on the representations made by his vendor, paid the first mortgage and caused the same to be released. Subsequently, plaintiff learned that his vendor owned only one half of the fee simple estate; and that there was a judgment against the owner of the other one half of such estate, which was a lien junior to the mortgage released. There are no subsequent purchasers, and the holder of the judgment has in no manner changed his position, and the restoration of the mortgage will place him in no worse position than he was at the time the mortgage was released.

Held, that the plaintiff is entitled to have the mortgage restored and to be subrogated to the rights of the holder of the mortgage as against the owner of the judgment.

Opinion filed October 23, 1922.

Subrogation, 37 Cyc. p. 449 n. 58; p. 451 n. 62.

From a judgment of the District Court of Stutsman County, *Nuessle*, J., defendant, Wells, appeals.

Affirmed.

John A. Jorgenson, for appellant.

A. W. Aylmer and *A. L. Aylmer*, for respondent.

CHRISTIANSON, J. This is an action to restore and foreclose a certain mortgage alleged to have been released through mistake. The material and undisputed facts are as follows: Cecil Dunlop and Maud Dunlop (husband and wife) were the joint owners of 160 acres of land situated in Stutsman county in this state. On June 6, 1916, they executed and delivered a first mortgage on said land to W. B. S. Trimble Company to secure the sum of $1,750. That mortgage was duly recorded in the office of the register of deeds of said county on June 9, 1916. On January 3, 1917, said Cecil and Maud Dunlop executed and

delivered a second mortgage on said land to the Citizens' National Bank of Jamestown to secure the sum of $2,000 which said mortgage was recorded in the office of the register of deeds of said county, August 20, 1917. On April 23, 1919, there was docketed in the office of the clerk of the district court of Stutsman county, a judgment for the sum of $2,003.32 in favor of Charles N. Wells and against Cecil and Maud Dunlop. In May, 1919, the judgment was released as to Cecil Dunlop. In May, 1919, said Cecil Dunlop was adjudged a bankrupt and one Nierling was duly appointed trustee of said bankrupt's estate. On April 26, 1920, said trustee sold the land to the plaintiff. Thereafter a trustee's deed was executed which was duly recorded February 8, 1921. Prior to such sale the trustee represented to the plaintiff and all other bidders that he as trustee of said bankrupt's estate held the fee title to the entire quarter section of land subject only to the two mortgages above described. The plaintiff purchased the premises on the strength of these representations and knew nothing whatever about the interest of said Maud Dunlop in said premises or the judgment held by the defendant Wells until in April, 1921. In the meantime and on or about February 12, 1921, the plaintiff paid the then holder of the first mortgage the full amount of said mortgage with accrued interest thereon and received a satisfaction of such mortgage which was duly recorded in the office of the register of deeds on February 26, 1921. On or about April 24, 1920, the plaintiff paid the Citizens National Bank of Jamestown the amount due on the second mortgage and received an assignment of said mortgage and the notes secured thereby. In April, 1921, he discovered that Maud Dunlop owned a half interest in the land, also, the existence of the judgment in favor of the defendant Wells, and he thereupon brought this action to restore the first mortgage which had been satisfied of record and to foreclose the same. The plaintiff is the cashier of a bank in Jamestown and has occupied that position for some fifteen or twenty years. The trial court found that the mortgage was released through mistake, and ordered judgment in favor of the plaintiff. The defendant Wells has appealed.

Appellant contends that the plaintiff failed to establish that he released the mortgage through mistake, as that term is defined by § 5854, Comp. Laws, 1913. That section provides: "Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person

making the mistake and consisting in: 1. An unconscious ignorance or forgetfulness of a fact past or present material to the contract; or, 2. Belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing, which has not existed."

The appellant contends that it was a neglect of legal duty on the part of the plaintiff not to examine the records or obtain an abstract of title before he caused the mortgage to be released.

We are unable to agree with this contention. It is undisputed that the trustee in bankruptcy made specific representations as to the condition of the title; that the plaintiff bought the land and subsequently paid the amount due on the mortgage and caused the same to be released in reliance upon such representations. There is no contention that the appellant has in any manner been induced to change his position or has lost any substantial right by the action of the plaintiff in releasing the mortgage. The general rule established by the great weight of authority is that under such circumstances equity will grant relief and restore the parties to their original position.

"The rule of law, indeed, is well established," said Bruce, Ch. J., speaking for this court in Strehlow v. Fee, 36 N. D. 59–66, 161 N. W. 719, "that where an instrument has been surrendered or discharged, or an encumbrance or charge has been satisfied through mistake, the party making the same is entitled to be replaced in his original position, provided only that other creditors have not been induced by the action of the plaintiff or petitioner to change their position, and have not lost any substantial and material rights by such action."

Ruling Case Law (19 R. C. L. p. 469) says: "There can be no doubt of the authority of a court of equity, in a proper case, to reinstate a satisfied mortgage upon real estate, when it appears to have been given under mistake or inadvertence, or procured by fraud. Indeed it is a common thing for courts of equity to relieve parties who have by mistake discharged mortgages upon record, and to fully protect them from the consequences of their acts when such relief will not result prejudicially to third or innocent persons. One of the most common mistakes connected with releases of mortgages is where the mortgage is renewed and the prior lien released in ignorance of intervening rights. Ignorance in such a case is regarded in equity as equivalent to a mistake, and

relief will be granted where there is no other element of estoppel, and where the party seeking the relief has not delayed action."

Nor was the established equitable rule changed by § 5854, supra, as appellant's counsel asserts that it was. In our opinion that section announces no new rule, but is merely a statutory enactment of the well-established equitable rule on the subject. See 2 Pom. Eq. Jur. 4th ed. p. 1709. Section 5854, supra, in the identical language in which it appears in our statute originally appeared in the proposed civil code of New York and was thence adopted in the civil code of California (2 Pom. Eq. Jur. 4th ed. p. 1708) and was thence adopted and embodied in its present form in the civil code of the territory of Dakota of 1877, Civil Code 1877, § 888. The definition of mistake as embodied in that section has been approved by the courts of states where the section has not been adopted as part of the statutory law. See § 2 Pom. Eq. Jur. 4th ed. p. 1708. As already indicated the section was adopted in the state of California prior to its adoption in this state. In considering a question of reinstatement of a mortgage released through mistake the supreme court of California (White v. Stevenson, 144 Cal. 104, 77 Pac. 830) said: "Mistake is the foundation of one of the chief branches of equity jurisprudence, and the exercise of equity jurisdiction is frequently had where a contract as written does not express the terms of the actual agreement between the parties. This jurisdiction is often invoked to set aside or cancel the release of a mortgage that has been given under a mistake of fact, or contrary to the evident intention of the parties; notably when, upon the execution of a new mortgage in renewal or as a substitute for a prior one, the former mortgage is released in ignorance of the existence of an intervening lien. Equity looks at the intention of the parties, and will control the effect of a release executed under a mistake of fact, or cause it to be canceled, when no intervening rights have accrued by reason of the mistake. Jones, Mortg. 971; Story, Eq. Jur. 167; Pom. Eq. Jur. 871; Swift v. Kraemer, 13 Cal. 526, 73 Am. Dec. 603; Birrell v. Schie, 9 Cal. 104; Matzen v. Shaeffer, 65 Cal. 81, 3 Pac. 92; Shaffer v. McCloskey, 101 Cal. 576, 36 Pac. 196; Pearce v. Buell, 22 Or. 29, 29 Pac. 78; Hutchinson v. Swartsweller, 31 N. J. Eq. 205; Bruse v. Nelson, 35 Iowa, 157; Young v. Shaner, 73 Iowa, 555, 5 Am. St. Rep. 701, 35 N. W. 629;

Geib v. Reynolds, 35 Minn. 331, 28 N. W. 923. 'The principle which runs through all cases of this description,' says Barculo, J., in Barnes v. Camack, 1 Barb. 392, 'is that, when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons.'" See, also, Bormann v. Hatfield (Bormann v. Vyverberg) 96 Wash. 270, 164 Pac. 921, L.R.A.1917E, 1052, and extended note.

It is well settled that the equitable rule under consideration is applicable to a situation like that presented here, viz.: Where a person after acquiring title to certain premises causes the lien of a mortgage to be extinguished by payment or merger, in ignorance of defects in the title. In such case the owner of the premises is entitled to be subrogated to the lien of the mortgage as against an intervening judgment junior to the mortgage. Thus the supreme court of New York held that a purchaser of premises subject to a mortgage who paid the mortgage and caused the same to be canceled, in ignorance of the judgment lien against a former owner that was subsequent to the mortgage, was entitled to have the same reinstated, as the mortgage lien has precedence over the judgment. Barnes v. Mott, 64 N. Y. 397, 21 Am. Rep. 625. In this case the court said: "Upon payment of the mortgage by the then owners of the premises, they were entitled to all the rights of the mortgagee, and to an assignment of the mortgage; and having caused the same to be satisfied under circumstances authorizing an inference of mistake of fact, equity will presume such mistake, and give the party the benefit of the equitable right of subrogation. To do so in this case is to prevent manifest injustice and hardship, and interferes with no superior intervening equities." See, also, Ayers v. Adams, 82 Ind. 109; French v. DeBow, 38 Mich. 708; Bormann v. Hatfield (Bormann v. Vyverberg) 96 Wash. 270, L.R.A.1917E, 1052, 164 Pac. 921; 19 R. C. L. p. 472; Pom. Eq. Jur. 3d ed. §§ 791–793; 27 Cyc. 1381.

In the case at bar, it would be a manifest injustice to the plaintiff to refuse him the relief which he seeks. No one has been injured by, or has changed his position on account of, the release of the mortgage. It

is undisputed that the mortgage was released in ignorance of the record, and in reliance upon the representations made by the trustee.

The judgment rendered by the trial court was right. It is affirmed.

BIRDZELL, Ch. J., and ROBINSON, BRONSON, and GRACE, JJ., concur.

CHRIST P. WETZSTEIN, Respondent, v. MATHIAS BARTH, Appellant.

(190 N. W. 311.)

New trial — denial for insufficiency of evidence not error, where two juries and one judge had concurred in verdict.

This case presents a claim for services as a farm laborer. There have been two trials—twenty-four jurors and one judge have concurred in the same verdict of $300 and interest. The appeal is taken on the insufficiency of evidence. The specification is that the plaintiff failed to establish his case by a fair preponderance of competent evidence. *Held*, that the trial court did not err in denying a new trial.

Opinion filed October 23, 1922.

New Trial, 29 Cyc. p. 720 n. 82.

Appeal from the District Court of Morton County, *Pugh*, J. Judgment affirmed and case remanded.

Norton & Kelsch, for appellant.

There must be clear, positive and substantial evidence to support and sustain the verdict of the jury. Where the verdict is not supported by evidence of a clear, positive and substantial character, the verdict must be set aside as a matter of law. Nilson v. Horton, 19 N. D. 188, 189; Wagoner v. Bodal, 37 N. D. 597; Action v. Fargo Street R. Co. 20 N. D. 444; Evidence, 23 C. J. § 1756.

Evidence to refute or rebut payment by proof of checks received

Note.—On denial of motion for new trial for insufficiency of evidence, see 20 R. C. L. 277; 3 R. C. L. Supp. 1051; 5 R. C. L. Supp. 1095.

and cashed must be clear, positive, and convincing. Payment, 30 Cyc. 1293; Russell v. Scofield, 113 N. W. 1094.

L. H. Connolly, for respondent.

The motion for judgment non obstante is addressed to the sound legal discretion of the court. Kravanough v. Nestler, 177 N. W. 646.

Inasmuch as this is the second trial of the issues in this case the court ought to proceed with caution upon motion for judgment notwithstanding the verdict or for a new trial, although two or more verdicts are not necessarily conclusive. Atwood Lumber Co. v. Watkins (Minn.) 103 N. W. 332; Gross Coal Co. v. Milwaukee (Wis.) 175 N. W. 793; Ladwig v. Supreme Assembly (Minn.) 145 N. W. 798.

ROBINSON, J. In January, 1920, the plaintiff sued to recover for services as a farm laborer, $354. There have been two trials—twenty-four jurors have given a verdict for $300 and interest. In the memorandum opinion of four pages the verdict is well sustained by Judge Pugh. Indeed the writer considers it one of the best opinions coming to this court. The appeal is only because of the alleged insufficiency of evidence. The specification is,—the plaintiff failed to establish his case by a preponderance of competent evidence, and the fair preponderance of evidence is against him. The argument is to the same effect—it is, that plaintiff swore falsely and contrary to the testimony of three or four witnesses, but the facts are that twenty-four jurors heard the evidence, saw the witnesses, and gave the same identical verdict, i. e., $300 and interest, and the verdict has been confirmed by Judge Pugh. On such a record, were the court to set aside the judgment and grant a third trial, it would seem like a mockery of justice. It were better for the plaintiff to forego his labor claim than to incur the expense of three trials. In such a case a third trial should not be granted unless on a very clear showing that the verdict has no support.

Judgment affirmed and case remanded.

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

BRONSON, J. (specially concurring). I concur in an affirmance. The complaint seeks to recover $294.29 for work performed in 1918 and 1919, $50 for flax as a part of the consideration for plaintiff's work,

and two minor items of $5.15, moneys advanced, and of $5 for a load of straw. The total demand was $354.44. In the first trial the jury on February, 1921, returned a verdict of $300 with interest. The judgment entered thereupon was vacated and a new trial awarded by the trial court. In the second trial, the jury, on November 29th, 1921, again awarded a verdict of $300 with interest. The defendant has appealed from the judgment entered thereupon and from an order denying judgment non obstante, or, in the alternative, for a new trial. Defendant specifies insufficiency of the evidence to warrant the verdict of the jury. Defendant contends that, as a matter of law, the evidence discloses that plaintiff only worked for defendant fifteen months and ten days, instead of eighteen months and nineteen days as claimed by plaintiff; that defendant became indebted to plaintiff only in the sum of $806, which amount, through settlement had with plaintiff, defendant paid.

Although the evidence concerning plaintiff's demand is neither clear nor convincing and is, in many respects, conflicting, nevertheless, upon a review of the record, I am of the opinion that sufficient evidence was presented to warrant the submission of plaintiff's demands to the jury. Plaintiff testified that, in the fall of 1919 after his employment ceased, the defendant admitted that he owed plaintiff the sum of $300. Defendant's testimony is to the effect that plaintiff worked only fifteen months and ten days; that he owed plaintiff therefor $806; that he paid plaintiff $809.65; that he had settlement with plaintiff and plaintiff repaid and refunded to him this amount of $3.65. Plaintiff's testimony is to the effect that he worked for defendant eighteen months and nineteen days; that he had due him for part of his work 12½ bushels of flax; that he advanced some moneys to plaintiff and furnished straw for which defendant had not compensated him; that defendant had included in the payment, which defendant claimed to have made for his services, $150 which was otherwise due plaintiff for work in 1917. The difference between the period of plaintiff's services in 1918 and 1919 and the amount paid thereon, as claimed by defendant, and the time and amount as claimed by plaintiff, approximates the sum of $300 which plaintiff testifies that defendant admitted to be owing in the fall of 1919. Apparently, the jury, in both cases, gave credence to plaintiff's story and awarded, in each verdict, the exact sum of $300. The

rule is applicable that this court will not disturb the verdict, through the weighing of conflicting testimony, if there be substantial evidence in its support. Montana Eastern R. Co. v. Lebeck, 32 N. D. 162, 155 N. W. 648; Rickel v. Sherman, 34 N. D. 298, 158 N. W. 266; Senn v. Steffan, 37 N. D. 491, 164 N. W. 102.

GRACE, J., concurs.

RAY IMPROVEMENT COMPANY, a Corporation, Respondent, v. CHARLES HURICH, Appellant.

(190 N. W. 310.)

Justices of the peace — defendant estopped to appeal from judgment in forcible entry after justice has ordered stay pursuant to stipulation.

Though a justice of the peace has no authority under § 9110 of the Compiled Laws of 1913 to order a limited stay of execution in a forcible entry and detainer action, where such stay is, nevertheless, ordered, in pursuance of a stipulation carrying out an agreement for a settlement of the controversy, the defendant who obtains the benefit of such stay is estopped to pursue his remedy by way of appeal from the judgment.

Opinion filed October 23, 1922.

Justices of the Peace, 35 C. J. § 413 p. 738 n. 81, 82.

Appeal from District Court, Stark County, *Pugh*, J.

Affirmed.

Otto Thress, for appellant.

Crawford & Burnett, for respondent.

A stipulation staying execution may properly be entered into and such stipulation is binding on the parties. Shark v. Allgood, 100 Ala. 183, 14 So. 16; Keys v. Worner, 45 Cal. 60, also 39 Cal. 527; Dick Co. v. Sherwood Letter File Co. 42 N. E. 440; Kleinschmidt v. Morse, 1 Mont. 100.

"A party cannot appeal after taking a stay of execution as herein provided." Comp. Laws 1913, § 9116.

BIRDZELL, Ch. J. This is an appeal from a judgment of the dis-

trict court of Stark county dismissing an appeal from the justice's court of such county. The action was originally brought in justice court in forcible entry and detainer to secure the possession of certain described property in the city of Dickinson, together with damages for detention. The case was tried on March 17th, 1922, and resulted in a judgment awarding to the plaintiff the possession of the property with damages for detention and costs, making a total money judgment of $73.75. March 22d, 1922, execution was issued on the judgment. The justice's docket recites that on the same date the attorney for the plaintiff appeared and notified the court of a stipulation between the parties and their attorneys for a stay of execution until April 8th, 1922. On the following day notice of appeal and undertakings on appeal were filed in the office of the clerk of the district court. The plaintiff later moved to dismiss the appeal and after hearing the motion the district court dismissed it. The judgment of dismissal recites that it was admitted by one of the defendant's attorneys in open court that an agreement had been reached for settlement of the case and oral stipulation had between the attorneys for the parties for a stay of execution until the 8th day of April, 1922. It further recites that there was a stay of execution in the action and that subsequently the defendant appealed from the judgment. From the judgment so entered dismissing the defendant's appeal this appeal is taken.

The appellant advances two propositions for decision: First,—Was the stay of execution ordered by the justice of the peace? Second,—If so, did the stay deprive the defendant of his right of appeal?

The judgment appealed from recites that the motion to dismiss was made upon the records and files in the action and the affidavit of the defendant's attorney, and, as above stated, that the attorney admitted in open court that an agreement had been reached for settlement of the case and oral stipulation had between the attorneys for the parties for a stay of execution until the 8th day of April, 1922. These recitals are not impeached by anything in the record presented to this court. We must, therefore, conclude that the stipulation referred to was in fact made, and that the recital in the justice's docket that stay of execution was granted amounts, at least, to a true memorandum of the stipulation between the parties. A party who has stipulated for a stay of execution

is precluded from denying the authority of the justice to grant the stay. One cannot complain of an act for which he is himself responsible.

We are of the opinion that the stay, in the circumstances recited in the judgment appealed from, did deprive the defendant of his right of appeal to the district court. The appellant argues, and we think correctly, that a justice of the peace has no authority to stay an execution other than as expressed in the statutes. Section 9110, Comp. Laws, 1913, vests authority for the granting of limited stays upon judgments for money only; but no authority is granted to stay execution upon a judgment in forcible entry and detainer, except where an appeal is taken, in which event execution may be stayed by complying with § 9167 of the Compiled Laws.

But the appellant further argues that since the justice had no power to grant a stay, the right of appeal was not lost by virtue of § 9114, which is to the effect that a party cannot appeal after taking a stay of execution *"as herein provided."* It may be true that the right of appeal is not lost by virtue of this particular section, but we are of the opinion that it is lost, nevertheless, through the inconsistent conduct of the defendant amounting to a waiver of the right of appeal and to an estoppel to pursue it. Under the recitals in the judgment it clearly appears that pursuant to the agreement for settlement which had been perfected there was an oral stipulation for a stay until the 8th day of April, and it further appears that the defendant has had the benefit of that stay. Having had the full benefit of that to which he was not entitled, namely, a stay of execution, and the plaintiff having in reliance upon the stipulation foregone the right to pursue his remedy under the judgment, the defendant is in no position to attack the judgment by appeal. The fact that the defendant, later, in attempting to appeal to the district court, filed a stay bond under § 9167 does not affect the matter for it involved a breach of the stipulation. Neither is the result affected by the circumstance that the stipulation of settlement was oral in view of the judicial admission of the defendant's attorney in open court.

It follows that the judgment of dismissal appealed from is correct and it is affirmed.

ROBINSON, CHRISTIANSON, BRONSON, and GRACE, JJ., concur.

CHARLES L. POWERS, Appellant, v. DELIA BUCKEY, Sometimes Known as Delia Powers, Respondent.

(190 N. W. 312.)

Marriage — husband's action to annul marriage dismissed for failure to sue within a reasonable time.

In 1879 the plaintiff was duly married to defendant and until six or seven years ago he has lived with her as his wife, and they have one son forty-one years old and a daughter thirty-nine years. Now he brings suit to annul the marriage because of a supposed impediment arising from prior marriages terminated by death or divorce. The plaintiff has wholly failed to prove any impediment. Action dismissed.

Opinion filed October 23, 1922.

Marriage, 26 Cyc. p. 909 n. 17.

Appeal from the District Court of Cass County, *Cole*, J.
Affirmed.
Lovell & Horner, for appellant.
J. F. Callahan and *Lloyd Callahan*, for respondent.

ROBINSON, J. The plaintiff brings this action to annul his marriage with defendant and appeals from a judgment against him. In January, 1879, at Moorhead, Minnesota, he was duly married to defendant. She had been twice married and believed each husband to be dead or divorced. The marriage was contracted and solemnized in good faith and without any fraud or deception. On the evidence it stands unimpeached. Until seven years ago the parties lived together as husband and wife and had two children, a son, now forty-one years old, and a daughter, thirty-nine years. The ages of the parties are sixty-seven and sixty-four. He lives in Canada, she in Cass County, North Dakota. Each is well-to-do and has a good property and neither claims any property of the other. The plaintiff sues to annul his marriage on the ground that at the time it was solemnized husbands number one and two were not either dead or divorced. There is no question, only on Buckey, or husband number two. The plaintiff examined his record and testifies that Buckey married another woman on October 23, 1879, and

Note.—On effect of delay in suing for annulment of marriage, see 9 R. C. L. 378; 3 R. C. L. Supp. 789.

died in 1916, leaving two sons and three daughters. Now the presumption is that he did not marry until some time after he obtained a divorce, and the plaintiff has wholly failed to prove that each husband was not either dead or divorced. There is no testimony that either ever showed up or made any claim to his wife. This is no Enoch Arden case.

There is a time for all things under the sun, a time to speak and a time to keep silent. The time for plaintiff to speak or to bring this action, if any cause existed, was forty years ago before the conception of his son and his daughter. Now is the time to keep silent. Suits to annul a marriage, like other equity suits, must be brought within a reasonable time; a suit in equity must appeal to equity and good conscience.

Counsel cites authority to show that if there was any defect in the ceremonial marriage there was a good common-law marriage—and that is true. The rule is that a common-law marriage—a contract of marriage de præsenti and followed by cohabitation—is everywhere good unless the statute declares it to be void. Prior to chap. 91, Laws 1890, a common-law marriage was expressly recognized in this state. Schumacher v. Great Northern R. Co. 23 N. D. 231, 136 N. W. 85. For more than five years prior to the statute the parties were living together as husband and wife under a contract of marriage de præsenti when there was no claim of any impediment to the marriage. Hence it may be said they were doubly married. Furthermore it must be confessed that the suit is based on a stale, a very stale, claim and it makes no appeal to equity. We do not overlook the statute on the annulment of marriages, but it has no application to this case.

Judgment affirmed and action dismissed.

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

BRONSON, J. (specially concurring). I concur in an affirmance of the judgment. The record discloses:—Defendant was married to Sander Lien on August 16th, 1873; to William Buckey on January 25th, 1878; to the plaintiff on January 15th, 1879. The defendant when she married Lien was only fifteen years of age. She testifies that no cohabitation with him occurred. Lien married again on September 13th,

1879. Buckey likewise remarried on October 20th, 1879. Buckey died about 1906. For nearly thirty years after their marriage, plaintiff and defendant resided and cohabited together in Cass county, North Dakota. There they begot and raised two children, now mature. Since 1908 or 1909 the plaintiff has lived in Alberta, Canada, but there the defendant frequently visited him. Plaintiff returned and visited her. For thirty-seven years after their marriage they cohabited. Over forty-one years after plaintiff's marriage to defendant, he instituted this action for annulment. About one year and five months elapsed from the time of the rendition of judgment in this action denying plaintiff's demand and the time of filing the record on appeal in this court. Many of the facts are now buried in the mists of the past. Only after persistent investigation was the plaintiff able to ascertain and establish the facts above stated. Whether Lien and Buckey were each divorced before their remarriage is a matter of conjecture upon this record. It certainly is not clearly established that they were not divorced from the defendant when each of them remarried.

Now, when the winter of life is fast approaching for both of the parties, the plaintiff demands annulment upon technical grounds. The defendant has been anxious to continue their married life. She attempted reconcilement at different times. Plaintiff has demanded freedom, one way or the other. Forsooth, it does not appear that it is for financial reasons because both of the parties have accumulated property in their own name that appears sufficient. Again, it does not appear that this demand is made for any family reasons. Rather does it appear that the defendant has been true and faithful, and their children, worthy. Thus after years of knowledge concerning the circumstances, does he now demand that this marriage recognized, by him and the defendant, and, by the community and state, too, throughout these years, be annulled and the lifetime status wrecked, not only for him and defendant but for their children and grandchildren. Too evident it is that his demand is stale and makes no appeal to equity. Justice is the soul of the law and always does equity try to recognize justice and give to it the sanction of law. The laches of plaintiff speaks loud throughout the record. His demand is unconscionable. His acquiescence may be plainly inferred. His proof is not clearly established. 26 Cyc. 909. Properly the trial court denied his demand.

MAUD BOWEN, Respondent, v. MONTANA LIFE INSURANCE COMPANY, a Foreign Corporation, Appellant.

(190 N. W. 314.)

Appeal and error — orders overruling motion for directed verdict and motion for judgment notwithstanding disagreement of jury held not "appealable order."

In an action on an insurance policy, at the close of the testimony, the defendant moved for a directed verdict. This motion was overruled and the case was submitted to the jury, who failed to agree upon a verdict. Defendant thereupon renewed its motion for a directed verdict and moved for a judgment notwithstanding the disagreement of the jury, which motion was overruled by the trial court.

Held, an order overruling a motion for a directed verdict and denying a motion for judgment notwithstanding the disagreement of the jury is not an appealable order within § 7841, Comp. Laws, 1913.

Opinion filed October 23, 1922.

Appeal and Error, 3 C. J. § 266 p. 456 n. 28.

Appeal from District Court, Golden Valley County, *Pugh*, J.

Appeal dismissed.

Keohane & Jones, G. J. Oppegaard, and *H. S. Hepner*, for appellant.

Simpson & Mackoff, for respondent.

"Where an insurer with knowledge that a premium has been paid to one ostensibly its agent, remaining silent until after the death of the insured, it cannot deny the agent's authority to receive the premium." Southern L. Ins. Co. v. McCain, 96 U. S. 84, 24 L. ed. 653, mentioned in 14 R. C. L. 962, § 134.

A general agent may waive a forfeiture for nonpayment of premiums by extending the time of their payment in the absence of knowledge by the insured that the agent has no such authority. Knarston v. Manhattan L. Ins. Co., 124 Cal. 74, 56 Pac. 773.

It is further held in the case of Knarston v. Manhattan Life Insurance Company in a later decision, 140 Cal. 57, 73 Pac. 740, as follows: "Waiver of a forfeiture of a policy by extension of time of payment of premium, though not based on a new consideration or an estoppel, protects the insured until the insurer repudiates the extension."

In the case of New York L. Ins. Co. v. Eggleston, 96 U. S. 572, 24 L. ed. 841, quoted by this court in its opinion of Lechler v. Montana Life Insurance Company, the following doctrine as laid down in that case is accepted as the law in this state.

"Any agreement, declaration, or course of action on the part of an insurance company, which leads the party insured honestly to believe that by conforming thereto forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon a forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture. The representations, declarations, or acts of an agent contrary to the terms of the policy, of course will not be sufficient unless sanctioned by the company itself.

PER CURIAM. This is an action upon an insurance policy which was tried in the district court of Golden Valley county. At the close of the testimony the defendant moved for a directed verdict. The motion was denied and the case was submitted to the jury who failed to agree upon a verdict. Thereupon, the defendant renewed its motion for a directed verdict and also moved for a judgment in its favor notwithstanding the disagreement of the jury. This motion was likewise denied and the defendant appeals from the order of denial entered. This order is not appealable under the provisions of § 7841 of the Compiled Laws for 1913, and hence the appeal does not invoke the appellate jurisdiction of this court. It would seem that if the order appealed from were embraced within any part of § 7841, defining reviewable orders, it would come within subdivision 1. This subdivision provides that an order may be carried to the supreme court if it affects "a substantial right when" it "in effect determines the action and prevents a judgment from which an appeal might be taken." It is certain that the order in the instant case did not in effect determine the action, for, in the state of the record as it stood upon the refusal to grant the defendant's motion, the case would stand for trial and the action remain for determination either in favor of the plaintiff or defendant.

Neither, in our opinion, do the rulings complained of involve the merits of the action, or any part thereof, within subdivision 4, of § 7841.

Under a prior holding of this court, in the case of Persons v. Simons, 1 N. D. 243, 46 N. W. 969, it was pointed out that an appeal from a nonappealable order, which, in that case, was in substance to the same effect as the order in the instant case, presents a question going to the jurisdiction of this court to consider the merits. Hence, following the rule in that case, this court has no jurisdiction to review the order appealed from. It follows that the appeal must be dismissed and it is so ordered.

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

FRED W. SHEFFIELD, Respondent, v. STONE, ORDEAN, WELLS COMPANY, a Corporation, Appellant.

(190 N. W. 315.)

Municipal corporations — negligence of truck driver held for jury; whether automobile driver, who collided with truck coming from alley, was contributorily negligent, held for jury; whether contributory negligence of automobile driver proximately caused collision with truck held for jury.

In an action for personal injuries resulting from the collision of a truck of the defendant with a Ford sedan operated by the plaintiff at the intersection of a street and an alley, it is *held* that the questions of negligence, contributory negligence, and proximate cause were for the jury; and hence, that the trial court did not err in denying motions for a directed verdict and for judgment notwithstanding the verdict.

Opinion filed October 26, 1922.

Motor Vehicles, 28 Cyc. p. 49 n. 46, 47, 48 New.

From a judgment of the District Court of Cass County, *Englert*, J., defendant appeals.

Affirmed.

Divet, Holt, Frame & *Thorp*, for appellant.

"When a motorist is approaching a known dangerous situation, he is required to have his machine sufficiently under control to enable him to avoid a collision, and failing in this, he is guilty of negligence as a

matter of law." Berry, Automobiles, §§ 127–139, p. 417; Dempke v. Guinig (Wash.) 114 Pac. 436.

"The plaintiff was denied recovery where the evidence showed that in approaching the crossing in question, he did not have his car under control, and was not prepared to stop immediately if danger threatened; and this was held to be the case even if it appeared that the defendant was negligent in not having his car under control, in not sounding the horn, and in not making proper observations ahead." Berry, Automobiles, 3d ed. § 813; Gray v. Fox, 69 Pa. Super. Ct. 218.

"At street intersections motorists must exercise reasonable care to avoid collisions." Berry, Automobiles, 3d ed. § 812; MaChing v. Co. (Pa.) 97 Atl. 694.

The respondent, having entered the intersection of these streets first, was clearly entitled to the right of way. It was the duty, therefore, of the appellant, to have stopped his car, or so slackened his speed that there would have been no collision. Hill v. Co. (Wash.) 186 Pac. 322 and citations.

If plaintiff was going so fast when fifteen feet from the truck entering the street, that he could not comply with this rule, he was legally in the wrong and guilty of negligence as a matter of law. John v. Payntor (Wash.) 170 Pac. 132; Simon v. Lit Bros. (Penn.) 107 Atl. 635; Mayer v. Melletee (Ind.) 114 N. E. 241; Taylor & Co. v. Harding (Ky.) 206 S. W. 284.

"It is the duty of the driver of an automobile, when approaching a street crossing, to have his car under such control that he may stop it so as to avoid an accident." Healy v. Shedaker (Penn.) 107 Atl. 842.

"It is clearly the duty of the driver of a motor vehicle upon the public highways to at all times have the same under control, and to use reasonable care to observe defects or obstructions in the public highway. Owens v. County (Iowa) 169 N. W. 390; Russell v. Walkins (Utah) 164 Pac. 867."

"It is the duty of an automobile driver, traveling on a busy street of a large city, and especially when about to cross another much used street, to slow down his car to such an extent as to have control of same and to stop it if made necessary in meeting another car at such crossing." Mitchell v. Brown (Mo.) 190 S. W. 354; Huddy, § 127.

Lawrence, Murphy & Nilles, for respondent.

If by any reasonable theory deducible from the facts, the jury could have found that the truck driver had the last clear chance to avoid the injury, the mere fact that the plaintiff may have been guilty of contributory negligence as a matter of law would not bar a recovery. Actum v. Street R. Co. 20 N. D. 434, 129 N. W. 225; Welch v. Street R. Co. 24 N. D. 463, 140 N. W. 680.

CHRISTIANSON, J. Plaintiff recovered judgment against defendant for damages to his person and property. Defendant moved for judgment notwithstanding the verdict. The motion was denied and defendant has appealed.

The only error assigned is the ruling on the motion for judgment notwithstanding the verdict. Defendant specifically states that a new trial is not desired and that he waives all right thereto.

The question so presented, namely, under what circumstances judgment notwithstanding the verdict may be ordered, has been considered by this court in many cases. See, Meehan v. Great Northern R. Co. 13 N. D. 432, 442, 101 N. W. 183; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Aetna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436; Rieck v. Daigle, 17 N. D. 365, 117 N. W. 346; First State Bank v. Kelley, 30 N. D. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044; Dubs v. Northern P. R. Co. 42 N. D. 124, 171 N. W. 888. The rule established by these authorities is that judgment notwithstanding the verdict may be ordered only in a case where it clearly appears from the whole record that the party who moves for such judgment is entitled to a judgment on the merits as a matter of law.

The damages sought to be recovered in this action were caused by a collision between a truck operated by an employee of the defendant and a Ford sedan driven by the plaintiff. The collision occurred about noon, Nov. 8, 1921, directly in front of a blind alley leading into Sixth street south in the city of Fargo. Sixth street south is an extension of Broadway and is one of the main thoroughfares of the city. The street runs north and south and is bisected by Front street, that part of the street lying north of Front street being called Broadway and that part of the street lying south of Front street being called Sixth street south.

The blind alley in question intersects the west side of Sixth street immediately north of the Fargo Auditorium. The alley is 20 feet in width and at the point where it enters the west side of Sixth street it is covered by a sidewalk with a heavy brick and concrete wall on the north side, heavy concrete pillars on the south and other concrete posts at or near the entrance.

About 8 o'clock in the morning of Nov. 8, 1921, the plaintiff parked his car in the parking zone in the middle of Broadway in the block lying immediately south of Front street. The car remained where it was so parked until noon when the plaintiff entered it for the purpose of driving to his home. The plaintiff was accompanied by one Miss Harrington. The natural, usual, and shortest route for the plaintiff to travel to his home would be to go down Broadway in a southerly direction, across Front street and continue down Sixth street south in a southerly direction, and this is the route which he followed. It was a cold day and there was no snow on the pavement. The motor was cold and when the plaintiff started to drive some of the cylinders were missing. When the plaintiff reached Front street, that is after he had traveled a distance of about one-half block, he was interrupted by the eastbound traffic so that he was compelled to stop his car completely, although the motor kept running. Immediately south of Front street, Sixth street south runs down an incline (the evidence, however, does not disclose the percentage of the grade). The accident occurred at a point about 140 and not to exceed 160 feet from the point where plaintiff had stopped his car on the north side of Front street.

The evidence shows that after the traffic had passed so as to enable plaintiff to proceed, he crossed Front street and traveled in a southerly direction down Sixth street south,—on the west side of said street. The car was in low gear for the first 70 feet and in high gear the last 70 feet. According to the testimony of the plaintiff, however, the speed of the car was not greatly increased interim the shifting into high gear and the collision. When the plaintiff reached a point about 15 or 20 feet from the mouth of the alley, he noticed the truck coming out. Sixth street at this point is 45 feet in width with a parking zone 20 feet in width running down the center of the street, leaving a space of 12 feet 6 inches on each side of the parking zone for driving purposes. The

undisputed evidence is to the effect that the truck driver did not blow a horn or give any other signal. That is also true as regards the plaintiff. On seeing the truck coming out of the alley the plaintiff decided that the best way to avoid a collision was to turn the car to the left or east away from the approaching truck and in this way attempt to pass in front of it. The plaintiff gives the following version of what subsequently occurred: "There was a car in the parking zone at about that point, and as soon as I cleared the car there in the parking zone I swung my car to the left, realizing that there would probably be a collision if I could not clear the truck coming out of the alley, and I swung to the left towards the center of the street, trying to avoid getting mixed up with this truck, but as I got nearly by, the right front of the truck caught the right rear fender of the Ford just back of the brace there that holds it on to the car, and, as a result, it anchored that corner of the Ford so the car front kept on its direction, but in front of the truck; as a result of the anchoring the front, with the concussion that the truck itself gave the Ford, it held so that the momentum of it inclined to swing the front end of the Ford, and it held it on me, and I could not swing it back again, just like taking an article and holding it on one corner, so the effect that the concussion that the truck gave the Ford caused it to swing sideways and topple over on its side and skid down the hill. . . . One of the front springs of the truck hung on the rear of my car. The rear of my car was practically at the center line of the street. I turned that far towards the left to clear him when he came out of the alley."

The plaintiff's testimony is corroborated by that of Miss Harrington. There is a square conflict in the evidence as regards the speed of the truck and the automobile. According to the testimony of the truck driver, plaintiff was traveling at a speed of from 25 to 30 miles an hour, while the truck was not exceeding 3 or 4 miles per hour, and was stopped by the driver in a distance of 2 feet after he saw the approaching car. The evidence adduced by the plaintiff tends to show that immediately preceding the collision the truck traveled a distance of to exceed 22 feet while the car driven by the plaintiff covered a distance of some 15 or 20 feet. At the time of the accident the truck had been traveling down grade for a distance of approximately 147½ feet from where it was started. Defendant offered some evidence relating to cer-

tain marks on the street, observed by some of the witnesses an hour or two after the collision, which it is contended tends to show that the Ford sedan had skidded, also that the truck in question was stopped by the driver as testified to by him. And it is asserted that this evidence establishes "physical facts" of such a controlling effect as to outweigh any testimony advanced on the part of the plaintiff to the contrary. In our opinion this contention is not well founded. The "physical facts" referred to rested upon the testimony of witnesses. The credibility of such witnesses and the weight to be given to their testimony was for the jury. Rotter v. Detroit United R. Co. 205 Mich. 217, 171 N. W. 514.

Defendant also contends that the plaintiff violated certain traffic ordinances of the city of Fargo and § 2976L, Comp. Laws, 1913, and, hence, was guilty of contributory negligence as a matter of law.

The ordinances in question provided: That a vehicle turning into another street to the right shall turn the corner as near to the right as possible.

No person or operator in charge of any automobile, motor vehicle, or motorcycle on any of the public streets or avenues of the city of Fargo, shall drive or operate or permit the same to be driven or operated at a rate of speed faster than is reasonable and proper, having regard to the width, condition, and use of the road or so as to injure property or the life or limb of any person, and shall have such vehicle under perfect control.

No person shall drive a motor vehicle without a brake or brakes sufficient to bring and capable of bringing such vehicle, together with any trailer that may be attached thereto, to a complete stop within 50 feet, when the same is traveling at a rate of 20 miles per hour.

The driver or person in charge of a vehicle on approaching a street intersection shall have his car under perfect control; and the vehicle on the right, under ordinary conditions, shall have the right of way.

Section 2976L, supra, provided that " . . . upon approaching a descent, and also in traversing such . . . descent, and upon approaching a crossing or intersecting highway, . . . a person operating a motor vehicle shall have such vehicle under perfect control, and the rate of speed shall not exceed 1 mile in eight minutes."

In our opinion the evidence in this case is not such that it can be said as a matter of law that the plaintiff violated any of the provisions of the ordinance or of the statute cited. But even if the evidence indisputably established such violation it would not follow, as a matter of law, that plaintiff had no right to recover. Before the violation of the ordinances or statute cited would preclude a recovery, there must be a causal connection between such violation and the injuries for which recovery is sought. In other words, it must appear clearly that the violation of the statute or ordinances was the proximate cause of, or contributed directly to, such injuries. Retter v. Detroit United R. Co. 205 Mich. 212, 171 N. W. 514; Harris v. Bernstein, 204 Mich. 685, 171 N. W. 521; Gates v. Landon, 216 Mich. 417, 185 N. W. 723; Chambers v. Minneapolis, St. P. & S. Ste. M. R. Co. 37 N. D. 377, 395, 163 N. W. 827, Ann. Cas. 1918C, 954.

It follows from what has been said that the trial court did not err in denying defendant's motion for a directed verdict. This being so it necessarily follows that the trial court did not err in refusing to order judgment notwithstanding the verdict. Judgment affirmed.

BIRDZELL, Ch. J., and BRONSON, ROBINSON, and GRACE, JJ., concur.

STATE OF NORTH DAKOTA, Appellant, v. IRA KELSEY, Respondent.

(190 N. W. 817.)

Criminal law — supreme court has no jurisdiction to determine moot questions.

1. In a criminal prosecution for unlawfully possessing intoxicating liquor,

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Note.—On power of court to decline jurisdiction of moot question, see note in 6 B. R. C. 340.

On jurisdiction of the supreme court over judgments of state courts, see 27 R. C. L. 82; 3 R. C. L. Supp. 1504; 4 R. C. L. Supp. 1728; 5 R. C. L. Supp. 1463.

where evidence concerning the seizure under a search warrant was rejected and no evidence was offered or introduced that intoxicating liquors were found in defendant's possession, and where defendant has appealed from an order directing the jury to find for defendant and from a judgment of acquittal, it is *held*, that the questions presented are moot and the court has no jurisdiction thereover.

Criminal law — state has no right to appeal where court loses jurisdiction of defendant.

2. Where, in such criminal action, the trial court has advised a verdict, and a verdict and judgment of acquittal were returned, defendant's bondsmen exonerated and defendant discharged, thereby devesting the trial court of all jurisdiction in the action, it is *held*, for reasons stated in the opinion, that the state, under § 10993 Comp. Laws 1913, possesses no right of appeal.

Opinion filed October 30, 1922.

Criminal Law, 17 C. J. § 3312, p. 45 n. 74; § 3543 p. 203 n. 85.

Criminal action in District Court, Sargent County, *McKenna*, J.

State has appealed from an order directing jury to find for defendant and from judgment of acquittal.

Appeal dismissed.

S. A. Sweetman, State's Attorney, and *Sveinbjorn Johnson*, Attorney General, for appellant.

Curtis & Remington and *A. Leslie*, for respondent.

Statement.

BRONSON, J. This is a criminal prosecution for unlawfully possessing intoxicating liquors. The state has appealed from an order advising a verdict of acquittal and from the judgment of acquittal. At the trial the only witnesses called were the justice of the peace and the sheriff. The state attempted to prove, through an affidavit for a search warrant and the sheriff's return thereupon, that the premises described therein were searched, certain intoxicating liquors found and taken into sheriff's custody. The offer of such evidence, upon objection made, was refused. The defendant moved for an advised verdict. The state asked for a stay of proceedings. It was not granted. The court advised the jury to return a verdict of not guilty. This was done, defendant's

bondsmen were exonerated, and he was discharged. The state claims the right of appeal under a statute which provides that an appeal may be taken by the state from an order of the court directing the jury to find for the defendant. Comp. Laws, 1913, § 10,993. Defendant's counsel appears before the court and states that he is appearing only pursuant to his public duty as an attorney and at his own expense, for the reason that the fortunes of his client are not concerned.

Decision.

Concerning the sufficiency and admissibility of the search warrant, the affidavit therefor, and the return thereupon, it is evident that the questions presented are moot. If it be conceded that a legal controversy still remains, nevertheless, since evidence was neither introduced nor offered that the intoxicating liquors were found in defendant's possession, the questions are moot. Furthermore, since the determination of such questions can affect only the rights of other persons as they may perchance be brought into controversy in some case or cases where such persons will be entitled to be heard thereupon, they are moot.

In our Constitution, similar to the Federal Constitution, it is provided that no person shall be twice put in jeopardy for the same offense. N. D. Const. § 13.

Section 10,993, Comp. Laws, 1913, otherwise provides for an appeal by the state, viz.: (1) From a judgment for defendant or a demurrer to an information or indictment; (2) from an order granting a new trial; (3) from an order arresting judgment; (4) from an order made after judgment affecting any substantial right of the state. All of these provisions contemplate proceedings available in a case where the court retains jurisdiction over defendant's person. In this case when the court rendered a judgment of acquittal, exonerating the bondsmen and discharging the defendant, its jurisdiction over the defendant ceased. No actual controversy concerning the subject-matter or the defendant remained. District courts have original jurisdiction in cases at law and in equity. N. D. Const. § 103. Concerning such, this court has an appellate jurisdiction. N. D. Const. § 85. To give to the statute an interpretation requiring this court to exercise its appellate jurisdiction concerning questions which are not at issue in any pending case, or in

a case over which the trial court has retained any jurisdiction,' and further, requiring this court to determine a mere moot question where presentation alone is required by the state involves seriously the constitutionality of such statute. See 17 C. J. 45; United States v. Evans, 213 U. S. 297, 53 L. ed. 803, 29 Sup. Ct. Rep. 507; State v. Miller, 14 Ariz. 440, 130 Pac. 891; District of Columbia v. Burns, 32 App. D. C. 203; State v. Lee, 65 Conn. 265, 27 L.R.A. 498, 48 Am. St. Rep. 202, 30 Atl. 1110; People v. Miner, 144 Ill. 308, 19 L.R.A. 342, 33 N. E. 40. See also State v. Bronkol, 5 N. D. 507, 513, 67 N. W. 680; State v. Hazledahl, 2 N. D. 521, 529, 16 L.R.A. 150, 52 N. W. 315. We have not overlooked State v. Crawford, 8 N. D. 539, 46 L.R.A. 312, 73 Am. St. Rep. 772, 80 N. W. 193, 14 Am. Crim. Rep. 117. The questions here considered were not considered in that case.

It follows that the statute cannot constitutionally confer upon this court the power to review an order advising a verdict for defendant where, as in the instant case, such verdict of acquittal has been returned. The appeal is accordingly dismissed.

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

GRACE, J. (specially concurring). I am of the opinion that the questions presented are moot, and that for this reason the appeal should be dismissed.

STATE OF NORTH DAKOTA EX REL. ULANDER, et al., Petitioners, v. COUNTY COMMISSIONERS and County Auditors, respectively, of Burke and Renville Counties, Respondents.

(190 N. W. 549.)

Counties — each petition for transfer of township in one county to another to be considered by itself.

1. In three separate applications for original writs of mandamus to compel county commissioners to meet and county commissioners and county auditors

Note.—On creation, alteration and division of counties, see 7 R. C. L. 928; 2 R. C. L. Supp. 476.

to submit to the voters, pursuant to three separate petitions, respectively, presented to them, the questions of forming a proposed Lake county out of Burke county, eighteen townships in Renville county, and seven townships in Ward county; and, also, the question of withdrawing six townships from Renville county, which now contains only twenty-four townships, and adding the same to Ward county, it is *held*,

That each petition must be considered by itself and that there is no presumption that the subscribers to one petition consented to the request contained in another.

Mandamus — will not issue to require county commissioners to withdraw townships from county in violation of Constitution.

2. That the petition requesting the withdrawal of six townships from Renville county which contains only twenty-four townships, violates the constitutional requirement, § 167, Const., and mandamus will not issue to compel an idle act.

Counties — commissioners not required to submit question of formation of new county, where withdrawal of townships from other county will violate Constitution.

3. That the petition requesting the withdrawal of eighteen townships in Renville county composed of twenty-four townships, and the incorporation of the same in the proposed Lake county, likewise, violates the constitutional requirement.

Mandamus — not issued for performance of idle act.

4. That the submission to the voters in Burke county of the question of forming the proposed Lake county would be an idle act for which the writ of mandamus will not issue.

Applicability of statute to merger and destruction of counties doubtful.

5. That it is doubtful whether § 3205, Comp. Laws 1913, and article 3, of which it forms a part, apply to the merger and destruction of existing counties and the creation of a new county composed of the territory in whole or in part of such counties to be destroyed.

Opinion filed October 31, 1922.

Counties, 15 C. J. § 22 p. 401 n. 1 New; § 23 p. 402 n. 6 New; § 24 p. 402 n. 22 New. Mandamus, 38 C. J. § 23 p. 551 n. 18; § 29 p. 556 n. 54.

Three applications for original writs upon three orders to show cause issued thereupon.

Applications denied.

George A. Bangs, for petitioners.

Fisk, Murphy & Nash, for respondents of Burke county.

Bosard & Twiford and *Percy S. Crewe*, State's attorney, for respondents of Renville county.

PER CURIAM. Petitioners have presented three applications for the issuance of original writs of mandamus. This court granted three orders to show cause thereupon; respondents have appeared and through demurrers, motions to quash, and returns filed against the petitions seek dismissal of the orders.

The first petition alleges: That, on Sept. 6th, 1922, a petition was presented to the county commissioners of Renville county requesting that the question of detaching six townships from the county and transferring same to Ward county be submitted to the voters at the general election on Nov. 7th, 1922; that, on Sept. 6th, 1922, there was presented also a petition to such county commissioners for the formation of a new county to be called Lake county consisting of Burke county, and Renville county, minus the six townships mentioned, and seven townships in Ward county, to be submitted to the voters at said election; that, on Oct. 3d, 1922, the board granted such petition, but on Oct. 4th, 1922, rescinded this previous action upon the ground that the board was without authority at law for the reason that the transfer of such townships would reduce the county of Renville to less than the constitutional limit.

The second petition alleges: That, on Sept. 6th, 1922, a petition was presented to the county commissioners of Renville county, requesting the formation of a new county, to be named Lake county, consisting of seven townships in Ward county and all of the counties of Burke and Renville excepting the six townships above mentioned, and demanding the submission of the question to the voters at the general election on Nov. 7th, 1922; that, on Oct. 3d, 1922, the commissioners granted said petition, but on Oct. 4th, 1922, rescinded its action upon the ground that such petition is not provided for by law and that its action in granting such petition was void.

The third petition alleges: That on Oct. 3d, 1922, a petition was presented to the county commissioners of Burke county likewise requesting the submission of the question of forming a new Lake county to the voters at the general election on Nov. 7th, 1922; that such petition was signed by a majority of the legal voters in the county; that, through the activity of the commissioners, withdrawals of signatures were procured to the extent of some 500 signers upon the petition so as to reduce the number of signers thereon below a majority of the legal voters of

the county; that the county commissioners delayed action until such withdrawals were procured and on Oct. 4th, 1922, denied the petition for the reason that it did not contain a majority of the legal voters of Burke county.

In the petitions, it is also made to appear that the subject-matter contained in the request of each of such petitions was likewise presented to the county commissioners of Ward county and favorable action secured thereupon; that a petition was also presented to such county commissioners of Ward county requesting the withdrawal of seven townships in Ward county, in the so-termed "Goose Neck" territory, and incorporating the same in the proposed Lake county; that such county commissioners took favorable action thereupon. The first and second petitions request the original writ of this court to compel the county commissioners of Renville county to meet and such county commissioners and county auditor to submit to the voters of the county the question of the transfer of the townships from Renville county to Ward county, and the question of the proposed Lake county. The third petition requests the original writ of this court to compel the county commissioners of Burke county to meet and such county commissioners and the county auditor to submit to the voters of such county the question of the proposed Lake county.

In the application, arguments and submission thereof, before this court, these three petitions have been presented together.

First petition: Section 3199, Comp. Laws, 1913, provides that a majority of the legal voters residing in any territory may petition the county commissioners and also the county commissioners of the county to which they desire such territory to be transferred, for leave to have such territory transferred to such county and thereupon the county commissioners so petitioned shall order an election for such purpose in their respective counties to be held at, and in connection with, the next general election, provided such petition shall be presented to the several boards of county commissioners at least sixty days before such general election.

Section 167, N. D. Const., provides that no organized county shall be reduced so as to include an area of less than twenty-four congressional townships. It is manifest that the first petition, considered by itself, would reduce Renville county from twenty-four townships to eighteen

townships. In order to give any basis for which a withdrawal might be had under § 3199, there necessarily had to exist, as a constitutional prerequisite, the existence of a county containing more than twenty-four townships. The fact that under some other statutory provision action was contemplated which might merge the county affected into some other county did not give validity to a petition which, on its face, violated the constitutional provision. We are clearly of the opinion that each petition must stand and be considered by itself. It may not be presumed that the subscribers to one petition consented to, or joined in, the request made in the other petitions. On its face this petition was illegal. It is fundamental that mandamus will not lie to compel the performance of an idle act.

Second petition: Section 3205, Comp. Laws 1913, provides that whenever it is desired to form a new county out of one or more of the then existing counties, and a petition praying for the formation of such new county, describing the territory proposed to be taken, signed by a majority of the legal voters residing in the territory to be stricken from such county or counties shall be presented to the county commissioners of each county to be affected thereby and, if it appear that such new county can be constitutionally formed, it shall be the duty of the county commissioners to provide for the submission of the question to the voters, etc. This petition, on its face, proposed to reduce Renville county from twenty-four townships to six townships. Although provision was otherwise made in the first petition to annex these six townships to another county, nevertheless, this petition, pursuant to the request of its subscribers, violated the constitutional requirement.

Third petition: For the reasons stated in the consideration of the application for the first and second petitions it is apparent that it would be a mere idle act for the county commissioners of Burke county to submit the question of forming the proposed Lake county. Mandamus, accordingly, will not issue upon the third petition. Each of the orders to show cause, accordingly, are dismissed.

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

GRACE, J., disqualified, did not participate, NUESSLE, District Judge, sitting in his stead.

BEN BLEEKER, Respondent, v. G. J. JOHNSON & P. Z. MOWRY, Formerly Copartners under the Name and Style of The Johnson-Mowry Land Company, Appellants.

(190 N. W. 1010.)

Appeal and error — findings, unless clearly opposed to preponderance of the evidence, presumed correct.

1. Where lessees, as partners in a farm lease, agreed to pay a rental of $800 for five successive years, and, thereafter, the lessor, upon notice of dissolution of the partnership and the assumption of the partnership assets and liabilities, received the individual notes of the purchasing partner, and where, thereafter, the lessor extended the time of payment for rent due in 1911, 1912, or 1913 by accepting renewal notes, but made no extension of time concerning the rent due in 1914,

It is *held*, in an action for the rent due in 1914,—

That it was a question of fact concerning recognition and intention of the lessor in receiving the notes of the purchasing partner, and that the findings of the trial court, unless clearly opposed to the preponderance of the evidence, are presumed to be correct.

Partnership — extension of time for payment of past due rent from firm held not to discharge partner as surety of purchasing partner on dissolution for rent due later.

2. That the extension of time accorded for rent due in 1911, 1912, or 1913 did not serve to discharge the obligation of the selling partner, as surety, for the rent due in 1914.

Opinion filed October 31, 1922.

Appeal and Error, 4 C. J. § 2722 p. 775 n. 26. Partnership, 30 Cyc. p. 612 n. 66. Principal and Surety, 32 Cyc. p. 196 n. 10.

Action in District Court, Burleigh County, *Nuessle*, J.

Defendant has appealed from the judgment in plaintiff's favor.

Affirmed.

Newton, Dullam & Young, for appellants.

Note.—A partnership creditor, who with knowledge of an agreement between partners upon dissolution by which one assumed the partnership debts, thus establishing the relation of principal and surety between them, makes a valid agreement with the assuming partner to extend the time of payment of his debt, thereby discharges the other partner as surety, as will be seen by an examination of cases in notes in 9 L.R.A.(N.S.) 49, and 48 L.R.A.(N.S.) 547, on assumption of debts on dissolution of partnership.

See also 20 R. C. L. 987; 5 R. C. L. Supp. 1134.

In general a new contract by a partnership creditor with a partner assuming the debts of the partnership on dissolution, made with knowledge of the assumption respecting the partnership obligations to him, will discharge the retiring partner from liability thereon. Philippini v. Stead, 23 N. Y. Supp. 1061; Reed v. Ashe, 46 N. Y. Supp. 126.

The general principle is that the surety is discharged by any act of the creditor which causes the surety to forego taking steps to protect himself. White v. Walker, 31 Ill. 422; Taylorsville Bank v. Hardesty, 28 Ky. L. Rep. 1285, 91 S. W. 729; St. Louis Brewing Asso. v. Hayes, 107 Fed. 395; West v. Brison, 99 Mo. 684, 13 S. W. 95.

E. T. Burke, for respondents.

Statement.

BRONSON, J. This is an action for rent, tried to the court without a jury. The court found in plaintiff's favor. Defendants appealed. The facts are: Defendants were copartners owning land and engaged in the land business. Plaintiff, a farmer in Iowa, in September, 1909, bought from the copartnership a half section of land in Dickey county, North Dakota. By the terms of the sale, the partnership agreed to pay plaintiff $400 per quarter, as rental, for five years commencing December 1st, 1910. Accordingly, on Nov. 1st, 1909, two leases were made covering the land, each signed by plaintiff and the partnership, and each stipulating for a cash rental of $400 per year, payable on Nov. 1st, each year. In November, 1909, the partnership dissolved. Mowry purchased Johnson's interest and agreed to assume and pay all partnership debts. In May, 1910, plaintiff learned about this dissolution. This information he received when, upon writing to Mowry concerning the giving of notes to evidence the rental payments, Mowry sent to him ten notes for $400 each, signed by Mowry alone and evidencing the rental payments stipulated in the leases. Plaintiff retained these notes. Plaintiff received the rent for 1910. Thereafter, difficulty was encountered in collecting the rent. At different times, plaintiff wrote both partners in efforts to collect rent due. At all times he assumed the attitude that both of them were liable and that he was looking to both of them for payment. In 1911, plaintiff secured the services of an attorney in efforts to collect the rent. Correspondence was had between this attorney and the former partners. In December,

1911, Johnson advised the attorney that, if Mowry were written, doubtless the money would be paid, unless Mowry could get an extension. Mowry wrote to the attorney that plaintiff had agreed to carry him for the rent until Sept. 1st, 1912, providing he could get an indorser on his note. Later, Mowry wrote inclosing a check for $200 and his note, signed also by one Magoffin. Apparently, this note plaintiff received and retained. It is also apparent that Mowry gave a note for $500 to plaintiff, due November 1st, 1914. This evidently evidenced past due rent for 1911, 1912, or 1913. In December, 1914, plaintiff wrote to Mowry requesting him to pay the rent notes due Nov. 1st, 1914. He also inclosed a new lease to Mowry alone covering the land. It appears that this lease covered three quarters upon a new rental to Mowry alone for the years 1915 and 1916. In 1915, Mowry sent plaintiff a check for $500 instructing plaintiff to apply $400 on that year's rent and the balance on one of the past due notes. Mowry's recollection is that when he sent this $500, the only notes that were past due were those for the 1914 rent. Concerning this application of payment plaintiff testifies, with indistinct recollection, that Mowry advised him to make application of $100 on one of the other notes; that there was back rent unpaid because he had to take notes from him from time to time. Plaintiff states, however, that the rent for 1911, 1912, and 1913 has been paid. The rent for 1914 was not paid. This action, accordingly, in May, 1920, was instituted to recover such rent. Up until about 1914, Mowry's financial rating was good. Then he sustained successive financial losses through crop failures which impaired his assets. He is now unable to pay his obligations.

The trial court found that the rent for 1914 was unpaid; that plaintiff was not advised of the transfer and assumption of the debt by the purchasing partner, Mowry, until the spring of 1919; that at all times and under all circumstances plaintiff insisted that both defendants were indebted to him; that notwithstanding such insistence plaintiff received and retained notes signed by Mowry alone and did, in fact, receive payments for the years 1909, 1911, and 1912 from defendant Mowry; that at the close of the lease with the partnership, plaintiff made another lease with the defendant Mowry alone; that Mowry is now insolvent. The court determined that both the defendants were liable to plaintiff for the 1914 rent and rendered judgment accordingly. In defendant's

brief it is stated that after the entry of judgment, by agreement in open court, a credit of $100 was allowed upon the 1914 instalment. The above statement of facts have been gleaned from evidence that is fragmentary in its character and not specific in details concerning the transactions had between the parties since the dissolution of the partnership.

Decision.

Upon the dissolution of the partnership, the relation between the partners became that of principal and surety. Upon notice of the dissolution, the creditor might become bound to recognize this relation, through his acts of assent and recognition. Dean v. Collins, 9 L.R.A. (N.S.) 49 and note, 15 N. D. 535, 125 Am. St. Rep. 610, 108 N. W. 242, 11 Ann. Cas. 1027; Deke v. Huenkemeier, 260 Ill. 131, 48 L.R.A. (N.S.) 522, 102 N. E. 1059, Ann. Cas. 1914D, 290.

Plaintiff received full notice of the dissolution but insisted throughout in holding defendant Johnson to his partnership obligation, however, he received and retained, after notice of the dissolution, the notes of defendant Mowry who purchased the partnership interest and assumed the partnership debts. These notes evidenced the partnership obligation for rent that became due each year on November 1st for a period of five years. It further appears from the evidence that defendant Mowry in 1911 was unable to pay the rent for that year and requested from plaintiff an extension of time. This apparently was granted through plaintiff paying $200 and giving another note, signed by Mowry and a surety, for the balance. Further, apparently, some extension was granted to Mowry concerning the rent for 1912 or 1913 because it appears that Mowry did give to plaintiff one note for $500 due Nov. 1st, 1914. It does not appear that the notes for $400, each due Nov. 1st, 1914, were renewed or extension of time given thereupon.

The questions presented are:

(1) Did the acceptance of the notes by plaintiff from Mowry recognize the relation between the partners after the dissolution so as to discharge defendant Johnson as surety?

(2) Did the extension of time accorded, or the acceptance of new notes for the years 1911, 1912, or 1913, by plaintiff from Mowry operate as recognition of the relation between the partners, after dis-

solution, so as to discharge the defendant Johnson as surety for the rent due in 1914?

It was a question of fact whether the acts of the plaintiff in accepting the notes of Mowry alone for the year 1910 constituted such a recognition and intention concerning the new relation between the partners as to release the defendant Johnson as surety. 9 L.R.A.(N.S.) 82, note. It was a question of fact whether the plaintiff intended to receive such notes merely as evidences of debt under the leases or as a novation of the partnership debt. Nightingale v. Chafee, 11 R. I. 609, 23 Am. Rep. 535. The findings of the trial court in this regard are not opposed to the preponderance of the evidence and, therefore, are presumed to be correct. Richards v. Northern P. R. Co. 42 N. D. 472, 173 N. W. 778. It may be conceded that the granting of extension of time by the plaintiff to Mowry alone concerning the rent due for the years 1911, 1912, or 1913, operated to recognize the relation and to discharge the defendant Johnson as surety for the rent for such years. 9 L.R.A. (N.S.) 92, note; Johnson v. Jones, 39 Okla. 323, 48 L.R.A.(N.S.) 554, 135 Pac. 12. However, we are of the opinion that such recognition, concerning such years, for the rent did not operate to discharge the obligation of defendant for the rent due in 1914, concerning which no extension of time was accorded by plaintiff. The obligation due for the rent each year was a separate and independent demand. See Ducker v. Rapp, 67 N. Y. 464, 474; Coe v. Cassidy, 72 N. Y. 133, 137; 32 Cyc. 196; 1 Brandt, Suretyship & Guaranty, §§ 393, 406. The judgment is affirmed with costs.

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

ALLEN O'DELL, Respondent, v. HENRY HINEY, Appellant.

(190 N. W. 774.)

Appeal and error — motion must present all grounds claimed.

1. Where a party moves for a new trial, he must present all grounds which

Note.—On necessity of statement of case on motion for new trial, see 20 R. C. L. 310.

he claims entitle him to a new trial. In other words, he cannot present one ground in the trial court, and another ground in the appellate court.

Appeal and error — particular rulings claimed erroneous must be specified.

2. A party who assails the rulings of a trial court in the admission or exclusion of evidence either by motion for a new trial or on appeal must specify the particular ruling or rulings which are claimed to be erroneous.

Opinion filed October 31, 1922.

Appeal and Error, 3 C. J. § 732 p. 818 n. 23; § 863 p. 967 n. 42. New Trial, 29 Cyc. p. 944 n. 1; p. 945 n. 2; p. 947 n. 9.

Appeal from the district court of Ward County, *Lowe*, J.

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

Affirmed.

Funke, Campbell & Eide, for appellant.

O. B. Herigstad, for respondent.

CHRISTIANSON, J. This action was in claim and delivery for the possession of two heifers, fifty-three chickens, eleven turkeys and six ducks. The case was tried to a jury. The plaintiff prevailed. Defendant moved for a new trial. The motion was denied and defendant appealed. The facts necessary to an understanding of the case are as follows: The plaintiff is the owner of a farm situated in Ward county. On or about October 1, 1919, he entered into a written lease with the defendant Hiney whereby such farm was leased to Hiney for a term of three years. The lease provided that the plaintiff should furnish to the defendant certain ducks, turkeys, and chickens and that the defendant should take care of them and get one half of the increase thereof. The defendant entered upon the premises in accordance with the conditions of the lease and received the turkeys, chickens, and ducks into his possession. Subsequently, and on or about October 30, 1919, the plaintiff purchased the two heifers involved in this controversy, and the same were delivered to the defendant on the farm. On or about January 19, 1920, the defendant left the farm and took with him the personal property in controversy. On or about April 1, 1920, the plaintiff demanded of the defendant that he return to the farm and take the personal property back there or that he surrender the same to the plaintiff. The demand was refused on the sole ground that the defendant had a feed

bill against the heifers, and that he would not surrender possession of the personal property in controversy unless and until such feed bill was paid. The plaintiff refused to pay the feed bill and brought this action.

On the oral argument it was conceded that the judgment is right in so far as it relates to the turkeys, ducks, and chickens. That is in so far as it relates to the property covered by the farm lease. It is contended, however, that in so far as the heifers are concerned the judgment is erroneous and should be set aside. Upon the trial plaintiff contended that he purchased the heifers and turned them over to the defendant under an agreement with the defendant that he was to keep and care for them under substantially the same conditions as those agreed upon with respect to the turkeys, ducks, and chickens. This was specifically denied by the defendant who claimed that there was no agreement whatever with respect to the heifers. That he merely received the same and kept them for the plaintiff and that consequently he was entitled to compensation for feeding and caring for them. It will be noted that these contentions are in conflict. If plaintiff's contention is correct the right to possession of the heifers would stand precisely upon the same basis as the right to possession of the turkeys, ducks, and chickens; whereas, according to the contention of the defendant the right to possession of the heifers stood upon a wholly different ground from that of the right to possession of the turkeys, ducks, and chickens. The issues as thus framed were submitted to a jury, which as already stated, returned a verdict in favor of the plaintiff.

Upon this appeal it is contended that the judgment should be set aside and a new trial ordered for two reasons:

(1) Because the evidence is insufficient to justify the verdict; and,

(2) Because the court erred in excluding certain evidence offered by the defendant tending to show that he left plaintiff's farm in January, 1920, for the reason that the well on the place did not furnish sufficient water.

In our opinion neither of the contentions can be sustained. As already stated, defendant moved for a new trial. The laws of this state enumerate seven causes for new trials in civil actions, among which are the following:—" . . . 6. Insufficiency of the evidence to justify the verdict. . . . 7. Error in law occurring at the trial and

excepted to by the party making the application." Laws 1921, chap. 131. And they provide that "a party desiring to make a motion for new trial . . . shall serve with the notice of motion . . . a concise statement of the errors of law he complains of, and if he claims the evidence is insufficient to support the verdict, or that the evidence is of that character that the verdict should be set aside as a matter of discretion, he shall so specify." Section 7656, C. L. 1913. In this case the defendant did not challenge the sufficiency of the evidence in his motion for a new trial. The only ground specified in the motion for a new trial was that the court erred in refusing to permit the defendant to show that it was necessary for him to remove the heifers in controversy because of the insufficient water supply on the O'Dell farm. It would seem clear, therefore, that on this appeal the plaintiff would be limited to a review of the grounds presented to the trial court. In other words, having moved for a new trial he was required to present to the district court all reasons why a new trial should be had; and cannot on appeal present other grounds than those presented to the trial court. State v. Glass, 29 N. D. 620, 151 N. W. 229; Cohen v. Wyngarden, 48 N. D. 344, 184 N. W. 576; Kanable v. Great Northern R. Co. 45 N. D. 619, 178 N. W. 999. See also Lofthouse v. Galesburg State Bank, 48 N. D. 1019, 188 N. W. 585.

29 Cyc. 944, says: "Grounds not stated in the motion or written statement will not be considered at the hearing by the trial court. And similarly it is held that on appeal the reviewing court will not consider any grounds other than those specified in the motion. A party making a motion for new trial is bound by the reasons assigned therein and can urge no other on appeal."

In this case, however, the question of the insufficiency of the evidence would not be before us, even if a motion for a new trial had not been made and there had been an appeal from the judgment alone, for the question was in no manner presented in the court below. Horton v. Wright, B. & S. Co. 43 N. D. 114, 174 N. W. 67.

Did the court err in refusing a new trial on the ground specified in the motion for a new trial? We think not. The motion for a new trial purported to be based solely upon alleged error in the exclusion of evidence relating to the inadequate water supply on the O'Dell farm. The specification or statement was a general one. There was no attempt

to designate any particular ruling or rulings. Nor was there even a reference to the place in the record where such ruling or rulings might be found. In order to have ruled intelligently on the proposition, the trial court would have been required to explore the entire record for the purpose of finding, if possible, the particular ruling or rulings characterized by the general specification. Such burden could not be imposed upon the court. A party who asserts a right to a new trial because of erroneous rulings of the trial court is required to point out the particular ruling or rulings complained of. Willoughby v. Smith, 26 N. D. 209, 220, 144 N. W. 79; Erickson v. Wiper, 33 N. D. 193, 217, 157 N. W. 592; Kanable v. Great Northern R. Co. 45 N. D. 619, 178 N. W. 999; 3 C. J. 1370; Hayne, New Trial & Appeal, Rev. ed. pp. 738 et seq.

An examination of the transcript of the evidence, however, discloses that while the trial court sustained objections to some testimony offered in regard to the alleged inadequate water supply on the O'Dell farm, the defendant elsewhere was permitted to testify thereto.

On his direct-examination, defendant, over objections, was permitted to give the following testimony:

Q. During the winter of 1919 and 1920 did you haul water from anywhere or did you have water on the O'Dell place?

A. No, sir. . . .

Q. Was you compelled to leave the O'Dell place by reason of the fact that you were not able to obtain water for this stock?

A. Yes, sir.

It is true this proposition was not submitted to the jury, but no complaint has been made of the instructions. And according to the undisputed testimony the real point in controversy between the parties was whether the defendant was entitled to compensation for feeding and caring for the heifers. In fact, according to defendant's testimony this lawsuit would not have arisen if plaintiff had recognized the validity of defendant's claim for feeding and caring for the heifers. On his direct examination defendant testified that when demand was made upon him by the plaintiff for the possession of the personal property in controversy, he (defendant) stated to the plaintiff that he (defendant) would deliver the heifers, turkeys, ducks, and chickens to the plaintiff upon the payment of the feed bill claimed by the defendant.

Hence the main point in controversy was fully and fairly submitted to the jury.

Inasmuch as appellant has failed to show any prejudicial error, it follows that the judgment and order appealed from must be affirmed. It is so ordered.

BIRDZELL, Ch. J., and ROBINSON, BRONSON, and GRACE, JJ., concur.

CENTRAL METROPOLITAN BANK, a Corporation, Respondent,
v. AMERICAN STATE BANK OF BURLINGTON, a Corporation and Jourgen Olson, Appellants.

and

CENTRAL METROPOLITAN BANK, a Corporation, Respondent,
v. FARMERS STATE BANK OF SANISH, a Corporation, and Jourgen Olson, Appellants.

(190 N. W. 813.)

Judgment — refusal to vacate judgment by default, where defendant not shown negligent, held erroneous.

For reasons stated in the opinion, the trial court erred in making its orders denying plaintiff's motions to vacate the judgments entered in the above-entitled cases.

Opinion filed October 31, 1922.

Judgments, 34 C. J. § 529 p. 311 n. 4.

An appeal from the District Court of Ward County, *Lowe, J.*

Order reversed.

McGee & Goss, for appellants.

Funke, Campbell & Eide, for respondent.

GRACE, J. Both of the above-entitled appeals are from orders refusing to vacate judgments taken, it is claimed, by default. The facts are similar on each appeal. Hence one opinion will dispose of both appeals. The opinion will refer to the facts in the first of the causes above

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Note.—On discretion of trial court in granting or refusing to open, vacate or set **aside a judgment, see** 15 R. C. L. 720; 3 R. C. L. Supp. 489; 5 R. C. L. Supp. 848.

entitled. These actions were pending in the district court of Ward County upon pleadings by both plaintiff and the defendants.

The material facts necessary to be stated are substantially as follows: It appears that a term of court had been called for Ward county for May 24th, 1922; the jury to report May 31st. It appears that the trial court, the Honorable John C. Lowe at the call of the trial calendar on May 24th, set these two actions for trial. On that date, E. R. Sinkler, attorney, of Minot, North Dakota, was attorney for defendants; the firm of McGee & Goss having theretofore withdrawn as defendant's attorneys. Prior to May 28th, defendants re-employed McGee & Goss as their attorneys. On May 29th Mr. Goss went to the district court chambers, where he found Judge Lowe and Mr. Eide of the firm of Funke, Campbell & Eide, plaintiff's attorneys. In substance, what was said there is as follows: Mr. Goss there called the attention of Judge Lowe and Mr. Eide to the fact that his firm was employed as attorneys for the defendants, and that he had heard the actions had been set for trial. Judge Lowe stated that no cases would be tried or forced to trial over the objections of either parties to civil actions; that Judge Lowe and Mr. Eide were informed by Mr. Goss that the latter's clients were not ready for trial and objected to the cases being called for trial; that they had been set for trial in their absence and without notice; that Judge Lowe assured Mr. Goss in Eide's presence that the cases would not be called for trial over Goss's objections; that Judge Lowe told Goss to write him, giving him a list and number of the cases in which McGee & Goss were attorneys and that had been set for trial and that if necessary the calendar of cases could be recalled and the cases reset. On May 29th, McGee & Goss wrote Judge Lowe the following:

May 29th, 1922.

Hon. J. C. Lowe,
Minot, N. Dak.
Dear Judge:—

To-day you said to let you know of any cases which we had objections to trying at this term of court, so if necessary you could reset the calendar.

Since that time, we have spoken to our clients in Nos. 145–6, Central Met. Bank v. Farmers St. Bank of Sanish et al., and Central

Met. Bank v. American State Bank of Burlington et al., and in both of these cases, we are informed that defendants understand that the plaintiffs are not pushing these cases but relying on their collateral, and that the matter will work itself out automatically by fall, and they do not desire to have these cases pushed to judgment; also, that these plaintiffs do not actually desire that. Under these circumstances, we object to trial at this time of those cases.

In view of the above, kindly take all of these cases off, and oblige.

Very truly yours,

McGee & Goss.

On June 3d, 1922, the calendar of cases for trial at the term of court noticed to be held were reset. The above-entitled actions were not included in the causes set for trial at that time and the numbers of said causes were wiped off the blackboard, upon which we presume was indicated the time cases were set for trial. Mr. Goss, attorney for the defendants, attended the call of the calendar at the time last mentioned as likewise did Mr. Eide. On that day, so defendants attorneys maintain, it was announced by the court that no civil cases would be tried until after the criminal cases were disposed of. On June 6th, plaintiff procured the entry of judgment by default in the sum of over five thousand in each case, together with costs.

Most of the facts stated appear either from the affidavit of Mr. Goss whose affidavit is in some respects corroborated by that of his partner Mr. McGee and from defendants statement of facts and the record. The affidavit of Mr. Funke shows that at the call of the calendar in May, Mr. Sinkler was attorney for defendants and that he interposed an answer for them. That on the 3d day of June 1922, the case was duly called for trial in its regular order, but neither of defendants appeared for trial at that time, either in person or by an attorney. Plaintiff later made proof of the allegations of the complaint in each case, and submitted proof controverting the allegations of the answers; that on the 7th day of June 1922, a notice of motion was made by the firm of McGee & Goss purported to be made on behalf of defendants, served on the attorney for the plaintiff, for the purpose of setting aside the judgments which had been entered; that such motion was returnable on the 14th day of June. It is further stated in the affidavit that affiant

believed that the answer of the defendant was interposed solely for the purpose of delay.

We deem it unnecessary to give further attention to the facts relied upon by each of the parties. It appears plainly from the record, now before the court, that defendants did not intend to neglect to defend both causes of action when they were properly brought on for trial. The record, in a measure, discloses that defendants had some disagreement with their attorneys McGee & Goss; that they at one time withdrew from the cases, but later became again attorneys for the defendants. They, perhaps, should have served notice of their reappearance as defendant's attorneys. It would seem from the record that there was a misunderstanding between the court and the attorneys of the parties to the action, just when, in fact, the cases would be set for trial and tried. There is no real showing that defendants have not been diligent in their defense. Their answers were interposed and there is no definite showing that they were endeavoring to procrastinate. In these circumstances, we believe, the due administration of justice requires that the defendants have an opportunity in court to establish their defenses. We believe, further, that the court abused its discretion in denying defendants motion to vacate the judgments.

The order in each case appealed from is reversed and each case remanded for further proceedings not inconsistent with this opinion. The appellants are entitled to their costs and disbursements on appeal.

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

BRONSON, J., I concur in result.

BEN F. WASEM, Respondent, v. CITY OF FARGO, a Municipal Corporation of the State of North Dakota, Alex Stern, Mayor of the City of Fargo and as such Mayor, J. J. Jordan, O. M. Strate, John Hogan, Kate S. Winder, and Alex Stern, City Commissioners of the City of Fargo, Leigh Monson, Police Magistrate,

Note.—On validity of ordinance restricting location of business of undertaking, see notes in 3 A.L.R. 966 and 25 A.L.R. 764.

See also 20 R. C. L. 455; 3 R. C. L. Supp. 1075; 5 R. C. L. Supp. 1108.

Wm. H. Shure, City Attorney for the City of Fargo, and as such City Attorney, Appellants.

(25 A.L.R. 758, 190 N. W. 546.)

Municipal corporations — ordinance prohibiting establishment of undertaking business within portion of city "occupied mainly for residences" held void for uncertainty.

An ordinance which provides that no undertaking establishment shall be established or maintained within those parts of the city occupied mainly for residences is indefinite and uncertain, and, therefore, invalid.

Opinion filed November 1, 1922.

Municipal Corporations, 28 Cyc. p. 354 n. 67.

Action in District Court, Cass County; *Cooley*, J., to restrain the enforcement of an ordinance.

Defendants have appealed from the judgment.

Affirmed.

W. H. Shure, City Attorney (*Chas. A. & Chas. M. Pollock* and *B. F. Spalding* of counsel), for appellants.

Lawrence & Murphy, for respondent.

Statement.

BRONSON, J. This is an action to enjoin enforcement of an ordinance. Defendants have appealed from decree of injunction determining the ordinance to be void. The facts are: For some twenty-one years in Fargo, plaintiff has been engaged in the undertaking business. In April, 1919, he negotiated for the purchase of 4½ lots in block 32 of the original townsite of Fargo for the purpose of conducting there his business and erecting a building therefor. On May 1st, 1919, a deed was issued. About May 5th, 1919, plaintiff made a contract for the excavation work for the building. Certain resident citizens of Fargo protested to him and to the city commission against such location of the business. A petition was presented to the city council requesting an ordinance to be enacted which would prohibit the building and maintaining of a morgue in portions of the city occupied mainly for residences. On May 7th, 1919, petitions were received by the city com-

mission. On May 8th, 1919, an ordinance was introduced and read. It provided, § 1, "That it shall be unlawful for any person, firm, or corporation to build, establish, operate, or maintain within those parts of the city of Fargo occupied mainly for residences, any morgue, undertaking parlors, room, or place used solely or mainly for the purpose of embalming, preserving, or caring for the dead; or any chapel or room used solely or mainly for funeral purposes." On May 16th, 1919, this ordinance was amended by providing: "No permit shall be granted to erect or maintain within the limits above provided, any morgue, undertaking parlors, or room or place used solely or mainly for purposes mentioned in § 1 hereof; and if any such permit has been heretofore issued the same shall be and is hereby revoked and canceled." The amended ordinance was then adopted. By its terms it provided that it should take effect and be in force ten days from and after its passage and publication. The ordinance was published May 17th and 20th, 1919. Plaintiff was present at one of the meetings of the city council. He knew about the ordinance. In the meantime the work of excavation proceeded. Plaintiff made a contract to erect the building. On May 17th, 1919, he secured from the city's superintendent of buildings a permit to build upon the premises a building to be used as a morgue. On Oct. 26th, 1919, plaintiff was arrested for violation of the ordinance. Upon trial before the police magistrate he was convicted and fined $100. Plaintiff appealed from the judgment of conviction. Later, in the district court, upon trial of such appeal, the jury disagreed.

Meantime, the construction of the funeral home progressed to completion and about Oct. 1st, 1919, plaintiff started to use the same as a morgue and to conduct his entire business there. Since that time he has so used the premises. On March 10th, 1920, this action was started and a temporary order secured enjoining the city officials from enforcing the ordinance. The complaint alleges, among other grounds, that the ordinance is invalid, because indefinite and uncertain, and that plaintiff is threatened with actions and with arrest from day to day, while such mortuary is so maintained by him.

At the trial the inquiry was directed specifically to the legality of the ordinance. Defendants introduced a plat of the city of Fargo. Defendants offered to prove through two witnesses that all that part of the city of Fargo, south of 1st avenue south (wherein the mortuary

is located), has since the organization of the city been occupied mainly for residence purposes; that, likewise, the portion of the city north of 6th avenue north has been occupied mainly for residence purposes; that the business portion of the city lies generally in the territory between the N. P. Ry. and the G. N. Ry. (south, and north, respectively, of the residence portions). This offer was rejected upon the grounds that plaintiff sought injunctional relief based upon the invalidity of the ordinance.

The Honorable Chas. M. Cooley, district judge, found that for more than twelve years plaintiff had been engaged in Fargo in the lawful business of maintaining an undertaking establishment; that on April 5th, 1919, plaintiff negotiated for the real estate in block 32; that he began active work on May 8th, 1919, to erect and construct a mortuary thereon; that plaintiff has expended about $25,000; that the mortuary chapel cost about $15,000; that the ordinance became effective on June 1st, 1919; that the work of construction proceeded for a period of nearly three months before any attempt was made to enforce this ordinance; that, before the enactment of the ordinance, a building permit was given to plaintiff for the erection of such mortuary in accordance with the approved plans and specifications, which permit had never been revoked; that plaintiff has been threatened with a multiplicity of suits and prosecutions under the ordinance which require injunctional relief; that the ordinance is illegal and void for uncertainty; that it is incapable of valid enforcement because of the indefinite and uncertain territory within which the same purports to be operative. Accordingly, the ordinance was held void and a judgment to prevent its enforcement was entered.

Decision.

The only question requiring consideration is whether the ordinance is indefinite and uncertain, and, therefore, invalid.

The city possesses the power to regulate the establishment and maintenance of undertaking establishments and to prescribe the limits within which they may be operated. Comp. Laws, 1913, § 3818 ¶¶ 52–75. The express statutory authority is conferred upon the city to regulate the location of undertaking establishments. ¶ 75, supra.

The city of Fargo has sought to exercise this authority. By the

ordinance it declares, in effect, that undertaking establishments are nuisances per se if located and maintained within those parts of the city occupied mainly for residences.

The business of undertaking, which theretofore was wholly a lawful business conducted anywhere within the city limits, still remains a lawful business where it is not conducted in a place prohibited by the ordinance.

But, since the ordinance became effective, how may an owner of an undertaking establishment, desirous of obeying the law, determine whether his location now is, or yesterday was, in a lawful or unlawful place? For the test of the validity of the ordinance depends upon its universality; its universal application in determining a definite and certain restricted location. In this case the test of the validity of the ordinance is not made dependent upon proof that within a certain designated area, wherein the mortuary is located, the properties are either mainly or wholly occupied for residences. No proof has been presented in that regard.

In determining the "parts occupied mainly for residences," what portion of the city around the locus in quo shall be included? What portion excluded? How much of a portion in extent, in length, in width, may be considered? What measure or rule stick is furnished by the ordinance, through which the undertaker may determine that his location, present or prospective, is lawful? May the same location, through the consideration of eight or nine blocks, of surrounding and adjacent territory, by testimony of witnesses, verdict of jury, and finding of court, be made unlawful because "occupied mainly for residences," and, through the consideration of another eight or nine blocks, likewise surrounding and adjacent, in another action, by other testimony, another verdict of the jury, and finding of the court, be made lawful? If so, is the rule of guidance fixed by the ordinance or delegated to others? Defendants present no rule of ascertainment. However, they contend that there are well-recognized districts in cities patent to all and capable of judicial notice. That business districts are central, residence districts, suburban; that the line of demarcation can be ascertained. But the ordinance by its terms, does not confine the prohibition of location to exclusive residence districts, nor award the license of lawful locality to exclusive business districts. Pursuant to

the very terms of the ordinance, a location within territory, partly devoted to business purposes, may be prohibited because such territory is "occupied mainly for residences." In Phillips v. Denver, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902, the ordinance involved, provided that no livery stable should be located in any block where a school building was situated or in any block opposite to a block where a school building was situated. The court stated that the record did not show the size or dimension of blocks in Denver nor show that the blocks were of uniform dimensions; therefore, there was no definite distance from school buildings within which the construction and maintenance of livery stables were prohibited by the ordinance. It was held invalid. In St. Paul v. Schleh, 101 Minn. 425, 118 Am. St. Rep. 638, 112 N. W. 532, the ordinance involved prohibited the location of a woodyard within 150 feet of any inhabited portion of any residence district without first securing the consent and permission of the common council; the court stated that in a general sense the residence portion of a city may be distinguished from the central business portion; but it would be difficult to locate any definite line between business and residence sections. If the ordinance meant the general outlying residence portion, what did it mean by the inhabited portion of such residence district? Did it mean within 150 feet of any house occupied as a residence? Or, did it mean that territory embraced within a circle, the diameter of which is 300 feet, wherein the majority of houses are residences? Or, did it mean a block, a ward, or some other division? The ordinance was held void for uncertainty. However, in People ex rel. Keller v. Oak Park, 266 Ill. 365, 107 N. E. 636, an ordinance was upheld which provided that no public automobile garage should be constructed on any site where two thirds of the buildings within a radius of 500 feet thereof were used exclusively for residence purposes. The prohibited territory in such ordinance was definitely ascertainable. Consonant with the principles deducible from the above-stated cases, and, in accordance with the well-recognized principle of law that a municipal ordinance must be definite and certain, I am clearly of the opinion that the ordinance involved herein is indefinite and uncertain and, therefore, is invalid. The judgment of the trial court should be affirmed.

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

ROBINSON, J. (dissenting). This is an appeal from a judgment enjoining the city of Fargo from the enforcement of an ordinance against maintaining a morgue or undertaking establishment in any part of the city occupied mainly for residence purposes. It appears that pending the passage of the ordinance the plaintiff purchased a lot in the best residence part of the city and commenced the erection of a morgue or undertaking establishment. It seems that he run a race with the city commissioners by trying to get the establishment well under way before the passage of the ordinance. He avers that prior to the passage he had expended $1,000 on the building and incurred obligations to pay on a building contract $15,000, and that subsequently he paid the same. The plaintiff contends that the city counsel had no legal power to pass and enforce the ordinance restraining him from conducting the business. Also, that the ordinance is indefinite, uncertain, and that the business is not a nuisance.

The ordinance makes it unlawful for any person to maintain within parts of the city of Fargo occupied mainly by residences any morgue, undertaking parlors, rooms or places used mainly for the purpose of embalming, preserving or caring for the dead, or any chapel or room used mainly for funeral purposes.

For violation the punishment is a fine not exceeding $100 or imprisonment not exceeding three months, or both. Now it seems entirely clear that neither the ordinance nor the act of the legislature is in any way ambiguous, indefinite, or uncertain. By statute, § 3818, the city commission is given power to pass the ordinance in question. The power is given by §§ 52, 54, 75.

Section 52: To declare what shall be a nuisance and abate the same and to impose fines upon persons who may create, continue, or suffer a nuisance to exist.

Section 54: To do all acts and make all regulations which may be necessary or expedient for the promotion of health or for the suppression of disease.

Section 75: To regulate the location of hospitals and undertaking establishments.

The ordinance is strictly within the letter and spirit of the law and the power granted to the city commissioners. Contrary to the ordinance

the plaintiff undertook to construct and maintain an undertaking establishment in a part of the city used mainly for residence purposes. Indeed, it is in the very best residence part of the city. The ordinance prohibits the keeping of an undertaking establishment within "those parts of the city of Fargo occupied mainly for residences." By the use of his eyes any person can see and determine as to whether any part of a city is occupied mainly for residences. There is no claim that the undertaking establishment is in a part of the city that is not occupied mainly and almost exclusively for residence. It is true the plaintiff avers that an undertaking establishment is not a nuisance per se, and the same is true of a livery stable; but it may become an actual nuisance by reason of its location. This the statute clearly contemplates. Hence it gives the city commissioners power to regulate the location of undertaking establishments. But it seems the plaintiff claims a pre-emption right to carry on the business because in the race against time he succeeded in getting the morgue well under way before the passage of the ordinance. But that is a matter of no account. Even though it had been wholly constructed and long used before the ordinance the city commissioners had perfect authority to condemn it and declare it to be a nuisance. Under the law as it is no person can acquire any pre-emption right to conduct a business that may become a nuisance. In every city like Fargo there are districts that are used mainly for residences,—districts in which the people have a special right to cheerful, sanitary, happy, and even esthetic homes and in such a district a morgue or undertaking establishment is offensive and out of place. And indeed it is justly considered an actual nuisance and it cannot be otherwise. It subjects the adjacent people to disease and the fear of infectious diseases. It offends the sight and the sense of smell by the collation of dead bodies that may be embalmed or held for post mortems and kept for a time more or less exposed. It tends to surcharge the atmosphere with gloom and sadness, pestilential fear and forebodings. It tends to drive mirth and cheerfulness from the homes of the people, for who can be cheerful and happy within view of a corpse or a funeral rite? Of course it is true that soon or late death, sadness, and gloom is the lot of all, but that is no reason why the misfortunes or calamities of others should be thrust upon the homes, the sense, and sight of any people.

The plaintiff claims the right to enjoy life, liberty, and property

without any restraint by the ordinance. But those whom he offends have equal rights with him and the maxim of law is that every man must so use his own rights as not to infringe on the rights of others. Comp. Laws, § 7248. The ordinance in question is very plain, simple, direct, and unambiguous. No one can misunderstand its import. It is simply that no one shall maintain a morgue or undertaking establishment in that part of the city which is used mainly for residences. Indeed to most people a morgue in the residence part of a city is more offensive than a livery stable. It is like unto a pest house. It lessens the value of all adjacent property. Without any ordinance the morgue in question might well be adjudged a nuisance.

Were the case one of doubt, which it is not, the injunction should not be granted. The case presents no equity. The plaintiff should have known well that he had no right to operate a morgue or undertaking business in that part of the city. The ordinance is clearly authorized by statute. It is reasonable, definite, and in no way ambiguous.

SAMUEL McDOWELL, Respondent, v. FIREMAN'S FUND INSURANCE COMPANY, a Foreign Corporation, Appellant.

(191 N. W. 350.)

Insurance — agent may waive conditions of policy within scope of powers.

1. An insurance agent, authorized to issue, assign, cancel, and attach permits to fire insurance policies, may waive conditions in a policy, within the powers intrusted to him, the same as his company.

Insurance — agent may waive stipulation of nonwaiver so far as conflicting with his powers.

2. An agent, possessed of such powers, may waive a stipulation of nonwaiver contained in the policy so far as the same conflicts with his powers.

Insurance — insurer must affirmatively plead breaches of conditions.

3. It is the duty of an insurance company to affirmatively plead breaches of conditions contained in a policy.

Insurance — unnecessary for insured to replead breach of conditions in reply.

4. To present a waiver of such conditions, it is unnecessary for the insured to plead the same in a reply.

Note.—On effect of nonwaiver agreement on conditions existing at inception of insurance policy, see note in 13 L.R.A.(N.S.) 827; 14 R. C. L. 1161, et seq.; 3 R. C. L. Supp. 350; 5 R. C. L. Supp. 799.

Insurance — in action on fire insurance policy, where the defense is breach of conditions, waiver properly for jury.

5. In an action upon a fire insurance policy, where the defense presented breaches of conditions in a policy concerning vacancy, unoccupancy, increase of hazard through mortgage and conveyance of the premises, it is *held* that the trial court properly submitted the questions of waiver to the jury.

Opinion filed November 2, 1922.

Fire Insurance, 26 C. J. § 360 p. 287 n. 55; § 364 p. 292 n. 29; § 704 p. 500 n. 96; § 710 p. 504 n. 50; § 769 p. 556 n. 14. Insurance, 32 C. J. § 593 p. 1328 n. 3; § 598 p. 1332 n. 47, 48; 33 C. J. § 802 p. 88 n. 5; § 805 p. 91 n. 47; § 868 p. 135 n. 70.

Action in District Court, Eddy County; *Coffey*, J.

Defendant has appealed from the judgment and from an order denying judgment non obstante, or, in the alternative for a new trial.

Affirmed.

Lawrence, Murphy & Nilles, and *R. F. Rinker,* for appellant.

N. J. Bothne, for respondent.

Statement.

BRONSON, J. This is an action upon a policy of fire insurance. Defendant has appealed from a judgment in plaintiff's favor and from an order denying judgment non obstante or, in the alternative, for a new trial. The facts are: Plaintiff owned a half section of land with two separate dwellings thereon. On Jan. 17th, 1918, defendant issued its policy of $1,000 for a term of three years upon one of these dwellings. This dwelling was distant about three fourths of a mile from the other, the home dwelling. The former was then occupied by a tenant. Later, it was occupied by plaintiff's son under a contract for a deed dated Nov. 20th, 1918. In January, 1920, this contract was canceled and a quitclaim of the land made by the son to the plaintiff. For a time the premises were then occupied by another tenant and later by a hired man, for a certain period of time. During 1920 until about Christmas the plaintiff used the dwelling in his farming operations for purposes of getting meals and other temporary purposes during his farm operations. One Sexton, who made and signed the insurance policy as defendant's agent, was president of a bank in New Rockford

where plaintiff did his business and from whom he secured several policies of fire insurance. In December, 1920, plaintiff executed a real estate mortgage upon the land. He testified that he notified this agent about this loan and mortgage for the express purpose of saving his insurance, and the agent told him that it was all right; that it did not make any difference. Also, that when he made the contract with his son he notified the agent and that he was advised that it did not make any difference as the buildings belonged to plaintiff and it would be all right with the company. That, just before Christmas, when he quit eating there and using this dwelling, on that very day, he told the agent about the vacancy and he was advised that it was all right and would not make any difference. About Jan. 17th, 1921, before the insurance expired, plaintiff discovered that the dwelling had been totally destroyed by fire within a week previous. Defendant denied liability. It alleged in its answer: First, the vacancy and unoccupancy of the dwelling for a period of more than ten days and at the time of the loss; Second, increase of the hazard by encumbrances through mortgage and other liens; and, third, violation of the terms of the policy concerning concealment or misrepresentation of material facts, change of the interest of the insured in the property, and increase of hazard by plaintiff's acts, all contrary to the conditions of the policy. Plaintiff made no reply to these affirmative defenses.

Defendant contends that the evidence establishes vacancy and unoccupancy; that this was a material increase of the hazard; that the mortgage operated as a change of interest and an increase in the hazard; that the contract for a deed constituted change of interest; that it was necessary for the plaintiff to affirmatively plead waiver and that the evidence is insufficient to establish waiver; that the trial court erred in not granting a continuance to secure the agent's testimony.

Decision.

It was defendant's duty to affirmatively plead breach of conditions and stipulations of the policy. Beauchamp v. Retail Merchants Asso. 38 N. D. 483, 496, 165 N. W. 545; Ennis v. Retail Merchants Asso. Mut. F. Ins. Co. 33 N. D. 20, 32, 156 N. W. 234; 26 C. J. 500. Defendant performed this duty. To present a waiver of these alleged breaches of conditions it was unnecessary for the plaintiff to allege the

same in a reply. Beauchamp v. Retail Merchants Asso. 38 N. D. 497, 165 N. W. 545; 26 C. J. 503. The defenses presented were subject to waiver. Beauchamp v. Retail Merchants Asso. 38 N. D. 492, 165 N. W. 545.

The policy was signed and delivered by Sexton as a duly authorized agent of the defendant. As such agent he attached to the policy a lightning clause, a gasolene stove permit, a trading with the enemy clause, and a percentage clause. Unquestionably, a vacancy permit attached by him, a loss clause payable to a mortgagee, his consent to an assignment of the insured's interest, all, would have been binding upon the company. His agency covered powers of issuance, of cancelation, of assignment, and of permits, for policies. Assuredly, his powers were coextensive with the powers intrusted to him. As such agent, possessing such powers, he had the authority to create and to waive conditions the same as his company. It was his act that imposed the conditions in the contract which he made. It was his acts and conduct that might waive such conditions, within the powers instrusted to him. Any stipulation in the contract to the contrary might itself be waived by him, pursuant to the powers intrusted to him, either by his express agreement or conduct. Beauchamp v. Retail Merchants Asso. supra; Bank of Anderson v. Home Ins. Co. 14 Cal. App. 208, 111 Pac. 507; Shook v. Retail Hardware Mut. F. Ins. Co. 154 Mo. App. 394, 134 S. W. 589; Brennen v. Connecticut F. Ins. Co. 99 Mo. App. 718, 74 S. W. 406; Continental Ins. Co. v. Bair, 65 Ind. App. 502, 114 N. E. 763, 116 N. E. 752; Continental F. Ins. Co. v. Brooks, 131 Ala. 614, 30 So. 876; Berry v. American Cent. Ins. Co. 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254; Benninghoff v. Agricultural Ins. Co. 93 N. Y. 495, 26 C. J. 288. Accordingly, notice to the agent was notice to the company; waiver of the agent was waiver of the company. See Yusko v. Middlewest F. Ins. Co. 39 N. D. 67, 166 N. W. 539. Assuredly, there could be no increase of hazard where the increase, if any, was waived by the defendant. The execution of the mortgage did not change the title, interest, or possession of the insured. Parmeter v. Williamsburgh City F. Ins. Co. 48 N. D. 530, 185 N. W. 810. Properly, the questions of waiver were submitted to a jury. It was within the discretion of the trial court to refuse any continuance. The judgment and order are affirmed with costs.

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

ROBINSON, J. (dissenting). In consideration of $15 defendant made to plaintiff an insurance policy and thereby agreed to insure him for three years from January 17, 1918, against loss by fire to the amount of $1,000 on a frame dwelling house on section 15–Tp. 148–Rg. 67. On the day before the expiration of the third year the house was completely destroyed by fire. Plaintiff obtained a judgment for $1,000 and defendant appeals.

The principal defense is that the insurance policy or contract provides that the policy, unless otherwise provided by an agreement indorsed thereon, shall become void if the house become vacant and unoccupied and so remain for ten days. The complaint is based on the original policy, without any modification, and on the trial it was shown to an absolute certainty that the dwelling house was continuously vacant and unoccupied for two months before its destruction by fire. The plaintiff relied on a waiver and testified against objection that he had given oral notice of the vacancy to the agent who took his application for insurance, and that said agent had told him it would be all right. But there was no such agreement or waiver indorsed on the insurance policy. There was no proof that the alleged agent had any power to make an agreement modifying or varying the terms of the policy and the complaint did not aver any such modification of the terms of the policy. The law is that in an action on a contract, when a party relies on a modification, or, which is the same thing, on a waiver of conditions of the contract, he must plead and prove the same as a part of the contract; that is, when a contract is modified and a suit brought thereon, the plaintiff must show the actual contract, as modified, on which the suit is brought. Here the contract was to insure an occupied dwelling house, and not a dwelling house vacant, unoccupied, and abandoned for two months. The plaintiff sues to recover for the loss of an occupied dwelling house and his proof wholly fails to show such a loss. On the contrary, the testimony of the plaintiff and other witnesses conclusively shows that at the time of the loss and for two months prior thereto the building was not in any manner occupied. It was vacant and was used for no purpose whatever. The plaintiff has not merely failed to prove a cause of action on the insurance policy; he has proven that he has no cause of action.

INGA ANDERSON, Appellant, v. THE BOARD OF EDUCATION OF THE CITY OF FARGO, a Body Corporate, Respondent.

(190 N. W. 807.)

Statement of facts.

1. Plaintiff brought an action against the defendant charging it in her complaint with negligence in establishing and maintaining upon its school playgrounds, certain apparatus, consisting of several heavy swings and chutes, more particularly described in the complaint, and in appropriate language alleged such apparatus to be a nuisance; and further alleging that her son, while on the school playgrounds, by reason of such negligence was injured and killed. She claimed damages in the sum of $25,000, and, in addition thereto, $200 to cover burial expenses of the boy and for physician's fees.

Ruling of court on demurrer to complaint.

2. The defendant demurred to the complaint, upon the grounds that it did not state sufficient facts to constitute a cause of action, and the trial court made an order sustaining the demurrer, from which plaintiff appealed.

Schools and school districts — board of education of the city of Fargo held not liable for death of pupil struck by playground apparatus installed in governmental capacity.

3. The order of the trial court was proper, in that the defendant in providing such swings and chutes and apparatus in question for the use of the schools, was acting in a governmental capacity, and therefore, was not subject to a suit, either in an action for damages or otherwise.

Opinion filed November 2, 1922.

Schools and School Districts, 35 Cyc. p. 971 n. 78; p. 972 n. 82, 87.

An appeal from the District Court of Cass County, *A. T. Cole,* J. Order affirmed.

Taylor Crum (*Aubrey Lawrence,* of counsel), for appellant.

Spalding & Shure, for respondent.

GRACE, J. Plaintiff appeals from an order sustaining a demurrer to the complaint. The action is one by plaintiff, a widow, against defendant to recover damages on account of the death of her son, a boy thirteen years of age, alleged to have been caused by the negligence of the defendant in the construction and maintenance upon a certain school

Note.—Authorities discussing the question of liability of school district, municipal corporation, or school board for injury to pupil, are collated in notes in **9 A.L.R. 911; 14 A.L.R. 1392; 21 A.L.R.** 1328; 24 A.L.R. 1070; 24 R. C. L. 604; 3 **R. C. L. Supp. 1377; 4 R. C. L. Supp.** 1547; 5 R. C. L. Supp. 1292.

playground, certain apparatus, later herein more fully described, by which in the circumstances hereinafter mentioned, the boy was struck in the head and killed.

The principal allegations of the complaint are in substance as follows: That the defendant is a body corporate by virtue of a special law in full force and effect, to wit: An act approved March 4th, 1885, entitled An Act To Amend an Act Providing a Board of Education for the City of Fargo and Regulating the Management of the Public Schools Therein. The amendment, which amends and reinacts § 14 of the act, and repeals § 24 thereof is also pleaded. It appears from the complaint that the defendant organized its board of education under the act and has conducted the public schools of Fargo under and by virtue of the act and amendments thereto; that defendant has possession and control of block 3, Darling's addition to the city of Fargo, upon which there has been, and now is, a certain public school building, known as "Aggasiz School;" that at all times during the year 1920 and since, the control and possession of that public schoolhouse, school site, all of block 3 and all of the furniture, books, apparatus, and all appurtenances thereunto, belonging or in anywise appertaining, are and have been in the possession and under the control of the defendant, through its officers, agents and servants.

That upon the west side of the school building and within block 3, there is a plot of ground which is and was at all times hereinafter mentioned a public resort and public school playground, used and frequented and permitted by defendant to be used and frequented by more than five hundred children, ranging from six to fifteen years of age; that the duties of the defendant as to said public resort and public school playgrounds became and was a matter of public and general concern; that upon said public resort and public school playgrounds, the defendant, by and through its officers, agents, and servants, wilfully and negligently and by reason of carelessness, negligence, default, and wrongful acts of its said officers, agents, and servants, and for want of due attention to its duties, erected and suffered to be erected, and suffered and permitted to remain for several weeks to the said first day of December A. D. 1920, upon said public resort and public school playgrounds, and in a public and notorious manner, two chutes or inclined troughs, the summits of which were and are eight or more feet in height, and accessi-

ble to children by means of iron ladders, from which said summits the said chutes or inclined troughs sloped toward the west at a steep grade to the ground; that a few feet in a westerly direction from the chutes the defendant, acting as aforesaid, through its officers, agents, and servants, publicly and notoriously erected and allowed to be erected, and suffered and permitted to remain for several weeks prior to the first day of December 1920, several series of heavy swings, the same being contrivances and apparatus adapted for people to swing upon, to and fro, and were constructed of wood and iron, and suspended from poles or timbers which were fastened or attached to the tops of posts or poles more than twelve feet in height, with heavy wooden iron bound, or mounted plank seats, suspended by heavy iron chains, attached to said poles or timbers, which said poles or timbers were more than twelve feet from the ground; that said swings when in operation, swing from east to west and from west to east, were wholly unguarded or superintended by any teacher or other adult person; and were so constructed, located, and unprotected by any fence or barrier whatsoever, and without any mattress or netting thereunder.

That said apparatus consisting of said chutes and swings was not a part of the original plan of said public school building or of said public resort and public school playgrounds; and was entirely foreign to the original plan provided for, accepted and used in building said public schoolhouse and in laying out the public resort and public playgrounds and that in the erection and maintenance of such apparatus, there was no connection whatever with the original plans in the adoption of which the defendant may have acted in a discretionary or governmental capacity in the performance of any duty enjoined by law; that said chutes and swings were by the neglect or by the positive act and permission of the defendant, through its officers, agents, and servants, located and constructed or permitted to be located and constructed and permitted for several weeks to remain, in such manner as to constitute an eminently dangerous, constant, continuous, and, as to children, an attractive, enticing, inexcusable, and alluring public nuisance; which danger was patent and obviously apparent to any adult person of ordinary intelligence and caution; that the defendants by and through its officers, agents, and servants, did by locating, erecting, and maintaining and by permitting said apparatus to be located, erected, and maintained,

as aforesaid perform and suffered to be performed, a wilful malfeasance; and did so wilfully, carelessly, and negligently permit said chutes and swings to remain on said public resort and public school playgrounds for several weeks; and allowed said public resort and public school playgrounds for several weeks to be used as a playground for more than five hundred children, ranging from six to fifteen years of age, without said apparatus being guarded or fenced off in any manner whatsoever, and without any supervisors or supervisor or other precaution taken to protect said children, or any of them, lawfully on said grounds from being injured and killed by said apparatus; all of which was well known to defendant, its officers, agents, and servants, or in the exercise of ordinary diligence should have been known to it and them.

That on the first day of December A. D., 1920, one John William Anderson, deceased—only son of the widowed plaintiff herein—when he was thirteen years and three months of age, and when in good and robust health, and when lawfully on said public resort and public school playgrounds, and under legal compulsion to attend said school, and when lawfully in the vicinity of said apparatus, with other children, innocently yielded to the instincts of childhood and was sliding, running, and playing on and about said apparatus, as more than five hundred children were wont to do, and were reasonably likely to do, was struck in the head and neck by one of said heavy, iron-bound, or iron-mounted plank swing seats, and mortally wounded thereby; and then and there by reason of the said wilful carelessness, negligence, and default of the defendant, acting through its officers, agents, and servants, as aforesaid, was so mortally wounded that within a few minutes thereafter, and without regaining consciousness, he languished and died of the direct and immediate result of having been struck by one of the heavy swing seats as aforesaid, all without any fault or negligence of this plaintiff, or without any fault or negligence of the said William Anderson, deceased, when his age and surroundings are considered, but was wholly caused by the presence on said public resort and public school playgrounds of said nuisance, consisting of said chutes and swings, the presence of which, upon said public resort and public school playgrounds the defendant was in duty bound to take notice and abate; but on the contrary allowed and permitted the same to remain on said pub-

lic resort and public school playgrounds for said several weeks, prior to and on said first day of December A. D. 1920, to the great risk, hazard, and mortal danger of all of the more than five hundred children playing on said public resort and public school playgrounds as aforesaid.

That plaintiff is a widow forty-two years of age, with three living daughters, aged respectively, fifteen, nine, and six years, who are wholly dependent upon plaintiff for their education, care, and support; that her son the said John William Anderson, deceased, who was killed as aforesaid, in addition to his school and domestic tasks, was at the time of his death and for sometime prior thereto, earning and contributing about twenty dollars per month toward the support of himself, the plaintiff, and his three sisters, by working a portion of the time for a merchant; and was likely to be and already was the sole person upon which plaintiff depended and was likely to depend for assistance for her own and her daughters' support.

The demand for judgment was in the sum of $25,000 damages, and $200 additional for burial expenses and fees for physician services expended by the plaintiff in caring for the injuries of her son.

To the complaint the defendant interposed a demurrer. The ground of the demurrer was that the complaint did not state sufficient facts to constitute a cause of action. The trial court made an order sustaining the demurrer from which defendant appeals. The theory of the demurrer, if we correctly understand its import, is that the schools of the city of Fargo are a part of the educational system of the state of North Dakota, and, as such, are a governmental agency of the state, and that like the state, they are not subject to be sued for a wrongful tortious act, occurring in connection with the exercise of their governmental functions. The schools of Fargo are organized and conducted under a special act of March 4th, 1885, as amended by an act of February 2nd, 1915. All of the schools of Fargo are managed and directed by the board of education. This board has power to organize, establish, and maintain such and as many schools in the city as it may deem requisite and expedient and to change and discontinue any of the same.

Section 18 of the act defines the powers and duties of the board, which provide as follows:

Section 18. The said board of education shall have power, and it shall be their duty:

1. To organize, establish, and maintain such and so many schools in said city as they may deem requisite and expedient, and to change and discontinue the same.

2. To purchase, sell, exchange, and lease houses or rooms for school purposes, lots or sites for schoolhouses, and to fence and improve them as they may deem proper.

3. Upon such lots or sites as are now owned or leased, or as may hereafter be purchased, owned, or leased for school purposes, to build, enlarge, alter, improve, and repair schoolhouses, outhouses and appurtenances as they may deem advisable.

4. To provide, sell, exchange, improve, and repair school apparatus, books for indigent pupils, furniture and appendages, and to provide fuel and other needful supplies for the schools.

5. To have the custody and safe keeping of the schoolhouses, outhouses, books, furniture and appurtenances, and to see that the ordinances of the mayor and city council in relation thereto are observed and enforced.

6. To contract with license, and employ all teachers in said schools, and, for good cause, to remove them.

7. To pay the wages of teachers out of the moneys appropriated and provided by law for the support of common schools in said city, so far as the same shall be sufficient, and the residue thereof from the moneys authorized by this act to be raised.

8. To defray the necessary and contingent expenses of the board, including the compensation of the secretary.

9. To have in all respects the control and management of the common schools of said city, and from time to time to adopt, alter, modify, and repeal as they may deem expedient, rules and regulations for their organization, grading, government, and instruction, or the reception of pupils and their transfer from one school to another, and generally for their good order, prosperity, and utility.

Subdivision 4 of § 18 of the act, confers upon the board of education power, to purchase all the needful supplies for the schools and all apparatus, furniture, and appendages; this power is broad enough to authorize the board to purchase all needful supplies for use in maintaining the health of the pupils and for their proper physical development. It may provide for apparatus to be used in manual training

which develops the intellect and skill of the pupil, and as well contributes to his physical improvement. So likewise may apparatus be provided for track or football, or basketball; and for smaller pupils, swings, teeter boards, and much other apparatus may be provided, all designed to improve the pupil in some respect. All such apparatus and much more, not necessary here to mention, the board is authorized to provide for use in the schools. All such apparatus is considered approximately as much a part of the needful supplies of schools as are the desks or other needful furniture. It constitutes a necessary part and portion of the school system. The school would not be kept in needful supplies, unless such were a part of them. Hence, when the board of education provides them, it is acting in a purely governmental capacity. In reality it is a part of the principal duties of the board to provide such needful and necessary apparatus. If it be conceded that the board in furnishing and installing such apparatus and needful supplies in a school or on the school grounds, is acting in a governmental capacity—and we think this must be conceded—it cannot be charged with the establishing and maintaining of a nuisance, in that respect, in the absence of a permissive statute to that effect and there is no such statute in this state. Neither is it liable in an action of negligence if the act of negligence grew out of some act or acts of the board while acting in a governmental capacity. It is true, as appears from appellant's brief, that the New York supreme court appellate division, under an act very similar to the special act here under consideration, arrived at a contrary conclusion in McCarton v. New York, 149 App. Div. 516, 133 N. Y. Supp. 941. It in substance there held that if the board of education maintained a flag pole which was unfit for the purpose, in that it was rotten and never should have been selected for such use, and which was in a position to endanger the life of those lawfully in the vicinity of the school building, with notice as alleged, that it was in an unsafe condition, it was liable upon the the theory of having erected or of maintaining a nuisance, depending upon whether the original erection was unsafe, or the flag pole was maintained with actual knowledge that it was in a dangerous condition, or upon the theory of negligence, depending upon its failure to perform its statutory duty to provide for "prompt and efficient" repairs. In the same case the court in its opinion cited other New York authority in support of its decision.

However, in reaching our conclusion, we do not feel that we can follow the New York authority. To do so, we think, would result in placing a school corporation, having a board of education, and perhaps every school corporation, in such a position that actions for erecting or maintaining a nuisance or for negligence or for damages could be brought with as much ease against them as against the ordinary business corporation, and if this would be the result, boards of education or school officers would have no immunity; and from fear and anticipation of such suits, perhaps would fail to exercise the functions incumbent upon them in their governmental capacity, and this might very frequently result largely in failure of administration of school affairs. We think the safest rule is that where such a board is acting in a governmental capacity in the discharge of its lawful duties and its acts are such as are within its powers as defined by law, that it should be immune from all forms of action against it, except such as are by law permitted.

Appellant has cited several decisions from the state of Washington in support of her position, among which may be mentioned: Bruenn v. North Yakima School Dist. 101 Wash. 374, 172 Pac. 569, 19 N. C. C. A. 857; Holt v. School Dist., 102 Wash. 442, 173 Pac. 335; Kelley v. School Dist., 102 Wash. 343, 173 Pac. 333; Howard v. Tacoma School Dist., 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792; Stovall v. School Dist., 110 Wash. 97, 9 A.L.R. 908, 188 Pac. 12; Redfield v. School Dist., 48 Wash. 95, 92 Pac. 770. These cases do support the theory that a board of education may be sued for its negligence in the discharge of its functions and duties, but what we have said above with reference to New York cases is sufficient to dispose of these and other citations of like import by the appellant.

This brings us to the consideration of the claim of appellant that the schools of Fargo constitute a corporation, capable of suing and being sued, having a corporate seal and other attributes of the ordinary business corporation. We think its right to sue or be sued has reference to suits arising on contract or involving title of property, or suits authorized by law.

It is not necessary to the decision of this case, to distinguish between the rule of nonliability of a school corporation and that applied to municipal corporations proper, such as cities or incorporated villages,

which are quite frequently liable for acts of malfeasance or neglect of duty on the part of its officers and agents, as for instance, their negligence in not keeping streets or sidewalks in repair. We, therefore, refrain from entering upon any discussion in this respect.

Before concluding this opinion, it may be well to observe that the complaint, after setting out the allegations, with reference to negligence and the construction and the maintenance of a nuisance, which we have largely above set forth, also alleged the following: "All of which was well known to defendant, its officers, agents, and servants, or in the exercise of ordinary diligence should have been known to it and them." This is an attempt to plead knowledge on the part of the board of education. It states, however, no facts showing that the board had any such knowledge, and amounts to nothing more than a mere legal conclusion; but if facts were stated which showed knowledge, we still do not think the board of education would be liable if it acted in a governmental capacity in constructing the apparatus in question, and we have concluded it did; neither do we regard it as material in this case that the apparatus which caused the injury was not a part of the original plan of the school building, assuming that it was not a part thereof. The board in providing the apparatus, as we have held, was acting within its governmental capacity, and for that reason is protected from liability.

It is regrettable, indeed, that William Anderson lost his life in the circumstances mentioned; that his mother has sustained an irreparable loss, and that while it is a maxim of law that for every wrong there is a remedy, that maxim does not seem to hold true in this and similar cases. While the plaintiff's loss is a real one and the damages suffered by her, no doubt substantial, the law affords her no remedy. The law, in effect says to her: You alone must bear this burden; that even if substantial damages might in some small measure assuage the great burden imposed upon you, through no fault of yours, nevertheless, in order to protect the public, you, widowed though you be, must bear the burden alone.

We hold that the demurrer is sufficient, and that the ground of the demurrer, that the complaint did not state facts sufficient to constitute a cause of action, is true. The order sustaining the demurrer is affirmed. The appellant is entitled to costs and disbursements on appeal.

CHRISTIANSON, J. (concurring). I concur in an affirmance on the ground stated in ¶ 3 of the syllabus, namely, that the defendant, school corporation, in providing swings and other playground apparatus was engaged in a governmental enterprise. In other words, I believe the case falls within the rule announced in Moulton v. Fargo, 39 N. D. 502, L.R.A.1918D, 1108, 167 N. W. 717. It is a well-settled common-law rule "that no private action can be maintained against a municipal corporation for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no pecuniary profit." And "as respects what are sometimes called 'quasi municipal corporations' such as counties, townships, and school districts, this is the rule everywhere, without exception." Snider v. St. Paul, 51 Minn. 466, 18 L.R.A. 151, 53 N. W. 763. This rule, as regards a quasi municipal corporation, was recognized and enforced in the early history of this state. Vail v. Amenia, 4 N. D. 239, 59 N. W. 1092. The rule as thus recognized and enforced has never been departed from since. If the rule is wrong the legislature has ample power to change it. It is the duty of the courts to enforce the law as it exists.

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

BRONSON, J. (specially concurring). I concur in affirmance of the order. I agree that the defendant, upon the facts alleged, was engaged in the performance of a governmental function. While so engaged, under well settled principles of law, recognized and followed in this state, the defendant was not liable for its negligence. Montain v. Fargo, 38 N. D. 432, L.R.A.1918C, 600, 166 N. W. 416, Ann. Cas. 1918D, 826; Moulton v. Fargo, 39 N. D. 502, L.R.A.1918D, 1108, 167 N. W. 717; Snider v. St. Paul, 51 Minn. 466, 18 L.R.A. 151, 53 N. W. 763; notes in 37 L.R.A. 301 and 49 L.R.A.(N.S.) 1026. If it be desirable to change this well-settled principle of law, the complaint should be addressed to the legislature for legislative enactment. Plumbing Supply Co. v. Board of Education, 32 S. D. 270, 142 N. W. 1131; notes in 37 L.R.A. 301 and 49 L.R.A.(N.S.) 1026.

WILLISTON COAL & ICE COMPANY, a Corporation, Respondent, v. JAMES COX DAVIS, Agent of the President under the Transportation Act of 1920, Appellant.

(190 N. W. 776.)

Carriers — duty at common law to properly cooper cars.

1. The common-law duty is imposed upon a carrier to furnish cars reasonably coopered for the purposes intended in an intrastate shipment.

Carriers — complaint for failure to cooper cars held to allege cause of action.

2. A complaint, alleging failure to so cooper cars and the furnishing of such cooperage by a shipper in intrastate shipments of lignite coal to his damage, alleges a cause of action.

Railroads — carrier's common-law duty to cooper cars suspended by Federal control.

3. It is a matter of defense for the carrier to show that such cooperage concerns interstate rates or Federal regulations, of such an administrative character, and so subject to Federal administration, during a period of Federal control, as to suspend the common-law duty imposed.

Opinion filed November 2, 1922.

Carriers, 10 C. J. § 71 p. 76 n. 3; § 88 p. 85 n. 14. Railroads, 33 Cyc. p. 45 n. 36.

Action in District Court, Williams County, *Moellring*, J.

The defendant has appealed from an order overruling a demurrer.

Affirmed.

Murphy & Toner, for appellant.

Fisk & Taylor, for respondent.

Statement.

BRONSON, J. The defendant has appealed from an order overruling a demurrer to the complaint.

In substance the complaint alleges: The plaintiff is a corporation engaged in the mining and disposition of lignite coal near Williston in this state. Between January 25th, 1919, and March 1st, 1920, the plaintiff shipped 308 carloads of lignite coal over the great Northern Railroad, a carrier then under Federal control, from Williston to various points in this state. Prior to such shipments the plaintiff requested

the carrier to furnish necessary, proper, and sufficient cooperage for the cars. The carrier refused so to do unless paid therefor at the rate of about $4 per car. In order for plaintiff to load and make shipment of such carloads of coal it became necessary to pay the carrier the amount so demanded for such cooperage or to furnish the cooperage, which the plaintiff did at a cost of $711.48. Between such dates the carrier furnished free cooperage of cars to other mine owners who similarly shipped lignite coal, at prices the same as charged by the plaintiff. Thereby the carrier gave a preference to such other persons and exacted a greater compensation for cooperage contrary to the provisions of article 21, chap. 14, N. D. Comp. Laws, 1913. By reason thereof, the plaintiff sustained actual damages in the sum of $711.48.

The demurrer asserts that the court has no jurisdiction of the carrier nor of the subject of the action; that the complaint does not state facts sufficient to constitute a cause of action.

Both in the trial court and in this court, the parties have submitted the issues upon written briefs and without oral arguments.

The defendant carrier contends: *First,*—that this action seeks to recover a statutory penalty and cannot be maintained because Congress never gave its consent that the United States or the Director General be sued; *second,*—that the question whether plaintiff has been subjected to discrimination is primarily an administrative question requiring precedent action by the railroad commissioners; *third,*—that rates, both interstate and intrastate, during the Federal control, were initiated and made effective by the President so as to render ineffective the statutes upon which plaintiff bases his cause of action and that jurisdiction was vested in the interstate commerce commission to award reparation for discrimination.

Decision.

Whether the court has jurisdiction over the person and subject of the action is answered by determining whether the complaint states a cause of action.

It is elemental, upon demurrer, that a complaint will be liberally construed and will not be overthrown if it states any cause of action. Weber v. Lewis, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105; 31 Cyc. 101, 289, 290; 21 R. C. L. 508.

At the common law a duty was imposed upon carriers to furnish cars reasonably well coopered for the purposes intended. Loomis v. Lehigh Valley R. Co. 208 N. Y. 312, 101 N. E. 907; Cincinnati, N. O. & T. P. R. Co. v. N. K. Fairbanks & Co., 33 C. C. A. 611, 615, 62 U. S. App. 231, 90 Fed. 467; Chicago & A. R. Co. v. Davis, 159 Ill. 53, 50 Am. St. Rep. 143, 42 N. E. 382; Gibbon Farmers Elevator Co. v. Minneapolis & St. L. R. Co. 142 Minn. 57, 170 N. W. 706. This common-law duty is recognized in this state, analogously, by a statute requiring carriers who furnish cars to grain shippers to properly cooper the same or permit the shipper to furnish the cooperage and recover the expense in a civil action. Laws 1913, chap. 234; Comp. Laws 1913, § 4707.

Clearly, the complaint alleges a breach of such common-law duty, and a cause of action for its violation. Loomis v. Lehigh Valley R. Co. and Gibbon Farmers Elevator Co. v. Minneapolis & St. L. R. Co. supra. The time covered in the complaint constitutes a period of Federal control of the carrier anterior to the adoption of the Transportation Act of March 1st, 1920. The demurrer admits the failure of the carrier to perform its common-law duty. To constitute a cause of action, as stated, it was unnecessary for the plaintiff to plead, by negation, any ultimate facts that might serve to suspend the operation of such common-law rule through Federal administration, or control. 21 R. C. L. 485. If this court should take judicial notice of Federal acts and orders, it does not follow that this question of cooperage of cars, in intrastate business, concerns either interstate rates or Federal regulations, or forms a part of any administrative question or order. It is a matter of defense for the carrier to show, through pleading and proof, that the enforcement of this common-law duty and remedy presents an administrative question concerning interstate rates or Federal regulations and control, subject to the jurisdiction, either exclusive or preliminary, of the interstate commerce commission or other administrative agency. See Baird Bros. v. Minneapolis & St. L. R. Co. 181 Iowa, 1104, 165 N. W. 416; Dreyfuss v. Pennsylvania R. Co. 90 Misc. 581, 153 N. Y. Supp. 971; Great Northern R. Co. v. Merchants Elevator Co. 147 Minn. 251, 180 N. W. 105; id. 259 U. S. 285, 66 L. ed. 943, 42 Sup. Ct. Rep. 477 (May 29th, 1922); Midway Co-op. Elevator Co. v. Great Northern R. Co. 41 N. D. 16, 169 N. W. 494; 10 C. J. 502. To give

any effect to such matters of defense through judicial notice would operate practically to make the demurrer a speaking demurrer. 31 Cyc. 322. Accordingly, the order overruling the demurrer is affirmed with costs.

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

THEODORE KOFFEL, Respondent, v. H. C. RHUD, Appellant.

(191 N. W. 464.)

Brokers — broker entitled to commission when producing under contract buyer ready, willing, and able, though terms of contract not fully consummated.

1. A broker who, pursuant to a contract of employment, procures a buyer ready, willing, and able to purchase his principal's land upon terms mutually satisfactory, as evidenced by a valid contract made between the parties, is entitled to recover his commission, although the terms of such contract have not been fully consummated.

Brokers — questions to defendant sued for commission held immaterial as concerning consummation of terms of sale, and not negativing existence of binding contract; question as to the value of broker's services in sale of land held both indefinite and an improper hypothetical question.

2. For reasons stated in the opinion it is *held*, that the trial court properly sustained objections to three questions propounded by the defendant.

Opinion filed October 27, 1922. Rehearing denied Nov. 22, 1922.

Evidence, 22 C. J. § 796 p. 709 n. 38. Brokers, 9 C. J. § 86 p. 592 n. 21; § 87 p. 596 n. 33; § 117 p. 647 n. 12.

Note.—The general rule that a real estate broker, to be entitled to commissions, must find a purchaser able, willing, and ready to purchase on terms prescribed in the contract between the principal and such broker, is applicable if the owner refuses to consummate the sale, as will be seen by an examination of the authorities collated in a note in 21 L.R.A.(N.S.) 935, on right of broker to commissions where he procures a purchaser at a price stated by his principal, but on slightly different terms, and the owner refuses to consummate the sale; 4 R. C. L. 314; 1 R. C. L. Supp. 1116; 4 R. C. L. Supp. 264; 5 R. C. L. Supp. 238.

Action to recover broker's commission, in District Court, Burleigh County, *Coffey*, J.

Defendant has appealed from the judgment and order denying judgment non obstante or, in the alternative, a new trial.

Affirmed.

E. T. Burke, for appellant.

Theodore Koffel and *I. C. Davies*, for respondent.

A broker is entitled to his commission when a binding contract is entered into even though not consummated. And the owner cannot defeat the broker's right to a commission by a refusal to perform, or by changing the terms of the contract. Lund v. Babb, 127 N. W. 548; Webb v. Burroughs, 127 N. W. 623; Minder & Jorgenson Land Co. v. Brusteen, 127 N. W. 546; Tilden v. Smith, 124 N. W. 841.

It has been also held that the broker is entitled to his commission, though the contract entered into between the parties was not specifically enforceable and was canceled by the parties thereto. Mattes v. Engel, 89 N. W. 651.

Also where the owner himself really consummates and completes the sale. Scott v. Clark, 54 N. W. 538; Heimberger v. Rudd, 138 N. W. 374; Kepner v. Ford, 111 N. W. 619.

Where the land broker's contract is to bring the parties together for a commission and when his acts result in bringing them together and in a sale, he is entitled to his commission. Northern Immigration Asso. v. Alger, 147 N. W. 100; Farmer v. Holmes, 160 N. W. 143; Canfield v. Orange, 102 N. W. 313.

A real estate broker is entitled to his commission when he produces a purchaser that is willing to buy upon the seller's terms, and the fact that the owner refuses to consummate the sale does not defeat the broker's right to a commission. Ward & Murray v. McQueen, 100 N. W. 253; Jordan v. Anderson, 155 N. W. 769; Jensen v. Bowen, 164 N. W. 4.

Statement.

Bronson, J. This is an action to recover a broker's commission. The jury returned a verdict for $2,000 in plaintiff's favor. Defendant has appealed from the judgment and from an order denying judgment

non obstante or, in the alternative, for a new trial. In a motion to dismiss the appeal plaintiff has presented several questions of practice. In view of the determination upon the merits, it is unnecessary to give consideration to these questions. The facts are: Pursuant to Koffel's testimony, the defendant, in March, 1920, came to his office in Bismarck and wanted him to procure a buyer for defendant's land in Tennessee: He told Koffel he would give him a good commission, better than the usual commission: Koffel saw Paul and had him confer with defendant: Paul had some land in Florida: As a result of conferences, plaintiff, defendant and Paul went to Tennessee and to Florida to see the lands: Paul and defendant made a deal whereby defendant's land in Tennessee together with some property in North Dakota was exchanged for Paul's land in Florida: Defendant made a deed to Paul conveying the Tennessee land: The consideration designated for defendant's Tennessee land was $45,000: This Tennessee land involved some 10,000 acres: The value of plaintiff's services are $1 per acre.

Pursuant to defendant's testimony, he never employed plaintiff to secure a purchaser for the Tennessee land: He had employed Koffel previously as an attorney but had a disagreement with him concerning business transactions: Plaintiff went with him and Paul to Tennessee and Florida: Koffel asked defendant if he wanted to trade for Florida land but defendant said nothing about commission and did not promise to pay any: Defendant and Paul made a trade: Defendant received some 4,500 acres of wood land in Florida. Defendant deeded to Paul some property in Bismarck and in North Dakota and also the Tennessee land: Paul accepted the deeds and the title to the Tennessee land but there is litigation growing out of this exchange which is still pending. Upon cross-examination he testified that he might have told plaintiff that, if he could find a buyer for his land, he might do something good for him; that he told him to try and sell this land for cash; that Koffel brought a buyer and told defendant that he could meet him at plaintiff's office. The trial court submitted to the jury the issues as to whether there was any agreement between the parties for plaintiff to furnish and bring to the defendant a buyer for his land in Tennessee and whether there was a sale of the land under such agreement. Also, the issue was submitted of the reasonable value of the plaintiff's services up to the sum of $10,866. The defendant specifies as error the sustaining

of plaintiff's objections to three questions propounded. These questions are: First, "Is there a suit between you and Paul in which he is claiming something like $4,000 for back taxes from you on the Tennessee land?" Second, "We offer to prove by the defendant now on the stand that Mr. Paul has accepted the deeds to the Tennessee land but refuses to pay within $4,000 of the purchase price, claiming a counterclaim on account of back taxes on the Tennessee land." Third, "Just tell the jury what the value of the services of the sale of that Tennessee land under the conditions under which it was sold." Plaintiff contends that through the court's action in this regard, testimony to show that the sale was not consummated and testimony concerning the value of plaintiff's services were excluded.

Decision.

A broker who, pursuant to the contract of employment, has produced a purchaser ready, willing, and able to purchase the land of his principal upon terms satisfactory to the principal is entitled to his commission. Paulson v. Reeds, 33 N. D. 141, 151, 156 N. W. 1031; Harris v. Van Vranken, 32 N. D. 238, 155 N. W. 65; Paulson v. Reeds, 39 N. D. 329, 167 N. W. 371, id., 48 N. D. 90, 183 N. W. 641; Ball v. Dolan, 18 S. D. 558, 562, 101 N. W. 719; Lund v. Bapp, 25 S. D. 439, 127 N. W. 548; Tilden v. Smith, 24 S. D. 576, 124 N. W. 841.

The brokerage contract involved is to procure a buyer, not to effect a consummated sale. 9 C. J. 592. Accordingly, the plaintiff was entitled to his commission although the details of the sale and trade have not been fully consummated. Paulson v. Reeds, supra; Minder & J. Land Co. v. Brustuen, 26 S. D. 38, 127 N. W. 546; 9 C. J. 596. Through the verdict of the jury, it is established that defendant employed plaintiff to procure a buyer for his Tennessee land and agreed to pay him a good commission. It is not questioned that plaintiff did procure a buyer for defendant's land in Tennessee and that a binding contract therefor was made between defendant and Paul. Pursuant to this contract, defendant deeded to Paul his Tennessee land, also some land in North Dakota. Defendant received about 4,500 acres of wood land in Florida. So far as this record discloses, the only reason why the terms of the sale have not been fully consummated is that Paul, or the defendant, claims that some of the terms of this contract have not

been fully performed by the other party. It is not questioned that the purchaser is ready, willing and able to respond, pursuant to the contract. Properly, the plaintiff brought this action for quantum meruit. Farmer v. Holmes, 35 N. D. 344, 361, 160 N. W. 143. The errors specified concern only the action of the trial court in sustaining plaintiff's objections to three questions. The first question was immaterial: It concerned the consummation of the terms of the sale: It did not negative or challenge the existence of a binding contract of sale. The second question likewise was immaterial: It relates to some act concerning a payment of part of the purchase price and a counterclaim concerning back taxes. Again this question does not negative the existence of a binding contract of sale. The trial court properly excluded the third question for the reason, at least, that it is both indefinite and an improper hypothetical question. The judgment and order of the trial court are affirmed with costs.

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

ROBINSON, J. (dissenting). The plaintiff sues for the reasonable value of services rendered defendant as a broker in the sale of certain real estate in Tennessee containing 10,866 acres at $45,000. The complaint avers that the services were reasonably worth $1 an acre. The plaintiff recovered a verdict and judgment for $2,000, and defendant appeals from an order denying a new trial. The answer is merely a general denial. It does not state the facts on which counsel for defendant relies and which fairly appear from the record. The facts are that the services which plaintiff claims to have rendered were of no value and were such as to entrap the defendant and to lead him into a great loss. The Tennessee land was a mountainous tract of no value. The plaintiff did not in any manner cause the sale of the same for $45,000 or any sale whatever. Defendant did not sell the land or have any opportunity to sell it for any sum, not even $1 an acre. The plaintiff merely introduced defendant to one Paul as a person who might be willing to dicker for the Tennessee land in exchange for Florida lands. The result of the dicker being that defendant was played for a sucker by Paul and induced to give away his worthless Tennessee land without any consideration, and in addition, to convey to Paul land and

property in Burleigh county worth probably $150,000 in exchange for some title to Florida land worth possibly $50,000, and that in the making of such exchange Paul was in fact aided by the plaintiff. It was at Paul's request and to aid him in making the deal that the plaintiff made a trip to Tennessee and Florida. The deal seems quite similar to a companion case which recently came before this court. Paul v. Leutz, 48 N. D. 1121, 188 N. W. 1022. In that case Paul made a ruinous and unconscionable deal with Leutz, as shown by the decision of this court, and if Mr. Koffel did not aid Paul in making that deal to despoil Leutz it is certain that he prosecuted an action to enforce the deal. The facts are that for several years the real estate business has been degenerating into piracy. It has grown to be a demoralizing and a swindling business.

It is quite manifest that the defense of the action was not well conducted and that a mere general denial was not a proper answer and it did not fairly present the defense. However, that does not seem a good reason for a denial of justice. The plaintiff does not show the real transaction and by objections he prevented any such showing. There is no evidence that his services were of any benefit to defendant. True he says that his services were worth from $3 to $5 an acre, but he does not show that defendant realized from the Tennessee lands $1 an acre. Defendant testified he knew the value of the services and yet he was not permitted to state the value. That was possibly by reason of misunderstanding the decision of this court in case of Paulson v. Reeds, and it may be that decision is like an evil tree and that it does tend to bring forth evil fruit. However, it does fairly appear that the services were a great damage and a loss to the defendant. Counsel for defense persistently tried to show the whole transaction and to show the great loss resulting from the deal with Paul, but he was excluded on technical points, and chiefly because it was not alleged in the answer. Counsel for defense sought to show that there was no completed sale; that the services in regard to the sale were of no value and that a lawsuit for a rescission of the sale was pending in the courts the same as in case of Paul v. Leutz, and the testimony was excluded. At abstract, page 46, Mr. Burke says: We want to show what the deal was and to show that it was not a deal for the Tennessee land. But his attempt to show it was denied. However, there is some showing of the lands and

property which defendant conveyed to Paul in exchange for the Tennessee and Florida land. The showing covers two pages of the abstract. 47, 48. The value of the North Dakota property conveyed to Paul was probably worth three times his title to the Florida lands. The Tennessee land cuts no figure in the case. It was used as a means to entrap the defendant. Now, while it is manifest the defense was not well conducted, yet the whole record shows that defendant has not had a fair trial and that the alleged services were of great damage and not a benefit to the defendant. Hence there should be a new trial on an amended answer, fairly stating the case and permitting a showing of the whole transaction.

GRACE, J. (dissenting). As stated in the majority opinion, the defendant specified error in the sustaining of plaintiff's objection to three questions. One of these questions was as follows: "Just tell the jury what the value of the services of the sale of that Tennessee land under the conditions under which it was sold." It is my view that that question was a proper one and defendant should have been permitted to answer it. It was competent to show the reasonable value, if any, of plaintiff's services in the transaction as a broker, and that was an issue submitted by the trial court to the jury. If defendant was not permitted to introduce any evidence in that respect, that was a denial which prevented him from proving his defense.

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

STATE OF NORTH DAKOTA EX REL. JOSEPH COGHLAN, as Supreme Court Reporter, for North Dakota, Respondent Relator, v. D. C. POINDEXTER, as State Auditor of North Dakota, R. A. Nestos, S. A. Olsness, S. Johnson, John Steen, Gilbert Semingson, and D. C. Poindexter, as Members of the Auditing Board of North Dakota, Appellants.

(190 N. W. 818.)

Statutes — law fixing salary of supreme court reporter held not repealed by general legislative bill prescribing smaller amount — repeals by implication not favored.

For reasons stated in the opinion it is *held* that § 8, chapter 211, Laws 1919, was not repealed by chapter 7, Laws 1921.

Opinion filed November 22, 1922.

Reports, 34 Cyc. p. 1618 n. 94. Statutes, 36 Cyc. p. 1071 n. 25; p. 1072 n. 26; p. 1135 n. 11.

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

Defendant appeals.

Sveinbjorn Johnson, Attorney General, and *Charles Simon*, Assistant Attorney General, for appellant.

"If any language be employed in the repealing statute which evidences an intention on the part of the legislature to abolish or extinguish the penalties provided by or incurred under the statute repealed, such intention will prevail, notwithstanding the saving clause statute, because one legislature has no power to limit or control a succeeding one in the exercise of its constitutional functions." Wilson v. People, 85 Pac. 187.

"If any presumptions are to be made they must be made in favor of the act, and not against it." State ex rel. Birdzell v. Jorgenson, State Auditor, 25 N. D. 539; United States v. Carling, 97 U. S. 546, 24 L. ed. 1082.

"If they are irreconcilable, and so inconsistent that they cannot stand together, the last repeals the first." Austin v. State, 135 S. W. 1167; State v. Walbridge, 119 Mo. 383, 41 Am. St. Rep. 663; Rawls v. Doe, 23 Ala. 240, 58 Am. Dec. 289; Edgar v. Greer, 8 Ia. 394, 74 Am. Dec. 316.

We particularly desire to call the court's decision to the following cases: Covington G. Belknap v. United States, 150 U. S. 588, 37 L. ed. 1191; Riggs v. Brewer, 64 Ala. 282; Collins v. State, 3 S. D. 18; United States v. Mitchell, 109 U. S. 146; Somers v. State, 5 S. D. 321; Owen v. Beale, 145 Ala. 108.

Joseph Coghlan, for respondent.

The leading case on this question in the United States and one which has been consistently followed since 1886 by the Supreme Court of the United States and by most of the states where this particular question has arisen is the case of United States v. Langston, 118 U. S. 389, 30 L. ed. 164. Quoting from the opinion: "Repeals by implication are not favored. It cannot be said that there is a positive repugnancy between the old and the new statutes in question. If by any reasonable construction they can be made to stand together our duty is to give effect to the provisions of each." Chew Heong v. United States, 112 U. S. 549, 28 L. ed. 773; State v. Stoll, 17 Wall. 425, 430, 21 L. ed. 650; Ex parte Yerger, 8 Wall. 85, 105, 19 L. ed. 332, 339; Ex parte Crow Dog, 109 U. S. 556, 579, 27 L. ed. 1030, 1035.

All the cases concerning the question of salaries and insufficient appropriations therefor which have been passed upon by the United States Supreme Court since the Langston Case have consistently followed the same. United States v. Vulte, 58 L. ed. 1071; Archibald v. United States, 218 Fed. 272.

Failure on the part of Congress to appropriate sufficient money was not necessarily a reduction of an officer's salary. Texas v. Steele, 57 Tex. 200.

PER CURIAM. In 1919 the legislature provided for the appointment by the supreme court of an officer to be known as the supreme court reporter, state law librarian and legislative librarian, prescribed his duties and fixed his compensation, and made appropriation for the payment thereof. Laws 1919, chap. 211. The act provided that such officer should receive an annual salary of $2,500, § 8, chap. 211, supra. Chap. 211, Laws 1919, has never been amended nor have any of its provisions been expressly repealed. In the general appropriation bill enacted by the legislature in 1921, the salary of the supreme court reporter was given as $2,000 per annum, or rather that sum, or $4,000

for the biennium, was appropriated. The question in controversy is whether the provision in the appropriation bill of 1921 operated as an implied repeal or amendment of § 8 of chapter 211, 1919 Laws, and changed the salary of the supreme court reporter from $2,500 to $2,000 per year. The state auditor proceeded upon the theory that § 8, Chapter 211, Laws 1919, was repealed and drew salary warrants in favor of the supreme court reporter on the basis of a $2,000 annual salary and refused to draw warrants on the basis of $2,500 per year. The reporter thereupon brought a proceeding in mandamus in the district court of Burleigh county to compel the state auditor to issue warrants for the greater amount. The contention of the reporter was sustained by the trial court. That is, the trial court ruled that chapter 211, Laws 1919, fixing the salary of the supreme court reporter at $2,500 per annum, was not repealed by implication by the Appropriation Act of 1921. The only question presented and argued on this appeal is whether the conclusion so reached by the trial court is correct. Hence, that is the only question we shall discuss.

In our opinion the district court was correct in holding that § 8, chapter 211, Laws 1919, was not repealed by the general appropriation bill of 1921. We think that result follows from an application to the facts here of the rule laid down in State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450. In that case this court ruled that where an act creating an office provides that the incumbent of the office created shall receive a certain salary fixed by the act that this constitutes not only a legislative declaration as to the amount of the salary to be paid but, also, an appropriation of the amount so fixed. The rule thus announced has never been departed from and has been adhered to in subsequent decisions. See State ex rel. Packard v. Jorgenson, 31 N. D. 563, 154 N. W. 525; State ex rel. Wallace v. Jorgenson, 34 N. D. 527, 159 N. W. 35.

Repeals by implication are not favored. "It is a reasonable presumption that all laws are passed with a knowledge of those already existing, and that the legislature does not intend to repeal a statute without so declaring." Lewis's Sutherland Stat. Constr. 2d ed. § 267.

Under our Constitution no bill may embrace more than one subject, and such subject must be expressed in the title. N. D. Const. § 61. And the general appropriation bill can "embrace nothing but appro-

priations for the expense of the executive, legislative, and judicial departments of the state, interest on the public debt, and for public schools." N. D. Const. § 62. In view of these constitutional provisions it does not seem likely that the legislature could have intended to utilize the general appropriation bill as an act to change salaries of state officers, or to repeal existing laws on that subject. Indeed the attorney general in an opinion rendered to a legislative committee in 1915, in effect, ruled that the general appropriation bill might not be used for the purpose of repealing existing laws, but that such repeal should be accomplished by an act or acts enacted for that specific purpose. Report of Attorney General 1915–1916, pp. 36, 37.

The judgment appealed from is affirmed.

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

GRACE, J., did not participate.

ROBINSON, J. (dissenting). Chapter 211, Laws of 1919, provided for the appointment of a Court Reporter and Law Librarian, fixing the salary at $2,500 a year and making an appropriation of $3,000. At the last session the Legislature appropriated for the Reporter only $2,000. Now the Reporter brings mandamus to compel the Auditor to give him vouchers at the rate of $2,500.

Under the statute mandamus does not lie against the Auditor only to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station, § 8457. But the law does not specifically enjoin the Auditor to give vouchers in excess of appropriations. Our District Judges go entirely beyond their jurisdiction when they assume to direct and manage the executive department of the State.

CITY OF BISMARCK, a Municipal Corporation, Respondent, v. BURLEIGH COUNTY, a Public Corporation, Appellant.

(190 N. W. 811.)

Infants — city held not liable for part of mothers' pension paid by county; payments by city of claim for part of mothers' pension paid by the county held to be involuntary, so that it must be refunded by county.

In 1921 the county presented to the city a claim for $1348.80, being 25 per cent of the sum paid for mothers' pensions. The claim was presented and allowed and paid under a misapprehension of the law by all parties, all supposing that they knew and understood the law and all making the same mistake as to the law. Hence, the payment was not voluntary. The city officers had no legal or moral right to make payment and give away the money of the city. Hence, the county must refund the money. Judgment affirmed.

Opinion filed November 22, 1922.

Infants, 31 C. J. § 14 p. 993 n. 47. Payment, 30 Cyc. p. 1315 n. 4.

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

F. E. McCurdy, State's Attorney, for appellant.

H. F. O'Hare, for respondent.

The county of Burleigh was liable for the full amount of the mother's pension paid to residents living within the city of Bismarck in said county under § 2508, Compiled Laws, 1913, and the city of Bismarck, a municipal corporation, was not liable for any part of the mother's pension paid by the county of Burleigh to residents of said county living within the city of Bismarck. Pierce County v. Rugby, 47 N. D. 301, 181 N. W. 954.

While the general proposition of law that money voluntarily paid under a mistake of law cannot be recovered is everywhere recognized, yet an exception to this general rule is also recognized in the case of an unauthorized payment made by a public officer. See the following cases which assert and uphold this exception: *United States.*—Wisconsin Cent. Ry. Co. v. U. S. 164 U. S. 190, 17 Sup. Ct. Rep. 45, 41 L. ed. 399; McElrath's Case, 12 Ct. Cl. 201. See also United States v. Bartlett, 2 Ware, 17, Fed. Cas. No. 14,532. Compare Badeau v. United States, 130 U. S. 439, 9 Sup. Ct. 579, 32 L. ed. 997; Schlesinger's Case, 1 Ct. Cl. 16; Folsom's Case, 4 Ct. Cl. 366; McKee's

Case, 12 Ct. Cl. 504; Palen v. United States, 19 Ct. Cl. 389; Barnes v. Dist. of Columbia, 22 Ct. Cl. 366; Hillborn v. United States, 27 Ct. Cl. 547. *Arkansas.*—Weeks v. Texarkana, 50 Ark. 81, 6 S. W. 504. *California.*—Compare Riverside County v. Yawman, etc. Mfg. Co. 3 Cal. App. 691, 86 Pac. 900.

The reason for the exception to the general rule is that while an individual is dealing with his own money, and may do with the same as he pleases and is answerable to no one, yet public officers are dealing with money which is not their own and over which their powers are subject to well-known limitations. They can pay when the law requires or permits, and they cannot pay when it forbids. Barnes v. District of Columbia, 22 Ct. Cl. 394.

An action may be maintained to recover back money paid without authority of law . . . out of the city treasury, though fraud in fact be not imputed to the recipient of the money. The law charges upon persons receiving public moneys knowledge of the powers and authority of public auditing and disbursing officers, and compels the refunding to the treasury of moneys received from officials who exceed their authority, by making, under the forms of law, payments for which the legislature has not directly or indirectly given warrant. Such illegal payments may be sued for or may be used by way of set-off. McGinniss v. New York, 6 Daly (N. Y.) 419.

Robinson, J. This is an appeal from a judgment and order overruling a demurrer to the complaint. The complaint shows that in August, 1921 defendant presented to the city a claim for $1348.80, being 25 per cent of mothers' pensions paid by the county to nineteen different mothers during the years 1919 and 1920, which claim the city paid to the county. The complaint shows that the claim was presented by the county in good faith under the belief that the city was legally liable for the same under the statute, § 2508. The statute is that in certain cases the township where a pauper has a legal residence shall pay for the expenses of his care, 25 per cent, and the county shall pay 75 per cent; but, as held by this court, the statute does in no manner relate to allowances made under the mothers' pension act; Pierce County v. Rugby, 47 N. D. 301, 181 N. W. 954.

However, the claim was presented in good faith and it was paid

under a mistake of the law, each party believing that the city was liable for the same. The payment was made under a misapprehension of the law by all parties, all supposing that they knew and understood it and all making substantially the same mistake as to the law. Hence, under the statute it was not a free and voluntary payment. Section 5855. The city was under no legal or moral obligation to make the payment and its officers had no legal or moral right to donate or give away the money of the city. The mothers' pension is allowed by the county judge and is a charge against the county only. Hence the judgment is clearly right and is affirmed.

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

OLE NESVOLD and Hulda Nesvold, Respondents, v. W. J. GERDING, Appellant.

(190 N. W. 815.)

Trover and conversion — conversion of buildings shown.

1. The facts pleaded and proved by plaintiff, in the state of the record, establish conversion by the defendant of certain of plaintiff's buildings, more particularly described in the opinion.

Evidence — defendant's testimony of oral bargain for purchase of farm where buildings alleged converted were situated held admissible.

2. The court erred in excluding certain testimony offered by defendant.

Opinion filed November 22, 1922.

Evidence, 22 C. J. § 1557 p. 1162 n. 67. Trover and Conversion, 38 Cyc. p. 2026 n. 43; p. 2081 n. 1; p. 2086 n. 25.

An appeal from a judgment of the District Court of Ward County, *Geo. Moellring*, J.

Judgment reversed.

Note.—On necessity of demand and refusal to show conversion of property, see 26 R. C. L. 1122; 4 R. C. L. Supp. 1699; 5 R. C. L. Supp. 1441.

On acts which constitute conversion, see 26 R. C. L. 1110; 4 R. C. L. Supp. 1698; 5 R. C. L. Supp. 1440.

Funke, Campbell & Eide, for appellant.

There was no transfer or conveyance of these buildings by Gerding to Jones, therefore no sale, no transfer of title, no conversion. It is true that an owner selling land may expose himself to an action in trover provided his *conveyance carries* the house as part of the realty. Dolliver v. Ela, 128 Mass. 557; Dolliver v. McLaren (Mich.) 26 N. W. 583; Osborn v. Potter (Mich.) 59 N. W. 606; Wagner v. Cleveland (N. H.) 75 Am. Dec. 195; Wagner v. Cleveland (Ohio) 10 Am. Rep. 770; Stout v. Stoppel (Minn.) 14 N. W. 268; Shapiro v. Barney (Minn.) 14 N. W. 270.

However, in all the above cases, it will be noticed that it is an essential condition and element that the *conveyance* of the land *carries* the house. If, in the conveyance of the land, the title to the buildings does not pass for any reason, there is no conversion. 38 Cyc. 2018, 2020; Russel v. Richards (Me.) 25 Am. Dec. 254; Harris v. Gillingham, 23 Am. Dec. 700; Osgood v. Howard, 20 Am. Dec. 322; Sparks v. Hess, 15 Cal. 197; Jewitt v. Partridge, 12 Me. 252; Tapley v. Smith, 18 Me. 15; Pullen v. Bell, 40 Me. 314; Giles v. Simonds, 15 Gray 443; Peaks v. Hutchinson (Me.) 59 L.R.A. 279.

The sale of property to amount to conversion must be accompanied by delivery, that is, it must deprive the owner thereof. 39 Cyc. 2026. See in this connection the Michigan case, Mills v. Van Camp, 2 N. W. 938.

Conceding for the purposes of argument that Nesvold had the ownership of the buildings, then we submit that at the time of the sale he was in possession, and the rules in this jurisdiction are to the effect that such possession charges the purchaser with notice of the rights of the possessor, and as a consequence no title passed. Krause v. Krause, 30 N. D. 54; Sommer v. Miller (S. D.) 142 N. W. 174; Quaschneck v. Blodgett, 32 N. D. 603; Glendenning v. Hawk, 8 N. D. 419; Parker v. First Nat. Bank, 3 N. D. 87; Miller v. National Elev. Co. 32 N. D. 352.

With reference to the rights of the plaintiff and his ownership of these buildings erected upon lands of another, and the buildings not having been removed before termination of his tenancy, we cite, in addition to the above cases, the following, to the effect and holding that plaintiff was not the owner of the building. Stockwell v. Marks,

35 Am. Dec. 266; Hughes v. Kershaw, 15 L.R.A.(N.S.) 724; Fitzgerald v. Anderson (Wis.) 51 N. W. 554; Suits v. Park (Minn.) 16 N. W. 490; Free v. Stuart (Neb.) 57 N. W. 991; 11 R. C. L. 15, 16; Brigham v. Overstreet, 10 L.R.A.(N.S.) 452.

We submit that the complaint does not set forth ownership, general or special, and possession or immediate right to possession sufficient to constitute a cause of action in conversion. Parker v. First Nat. Bank, 3 N. D. 87; Glendenning v. Hawk, 8 N. D. 419; Miller v. National Elev. Co. 32 N. D. 352; Humpfreier v. Osborne (S. D.) 50 N. W. 88.

McGee & Goss (*E. O. Haroldson* of counsel), for respondent.

As the fact depriving plaintiffs of their property was both *fraudulent* and *tortious,* no demand for value or payment is necessary to constitute conversion, under all the authorities. 26 R. C. L. 1098, 1110, 1113, note 25, 1119, note 30, 1122, note 33, 1137.

"*Persons liable.* In trover, it may be stated as a general rule that one who receives, without right, the direct benefits of the personal property of another is liable in trover for the value of the same." 26 R. C. L. 1138, note 31.

In addition to the Ruling Case Law, on the sufficiency of facts to state a cause of action and define a conversion, see the following authorities. 38 Cyc. 2019, subd. 3.

GRACE, J. This is an appeal from the judgment of the district court of Ward county, where in an action for conversion, plaintiff recovered a judgment which, including costs, amounted to $842.35. The action is one in conversion brought to recover the value of certain buildings owned by plaintiffs, which they claim have been converted by defendant. In due time after the entry of the judgment, plaintiffs made a motion for judgment notwithstanding the verdict or for a new trial, which was denied.

The material facts necessary to be stated, follow: Prior to August 1918, one Dr. Yoeman owned the SW¼ of section 18, township 160, range 83 and Ole Nesvold owned the SE¼ of the same section. For several years prior to that year, Nesvold had rented the Yoeman quarter and lived upon it. Under an arrangement with Yoeman he placed upon the rented land from Yoeman, three certain buildings, a

chicken house, a machine shed, and another small building, with the understanding and agreement that when he moved from the land he could take the buildings he had placed thereon. In August 1918, the defendant purchased the Yoeman's quarter with actual knowledge of plaintiff's ownership of the three buildings above mentioned. On the 7th day of September 1918, the defendant purchased the Nesvold quarter under the terms of a written agreement. The defendant took no deed of the Yoeman land from Yoeman to himself, but caused it to be deeded to one, George W. Jones, who purchased it from the defendant. The defendant also sold to Jones the Nesvold quarter. At the time of the sale and transfer of the land to Jones, Nesvold was in actual possession of the Yoeman's quarter and was there at the time Jones arrived and took possession of it. Nesvold about this time attempted to remove the three buildings, but by Jones was not permitted to do so. He then went to Truro, a small town about thirty-five miles from Minot, and telephoned to the defendant at the latter place, who informed him that the buildings belonged to the defendant and forbade their removal from the premises.

The defendant specifies numerous errors, all of which have been considered. The decision of two of them will dispose of this appeal. He contends under the first assignment that the facts pleaded and proved by plaintiffs do not establish conversion of the buildings by the defendant, nor give a right of action against him on that ground. We deem it unnecessary to go into a lengthy discussion of the reasoning of defendant with reference to the essential elements of conversion, or to discuss at length the authority cited by him. It is unnecessary to consider all the refinements that may bear upon or enter into the subject of conversion. The case is simple. It is certain that plaintiff was the owner and had the right to possession of the buildings, unless, as defendant maintains, that plaintiff sold them to him. In effect it is the claim of defendant that the consideration expressed in the written agreement covering the land represented the agreed purchase price for both the land and these buildings; this claim will receive further consideration later in the opinion, but for the present it will be assumed as plaintiff contends, that the buildings were not included with the sale of the land. If the plaintiff lost the buildings, by whose act did he lose them? There can be but one answer to this question, which is,

he lost them by reason of the defendant exercising dominion over them, and selling them to Jones. In making that sale he must necessarily have assumed the attitude of claiming that the buildings were his; that he had a right to take and dispose of them for his own benefit and use. If the buildings were not in fact his, he converted them to his own use when he disposed of them as above stated, knowing they were plaintiff's buildings. If this be true, defendant's acts in this respect were tortious. By his acts he excluded the plaintiff from dominion over his property and asserted it in himself and sold it, and this, in defiance of and inconsistent with the plaintiff's rights of property. This was conversion of property, nothing less, 26 R. C. L. 1098, 1110, 1113.

Defendant's second assignment of error rests upon the claim that certain evidence offered on behalf of defendant was excluded and stricken out. By this evidence, defendant attempted to show that the three buildings which at the time defendant purchased plaintiff's land, were on the Yoeman quarter, were included in the deal, that is, in the purchase of plaintiff's land. With reference to this, the defendant gave the following testimony: "I told Mr. Nesvold that I had bought the Yoeman's place and that I would like to figure with him buying his quarter. We talked over about—we talked the matter over about the buildings and he said that he had a couple of buildings on the Yoeman's farm, which I knew. Dr. Yoeman had told me. So I agreed with him that I would buy his quarter and it was understood perfectly that the buildings on the Yoeman's place should go in with the deal." He said, "If I sell my farm I have no further use for the buildings, and he said that if we come to a close, or the close of a deal, that I might sell them off; that he had no more use for it. That he expected to move out of the country; away down to Willow city."

The defendant further testified that Nesvold said that if he did not sell, he would have to buy a house, and that he didn't have the money to buy that with. Defendant testified to the effect that this conversation was had after defendant had purchased the Yoeman land and after he had informed Nesvold to that effect. All of such evidence on objection by plaintiff was excluded; the court did not permit it to be considered by the jury and instructed the jury to that effect. In this, we think, the court erred. It should have received such testimony. It

related, we think, to the question of consideration. We think, however, in this connection, that it is incumbent upon the defendant before he can avoid liability to show that there was an agreement under which the buildings were purchased, other than the written one. The buildings were not included in the deal under the written agreement. If there were another agreement under which they were purchased, and that can be shown by competent evidence, such evidence would be competent and admissible. The reception of evidence of such an agreement, if any, and proof relating to the consideration of the written agreement would not, we believe, violate the rule, that parol evidence is not admissible to vary the terms of a written instrument.

We think it is clear there must be a new trial. The judgment appealed from is reversed and the case is remanded for further proceedings not inconsistent with this opinion. Appellant is entitled to his costs and disbursements on appeal.

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

BRONSON, J. (specially concurring). I concur in the reversal. Plaintiff's cause of action sounds in conversion. It alleges that defendant took possession of the buildings. The evidence is sufficient to support findings to that effect. Plaintiff's right thereto is based upon an agreement whereby the same remained at all times personal property. It was competent for defendant, under the general denial, to establish lawful possession of the buildings; that, in fact, he had purchased them from plaintiff and paid a consideration therefor. The parol evidence offered tended to show that all of the transactions between the parties, so far as they concerned the buildings in controversy, were not reduced to writing and embodied within the terms of the written contract and the deed. The contract and deed concerned realty. The buildings were personalty. They were situated upon land other than that conveyed in the contract and deed. Under the circumstances, a collateral agreement, concerning such buildings, and as a part of the whole transaction, might have been made and, for plausible reasons, not included within the written evidence which concerned realty. Accordingly, the testimony offered served to show that the written contract was not intended to cover the whole transaction;

that there existed a transaction of partial integration. For such purposes, parol testimony was admissible to prove ownership of the buildings and payment of a consideration. For such purposes, it did not serve thereby to vary the terms of the contract or the deed; nor to enlarge or restrict the subject-matter, the covenants, or the stipulations thereof. See Putnam v. Prouty, 24 N. D. 517, 526, 527, 140 N. W. 93; See 4 Wigmore, Ev. § 2430.

CHRISTIANSON, J., concurs.

P. B. NEFF and Edward Bailey, Respondents, v. WILLIAM H. SCHRADER, Appellant.

(191 N. W. 466.)

Brokers — brokers entitled to commission when producing under contract buyer ready, willing, and able to purchase.

1. A broker who, pursuant to his contract of employment has produced a purchaser ready, willing, and able to purchase the land of his principal, upon terms satisfactory to such principal, is entitled to his commission.

Brokers — brokers producing purchaser with whom principal made valid contract of sale entitled to commission, though contract thereafter canceled by mutual agreement.

2. Where brokers produced such purchaser with whom the principal made a valid contract for the sale of his land and agreed with his brokers concerning the amount of the commission to be paid, and where, thereafter, such principal and the purchaser, by mutual agreement, without notice to, or the consent of, the brokers, canceled the contract, the principal retaining the initial payment made upon the contract, it is held, for reasons stated in the opinion, that the brokers are entitled to their commission.

Opinion filed November 22, 1922.

Brokers, 9 C. J. § 87 p. 596 n. 33; § 91 p. 605 n. 78.

Note.—The settled rule as stated by the courts is that, in the absence of an express contract between the broker and his principal, the implication generally is that the broker becomes entitled to his commissions whenever he brings to his principal who is able and willing to take the property and enter into a valid contract upon the terms named by the principal, as will be seen by an examination of the cases discussed in a note in 44 L.R.A. 593, et seq.; 4 R. C. L. 303; 1 R. C. L. Supp. 1112; 4 R. C. L. Supp. 261; 5 R. C. L. Supp. 236.

On the question as to when a real estate broker has earned his commissions, see note in 139 Am. St. Rep. 225.

Action for broker's commission in District Court, Dickey County, *McKenna*, J.

Defendant has appealed from an order granting judgment non obstante and from the judgment so entered thereupon.

Affirmed.

F. J. Graham, for appellant.

If no motion for a direct verdict has been made, or if the motion for a directed verdict was properly denied, then a motion for judgment notwithstanding the verdict should not be granted. See Johns v. Ruff, 12 N. D. 74, 95 N. W. 440; West v. Northern P. R. Co. 13 N. D. 221, 231, 100 N. W. 254, 33 N. D. 36.

"If the right to a commission is dependent on payment of the price by the purchaser, the broker must show payment." (Burnett v. Edling, Texas, 48 S. W. 775), or tender (Fiske v. Soule (Cal.) 25 Pac. 430; 19 Cyc. 270).

Hinds v. Henry, 36 N. J. L. 328, holding that a broker may, by special agreement with his principal, so contract as to make his compensation dependent upon a contingency which his efforts cannot control, even though it relates to the acts of his principal, as upon the event of the purchaser's making a certain payment at a given time. Lyle v. University Land, etc., Co. (Tex.) 30 S. W. 723; McPhail v. Buell (Cal.) 25 Pac. 266; Lassen v. Bayliss, 125 Fed. 744.

A real estate broker who has undertaken the sale of property is not entitled to recover his commissions where the person procured as a purchaser after signing a written contract of purchase and paying part of the consideration in cash declares his total inability to perform the contract, which is thereupon canceled. See Melvin v. Aldrich (Md.) 32 Atl. 389; Smith v. Sheil, 28 Pac. 857; Martinson v. Hensler (Minn.) 157 N. W. 714.

W. S. Wickersham, for respondents.

"The contract of the broker is to negotiate a sale, that is, to procure a valid contract of purchase, which can be enforced by the vendor if his title is perfect; or, if he does not procure such contract, to bring the vendor and proposed purchaser together that the vendor may secure such contract." Baars v. Hyland (Minn.) 67 N. W. 1148.

The same rule is laid down in the following cases: Darrow v. Harlow, 21 Wis. 302; Brosse v. Cooley (Minn.) 45 N. W. 15; Cain v.

Nasurette (Mich.) 162 N. W. 287; Fuday v. Gill (Mich.) 161 N. W. 900; 19 Cyc. 242, 900; 9 C. J. 591; Wood v. McQueen, 13 N. D. 153; Paulson v. Reed, 33 N. D. 141; Gross v. Stevens, 21 N. W. 549; Flynn v. Jordal, 100 N. W. 236; Nagl v. Small, 138 N. W. 849; Leigh v. Slean, 188 N. W. 836.

In spite of some authorities to the contrary, we are convinced that in such a contract as is here pleaded the broker is entitled to his commission when through his instrumentality the purchaser has been produced, is able and willing to buy, and with whom the owner actually makes an enforceable contract of sale, even though the contract fails in the performance through default of the purchaser. The same rule is laid down in the following cases: Huntermer v. Arnt, 93 N. W. 653; Lund v. Rapp, 127 N. W. 548; Rowe v. Gage, 112 N. W. 469; Micek v. Waneka, 161 N. W. 367.

Statement.

BRONSON, J. Plaintiffs seek to recover from defendant $565 as a brokerage commission. The complaint alleges that defendant listed with plaintiffs, in 1919, his land, consisting of 144 acres, for sale at $90 per acre net to defendant, upon the agreement that plaintiffs should receive, as profits in making the sale, all in excess of $90 per acre for which said land might be sold; that, pursuant to such agreement, plaintiffs procured a financially responsible purchaser to whom defendant sold his farm at $100 per acre; that a written contract for a deed was made with the purchaser and possession of the farm delivered to Mayden by defendant; that, pursuant to a trade whereby property located in Denver was taken in exchange, plaintiffs allowed a discount from their commission of $575. That defendant paid to plaintiffs $300, and there is a balance of $565 due. Defendant, in his answer, alleges that such land was listed with plaintiffs at the stipulated price of $90 per acre net to him, with the agreement that plaintiffs should receive, as profits for making the sale, all in excess of $90 per acre, when the land was fully paid for and a deed given for land to the purchaser; that, pursuant to such agreement, plaintiff secured one Mayden to make a contract with defendant for the purchase of the land for $14,400; that the purchaser paid $950 in cash

and argeed to pay $2,000 on Nov. 1st, 1919, whereupon a deed should issue; that, after the contract had been signed, plaintiffs and defendant agreed that the amount due plaintiffs for commission was $565, to be paid to them out of the $2,000 payment to be made by the purchaser on Nov. 1st, 1919, and in no other way; that, pursuant thereto, defendant made out an order directing the First National Bank of Oakes, North Dakota, to pay plaintiffs $565 whenever such purchaser should make payment of the $2,000 due Nov. 1st, 1919; that the purchaser took possession of the land about Sept. 1st, 1919, and threw it up Oct. 1st, 1919; that he has never made payment of the $2,000; that defendant has at all times been ready, willing, and able to go ahead and fulfil the terms of the contract and that the purchaser refuses and neglects so to do.

In the evidence the following facts appear: Defendant resided on his farm of 144 acres in Dickey county. He listed the farm for sale with plaintiffs at a stipulated price of $90 net to him, with the agreement that plaintiffs should receive, as commission upon a sale, the price in excess thereof. Plaintiffs brought a purchaser, one Mayden, to defendant's farm. Through negotiations had, defendant went to Denver, Colorado, there to inspect Mayden's house and lot, proposed to be traded as part of the purchase price for his farm. Upon the return of the parties to Nebraska, a contract dated July 14th, 1919, was made between the parties whereby defendant agreed to convey his farm to Mayden for a consideration of $14,400 to be paid as follows: $950 in cash; $2,000 cash on Nov. 1st, 1919; $1,200 due July 25th, 1920; and $7,000 through Mayden's note and mortgage upon the land due Nov. 1st, 1924. Further, Mayden agreed to give in payment his Denver property, valued at $5,000, subject to a mortgage for $1,750, which defendant assumed and agreed to pay. The contract provided for the execution and delivery of warranty deeds, the furnishing of abstracts showing good and sufficient title, and the transfer of possession of both properties on Nov. 1st, 1919, at which time settlement would be made in accordance with the contract.

In the sale of the Denver property as part of the purchase price for defendant's farm, it was agreed between plaintiffs and defendant that $500 should be deducted from their commission and also $75, one half of defendant's expenses upon the trip of inspection to Denver. Im-

mediately Mayden paid to defendant $950, pursuant to the contract. On July 16th, 1919, defendant, after his return home, wrote plaintiff Neff in part, as follows:

"Now, Mr. Neff, as your commission between you would come to $865 I have not seen Mr. Bailey as yet. I promised him that I would give him $300 if he made the deal. Now I'll give the figures which I hope will be correct. The full commission would be $1,440 deducting as you agreed $500, also half of my expenses going and returning from Denver I figured up all my expenses which was $150 and half of that would be $75. That would leave you and Mr. Bailey $865. And if Mr. Bailey demands the $300 what will I do about it? So I will keep out that amount and you had better come up here and settle between yourselves. So I will inclose draft for $300 as I think it would be fair that you fellows would wait for the balance until Nov. 1st, when we make full settlement, but, you come up and I'll make it satisfactory with you."

Shortly afterwards, defendant sold to Mayden his personal property upon the farm. Mayden's son came and took possession of the farm and for a short time, apparently, lived with the defendant on this farm. Then, on Sept. 9th, 1919, defendant moved to Denver. Prior to this time, in August 1919, defendant saw Neff. Defendant gave an order for the commission due plaintiffs and left the same at a local bank. In the testimony there is a dispute concerning the contents of this order. Defendant testified that the order directed the bank to pay plaintiffs $565 when Mayden paid the $2,000 and complied with the contract. Plaintiffs testified that the order directed the bank to pay them $565 on Nov. 1st. 1919. The order was lost. Before defendant left for Denver he deposited with the bank a warranty deed for his land signed by himself and his wife, also a blank mortgage for $7,000 to be signed by Mayden. Defendant Neff said there was some complaint about the title to his land but he had it straightened out in about sixty days' time. At Denver, the tenant in possession of the Denver property paid defendant one month's rent, $30. Defendant, however, testifies that he never received nor took possession of the property. In April 1920, defendant returned.

Some dispute had arisen between Mayden and defendant concerning defendant's representations as to whether his land was subject to flood-

ing. Mayden had refused to make further payments. In May or June, 1920, Mayden and defendant agreed to cancel their contract. This was done without notice to, or the consent of, the plaintiffs. Pursuant to their agreement, defendant retained the $950 paid by Mayden and received the return of his land. Mayden received the $30 rent paid to defendant and the return of the Denver property. On Oct. 1921, this action was instituted. The trial court submitted the issues to the jury who returned a verdict in favor of the defendant. Thereafter, upon motion for judgment notwithstanding the verdict the trial court granted such motion and, pursuant thereto, judgment was entered in plaintiff's favor for $565 commission and interest. Defendant has appealed from the order granting judgment non obstante and from the judgment entered thereupon.

In an extensive and able memorandum opinion the trial court has found, as a matter of law, that the evidence disclosed that plaintiffs had fully completed their contract and had earned their commission; that defendant entered into a valid and binding written agreement with Mayden, who, from the evidence disclosed, was financially able, ready, and able to respond and in recognition of such valid agreement the defendant voluntarily made a contract to cancel such contract with the purchaser and to retain the profits accrued under such contract.

Opinion.

I am of the opinion that the trial court did not err in granting the motion for judgment non obstante. Laws 1921, chap. 133. This court has frequently recognized the principle that a broker who, pursuant to the contract of employment, has produced a purchaser ready, willing, and able to purchase the land of his principal upon terms satisfactory to his principal is entitled to his commission. Koffel v. Rhud, ante 194, 191 N. W. 464; Paulson v. Reeds, 33 N. D. 141, 151, 156 N. W. 1031; Harris v. Van Vranken, 32 N. D. 238, 155 N. W. 65; Paulson v. Reeds, 39 N. D. 329, 167 N. W. 371; Id. 48 N. D. 90, 183 N. W. 641; Ball v. Dolan, 18 S. D. 558, 562, 101 N. W. 719; Lund v. Bapp, 25 S. D. 439, 127 N. W. 548; Tilden v. Smith, 24 S. D. 576, 124 N. W. 841. Through defendant's admissions, it

appears that a purchaser was produced for defendant's land upon terms satisfactory to defendant. A valid, binding contract was made between the parties. Defendant recognized and acted under this contract. He delivered his farm to Mayden. He received rent from the Denver property.

No question is raised concerning Mayden's financial responsibility and ability to perform the contract. Through mutual dealings, between Mayden and defendant, subsequent to this valid contract, apparently, in part, because of defendant's title and his representations concerning his land, this contract was canceled without notice to, or the consent of, the plaintiffs. Defendant retained the initial payment of $950 cash paid by Mayden upon the contract. Plaintiffs are clearly entitled to their commission. Upon the issues plaintiffs established their cause of action; defendant's defense failed. Even though it be conceded that plaintiffs agreed, pursuant to the order, to accept their commission when Mayden paid the $2,000 due Nov. 1st 1919, and that such agreement was valid, nevertheless, the settlement made between the parties which recognized the contract and, then terminated it by a new agreement, also recognized plaintiffs' right to their commission pursuant to the terms of such contract. Defendant, by his own act, waived his right to collect from Mayden $2,000 and waived the right, if any there were, to compel plaintiffs to wait for their commission until such payment was made. 9 C. J. 605; Smith v. Eelis, 191 Iowa, 1307, 184 N. W. 385; Red River Valley Co. v. Hutchinson, 41 N. D. 193, 170 N. W. 317.

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

ROBINSON, J. (dissenting). This is an action to recover from defendant $565 as a balance due on a commission for an abortive sale of 144 acres of land in Dickey county. The land is about twenty miles east of Ellendale and is adjacent to the James river. In the summer of 1919 the land in question was owned and occupied by defendant and he listed it with the plaintiffs for sale at $90 an acre net to him. One of the plaintiffs lived in Nebraska and not far from the home of one Mayden, to whom he tried to sell the land at $100 an acre. May-

den went north, saw the land and agreed to take it at $100 an acre on condition that defendant take from him a lot in Denver, Colorado, at $5,000. The bargain was concluded and Mayden paid earnest money, $950, from which $300 was paid on the commission. To promote the sale the plaintiffs agreed to reduce their commission $575. The contract was that on November 1, 1919, Mayden should pay defendant, at the First National Bank of Oakes, $2,000, and give defendant a mortgage on the land for $7,000 and convey to him the $5,000 property in Denver. Conveyances were made in escrow, but they were never delivered because that Mayden repudiated the contract and refused to perform it. With the escrow papers there was given an order to the bank to pay the plaintiffs from said $2,000, the commission of $565. That order was lost and it seems the main dispute was on the form or wording of the order. Soon after making the preliminary contract it seems Mayden discovered that the land was subject to overflow from the James river. He claimed that he was deceived and claimed damages, and that was the cause given for his refusing to perform the contract. He was not responsible. There was no evidence that he had any property in this state; no evidence showing that he had any property elsewhere, or that it was in any way feasible for the defendant to enforce the contract. Hence, the defendant wisely concluded to abandon and cancel the contract. The testimony of the defendant is that the plaintiffs never demanded the commission or spoke to him concerning any commission till a year and a half afterwards; that then Mr. Neff, one of the plaintiffs, came to him smiling and said that he had never received that commission, and defendant made answer that he had never received the $90 an acre for the land.

Concerning the order for the payment of $565 on commission, the plaintiffs testify that the order was absolute and unconditional. The defendant and one disinterested witness testified to the contrary and testified that the order was for payment of the commission out of the $2,000. On that question the testimony of the defendant and his witness is positive, circumstantial, and convincing. The jury believed the defendant and had a right to believe him; but the trial court took the position that when the preliminary contract was made the commission had been earned and that there was no consideration for any

conditional contract in regard to the payment of the commission. But as the evidence shows beyond question, the plaintiffs never produced a purchaser ready, able, and willing to buy the land at $90 an acre. The preliminary sale contract proved abortive and it was abandoned and repudiated. The defendant had no means of enforcing it. He was under no obligation to expend good money by an uncertain suit in Nebraska to enforce such a contract. The verdict of the jury was right and conscionable. The judgment and order contrary to the verdict should be reversed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, A CORPORATION, Appellant, v. K. A. NEPSTAD, Respondent.

(190 N. W. 1009.)

Limitation of actions — objection that action not commenced within statutory limit can only be taken by answer, and not by objection to evidence.

This is an appeal from a judgment in favor of the defendant on a directed verdict. On the trial the court sustained an objection to any evidence on the ground that it appeared that the action was barred by statute. The objection to the evidence was, in effect, a demurrer to the complaint on the ground that it appeared on the face of the complaint that the cause of action did not accrue within six years. But an objection that the action was not commenced within the time limited by statute can only be taken by answer. Hence there was manifest error in sustaining an objection to any evidence. Judgment reversed.

Opinion filed November 22, 1922.

Limitations of Actions, 37 C. J. § 709 p. 1207 n. 74; § 716 p. 1212 n. 31; § 720 p. 1216 n. 67. Pleading, 31 Cyc. p. 760 n. 96.

Appeal from the District Court of Dickey County, *McKenna,* J.

Reversed.

A. K. Gardner, and *A. P. Guy,* for appellant.

The statute of limitations is a statute of repose which cannot be taken advantage of by demurrer, but must be pleaded by answer, and being an affirmative defense not constituting a counterclaim, is deemed to be denied or avoided without reply. (Assignments of Error

I, II, III, IV.) Comp. Laws, 1913, §§ 7358, 7452, 7467–7477; Scott v. N. W. Port Huron Co. 17 N. D. 91, 115 N. W. 192; Meyer v. School Dist. 4 S. D. 420, 57 N. W. 68; Lyon v. Bank, 15 S. D. 400, 89 N. W. 1017; Moore v. Persson, 21 S. D. 290, 111 N. W. 633; McCarthy Bros. v. Hanskett, 29 S. D. 535, 137 N. W. 286.

It is a general rule that where a person is obliged to pay money for which another is liable, his right of action to recover it from the latter accrues at the time of payment and the statute of limitations begins to run from that time. See Stockwell v. Ins. Co. (Cal.) 73 Pac. 833; Pleasant v. Samuels (Cal.) 45 Pac. 998; Enos v. Anderson (Colo.) 93 Pac. 475; In re Pangborn, 185 Fed. 673; Power v. Munger, 52 Fed. 705; West v. El Campo Land Co. (Tex.) 32 S. W. 424; Board of Comm'rs v. Streeter (Kan.) 43 Pac. 985; Owen v. Baxter (Mich.) 56 N. W. 930; Poe v. Dixon (Ohio) 54 N. E. 86; Wheeler v. Young (Mass.) 9 N. E. 531.

J. A. McKee, for respondent.

An amended pleading to be effective, must be rewritten, verified, served upon opposing counsel and filed. Satterlund v. Beal, 12 N. D. 122; Caledonia etc. Co. v. Noonan, 3 Dak. 189.

The complaint upon its face shows that the cause of action set out therein, clearly did not accrue within the statutory period as pleaded in the answer.

In such case where the plaintiff relies upon any fact to take the case out of the statute of limitations, he must plead the facts. Pierce v. Merrill (Cal.) 79 Am. St. Rep. 63.

When the statute of limitations has been pleaded, and the complaint shows upon its face that the cause of action is barred by the statute, a motion made at the trial to dismiss the action will be sustained. Davis v. Boyett (Ga.) 1 Am. St. Rep. 386.

Even where the statute provides that the defense of the statute of limitations must be raised by answer and not by demurrer, it is held that such a statute does not deny the right to interpose limitations by a demurrer or by a special exception. 25 Cyc. 1398, B, 3 and notes cited.

Where facts are relied upon to avoid the statute of limitations, it is not sufficient to merely join issue by a general reply, but the matter of avoidance must be specially pleaded. 25 Cyc. 1422, E, 2.

Where the defense has not been anticipated in the complaint, and is set up in the answer, the facts relied upon in avoidance of the statute must be pleaded in a reply, or they must be pleaded by *an amendment* of the complaint. 25 Cyc. 1415, D, 2.

It is a settled proposition of law that the statute of limitations begins to run from the time when a complete cause of action accrues, that is when a suit may be maintained. 25 Cyc. 1065, VI–A. Pomeroy, Code Pl. 822, note.

ROBINSON, J. This is an appeal from a judgment in favor of defendant on a directed verdict. On the trial the court sustained an objection to any evidence on the part of the plaintiff on the ground that it appeared from the complaint that the action was barred by statute. The complaint avers that on April 4, 1912, the plaintiff leased to defendant part of its right of way in Oakes, North Dakota, a part of lots 13 and 14 on its right of way; that the lease was until January, 1917; that by the lease defendant agreed to pay for rent $5 a year and all taxes until January 9, 1917; that for the years 1913 and 1914 taxes were duly levied against the leased premises amounting to $233.37, which defendant failed to pay and which the plaintiff paid and demanded repayment on January 24, 1920.

The answer avers that in March, 1914, the lease was canceled by mutual agreement. Then it avers that the cause of action did not accrue within six years. Now the objection to the evidence was, in effect, a demurrer to the complaint on the ground that it appeared on the face of the complaint that the cause of action did not accrue within six years. But "An objection that the action was not commenced within the time limited by statute can only be taken by answer." Comp. Laws, 1913, § 7358. It cannot be taken by demurrer or by the objection to the introduction of any testimony. This defense became a question of fact. However, in this case the cause of action, if any, accrued from the time that plaintiff paid the taxes and demanded repayment which was not six years before the commencement of the action. Manifestly the court erred in excluding any evidence and in directing a verdict.

Judgment reversed.

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

STATE OF NORTH DAKOTA, Appellant, v. JOHN H. BLOOM, Geo. M. Hogue, and Lee C. Pettibone, Respondents.

(190 N. W. 812.)

Appeal and error — order granting change of venue not reversible as requiring performance of idle acts.

Where defendants have made an application to the court direct for a change of venue, based upon their residence in other counties, and have secured an ex parte order for the transfer of the cause to a county of defendants' residence, and, where notice thereof was served upon the plaintiff, all within the time prescribed by § 7418, Comp. Laws, 1913, and, where thereafter, plaintiff, upon a motion to vacate such order, makes no showing of merits that the defendants are not entitled, as a matter of right, to such change, or that the order would or should have been otherwise, if made after notice and hearing, it is held, that the order of the trial court should not be reversed for the reason that it requires the performance of idle acts.

Opinion filed November 22, 1922.

Appeal and Error, 4 C. J. § 2924 p. 948 n. 40 New.

Motion in District Court, Cass County, *Cole*, J., to vacate an ex parte order granting a change of venue.

Plaintiff has appealed from an order refusing to vacate the same.

Affirmed.

Sveinbjorn Johnson, Attorney General, and *George F. Shafer*, Assistant Attorney General, for appellant.

William Lemke, for respondent.

In the case at bar when the statute says "or by order of the court," it would seem that it means that if statutory grounds come into view of the court, it has the power by its own order to change the venue.

The following cases have a considerable bearing on the proper interpretation to be given to our statute: State v. Superior Ct. (Wash.) 82 Pac. 875, 111 Am. St. Rep. 915; Buck v. City of Eureka (Cal.) 31 Pac. 845; Packwood v. State (Or.) 33 Pac. 674; Shattuck v. Myers (Ind.) 74 Am. Dec. 236; Theresa Village Mut. Fire Ins. Co. v. Wis.

Note.—On right to change of venue on the ground of convenience of witness; and that an impartial trial cannot be had on account of prejudice, see note in 74 Am. Dec. 241.

On grounds for change of venue generally see 27 R. C. L. 812, et seq.; 3 R. C. L. Supp. 1521; 4 R. C. L. Supp. 1767.

Cent. R. Co. (Wis.) 128 N. W. 103; Stockwell v. Township Board of White Lake, 22 Mich. 349; Stringer v. Jacobs (Ark.) 50 Am. Dec. 221; State v. District Ct. (Minn.) 95 N. W. 591; Watterson v. Kirkwood, 17 Kan. 9; Hyde v. Harkness, 1 Idaho, 601; Ward v. Moorey, 1 Wash. Terr. 104; Godbe v. McCormick, 1 Mont. 105; Spell v. Dodge, 57 Cal. 645.

Statement.

BRONSON, J. The state appeals from an order refusing to vacate an order granting a change of venue. On June 20th, 1922, the state commenced this action to set aside and cancel a purchase and deed of 1,360 acres of land in Kidder county upon grounds of fraud and conspiracy and to recover from defendants $13,600, the purchase price thereof. On July 17th, 1922, defendants made an application to the district court in the county where the action was instituted to change the place of trial from Cass county to Kidder county. The grounds of the application were that none of the defendants were residents of Cass county; that two of them had resided in Kidder county for over five years last past; that the land involved is situated in Kidder county; that nearly all of the necessary witnesses reside in Kidder county. Accompanying the application was an affidavit that the defendant Bloom for over ten years last past was a resident of Ramsey county; that the other defendants for more than five years last past have been, and are, residents of Kidder county. On the same date the trial judge ordered that the place of trial be changed from Cass county to Kidder county, the defendant Bloom being a resident of Ramsey county and the other defendants residents of Kidder county. The court ordered a copy of the application, affidavit, and order to be mailed to the Attorney General of the state. On August 8th, 1922, the State served notice of motion to vacate such order of transfer. The grounds of the motion and affidavit were that no demand had ever been made or served upon the plaintiff and that no notice of the application had been served upon the plaintiff prior to the obtaining and making of the order dated July 17th, 1922; that the state had no opportunity to be heard or to appear in resistance thereto. On July 24th, 1922, the clerk of the district court in Cass county transferred the papers in the cause to Kidder county.

On August 28th, 1922, the district court in Cass county denied plaintiff's motion to vacate. The state has appealed from the order of the court so denying its motion to vacate. By stipulation all the papers in the cause, both from Kidder county and Cass county, have been settled and certified to this court. The state contends that the ex parte order of July 17th, 1922, was invalid, for the reasons that defendants had never made any demand in writing for a change of venue in accordance with § 7418 Comp. Laws, 1913, and that it was made without notice to, or any opportunity of, the State to appear and contest the application.

Opinion.

Section 7417, Comp. Laws, 1913, provides, among other things, that this action shall be tried in the county in which the defendants, or some of the defendants, reside at the time of its commencement.

Section 7418, Comp. Laws, 1913, provides as follows:

Defendant Must Ask Change.—If the county designated for that purpose in the complaint is not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demands in writing that the trial be had in the proper county and the place of trial be thereupon changed by consent of the parties, or by order of the court as provided in this section. The court may change the place of trial in the following cases:

(1) When the county designated for that purpose in the complaint is not the proper county.

(2) When there is reason to believe that an impartial trial can not be had therein.

(3) When the convenience of witnesses and the ends of justice would be promoted by the change.

Defendants' application to the court was a demand in writing. This application, together with the affidavit and order of the court, were presumably received by, and served upon, the plaintiff on or about July 17th, 1922. The record does not disclose when the answer was served. From the record, however, it does appear that these defendants made

their demand in writing and their application to the court and, that notice thereof was served upon plaintiff, before the time for answering expired.

This court has heretofore held that, when a demand for a change of venue based upon the residence of defendants in another county, has been made within the time required by law, the right to a change is absolute and not subject to the court's discretion. Hinsey v. Alcox, 38 N. D. 52, 56, 164 N. W. 296; Fargo Silo Co. v. Pioneer Stock Co. 42 N. D. 48, 171 N. W. 849; See note in 74 Am. Dec. 236; 40 Cyc. 155. The court, in certain cases, might even excuse the failure of defendants to demand a change of the place of trial within the time prescribed. Price v. Willson, 41 N. D. 209, 171 N. W. 245. After the defendants had complied with the statutory requisites it was only necessary, in any event, for defendants to move the court for a hearing and to give plaintiff an opportunity to controvert the question of residence. This hearing could be held after the time for answering had expired. Hinsey v. Alcox, supra. In our opinion it was erroneous for the trial court to grant a hearing of defendants' application without notice to the plaintiff. But upon the motion to vacate the order of the court, plaintiff did not controvert, in any manner, the residence of defendants as claimed in the application and affidavit for a change of venue. Upon such motion to vacate, where an opportunity was afforded to make a showing of merits, no showing was made that the order of transfer would or should have been otherwise, if made after notice and hearing to plaintiff. Upon this record, therefore, it appears that the right of the defendants to a change of venue is absolute; that the ex parte order made by the trial court is such as it would be compelled to make upon any hearing subsequently held after notice to plaintiff. Accordingly, in the absence of a showing of merits, the reversal of the order would require simply the performance of idle acts upon a further hearing. Such idle acts, this court will not require.

The order is affirmed.

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

GRACE, J., not participating.

THE STATE OF NORTH DAKOTA, Respondent, v. LAWRENCE MOZINSKI, Appellant.

(191 N. W. 345.)

Criminal law — statement of conclusion as to intent of accused by one assaulted not prejudicial where witness testified as to facts.

1. In a prosecution for the crime of assault with intent to kill, it is *held:* That prejudicial error did not occur in testimony concerning conclusions of law.

Criminal law — testimony as to other crimes unfaithfulness, and ill will admissible as res gestæ and to show intent and motive of accused.

2. That testimony concerning the disposition of manufactured whisky, unfaithfulness, and ill will of defendant towards his wife's parents was properly admitted as part of res gestæ and to show intent and motive.

Criminal law — evidence of other attempts of accused to kill wife, and relations of parties, admissible to show relationship, motive, and intent.

3. That evidence concerning attempts of defendant to kill his wife, and relations of the parties was properly admissible to show relationship, motive, and intent.

Criminal law — unless court's discretion in controlling cross-examination is prejudicial, its exercise will not be disturbed.

4. That scope of cross-examination is largely committed to the sound discretion of the trial court and its exercise will not be disturbed unless manifest prejudice results.

Argument of counsel not prejudicial.

5. That statements made by the state's attorney in his argument do not constitute prejudicial error.

Criminal law — verdict resting on substantial competent evidence not disturbed on appeal.

6. That the verdict rests upon some evidence of substantial nature proper to submit to a jury.

Opinion filed November 2, 1922. Rehearing denied November 23, 1922.

Criminal Law, 16 C. J. § 1115 p. 574 n. 56; § 1116 p. 575 n. 61; § 1146 p. 594 n. 89, 90; 17 C. J. § 3584 p. 246 n. 72; § 3593 p. 255 n. 55; § 3638 p. 298 n. 21; § 3674 p. 331 n. 41. Homicide, 30 C. J. § 364 p. 152 n. 41; § 407 p. 182 n. 67, p. 183 n. 72, 74; § 408 p. 184 n. 90; § 562 p. 318 n. 96.

Criminal prosecution in District Court, Walsh County, *Buttz,* J.

Note.—For authorities discussing the question of evidence of other attempts to kill, in prosecution for assault with intent to kill, see note in 62 L.R.A. pp. 207, 228, 278, 313, 314; 8 R. C. L. 206; 4 R. C. L. Supp. 535; 5 R. C. L. Supp. 455.

Defendant has appealed from judgment and order denying a new trial.

Affirmed.

H. C. DePuy, for appellant.

It was error for the court to allow evidence of other alleged attempts to kill, on the pretense that they tended to establish a motive or criminal intent on the part of the defendant for the alleged attempt to drown his wife. 8 R. C. L. 206, § 200; State v. Murphy, 17 N. D. 48; Judge Spalding's concurring opinion, ¶ 1, p. 63, 17 L.R.A.(N.S.) p. 620; 16 C. J. 586, 594, 600 §§ 1132, 1133, 1146, 1165; State v. Fitchette (Minn.) 92 N. W. 527; Davis v. State (Neb.) 74 N. W. 599; People v. Pinkerton (Mich.) 44 N. W. 180; People v. Bennett (Wis.) 81 N. W. 117; Shaffner v. Com. (Pa.) 13 Am. Rep. 649; Jauzen v. People (Ill.) 42 N. E. 862.

It was misconduct of the prosecuting attorney to propound on cross-examination insinuating questions without foundation in fact, calculated to prejudice the jury against the defendant. People v. Jansma (Mich.) 147 N. W. 601; 16 C. J. 893, § 2230; People v. Lieska, 126 N. W. 636; State v. Nyhus, 19 N. D. 492.

Vituperative and abusive language by a prosecuting officer in arguing a case is never permissible. Bishop v. State (Tex.) Ann. Cas. 1916E, 379, 16 C. J. 910, § 2259; State v. McPherson, 131 N. W. 645; See cases, both civil and criminal, cited in L.R.A.1918D, 87–93; Sasse v. State (Wis.) 32 N. W. 849; State v. Brunette, 28 N. D. 552; 2 R. C. L. p. 427, § 26; State v. Van Hoozer (Ia.) 185 N. W. 589; State v. Nyhus, 19 N. D. 326, 27 L.R.A.(N.S.) 487.

John B. Nevin and *Ben Greenberg,* for respondent.

The limits placed upon the re-examination is largely one of discretion and that the trial court is the best judge as to the limits to be exercised in this respect. McKelvey, Ev. 2d ed. § 263, p. 413; 28 R. C. L. 597; Spalding v. Chicago R. Co. (Iowa) 67 N. W. 227; State v. Rohn (Iowa) 119 N. W. 88; Daniels v. Dayton (Mich.) 13 N. W. 392; People v. Hare (Mich.) 24 N. W. 842; State v. McGahey, 3 N. D. 293, 55 N. W. 753; State v. Moeller, 20 N. D. 114, 126 N. W. 568; Erickson v. Wiper, 33 N. D. 193, 157 N. W. 592; 40 Cyc. 2522.

That the intent is but the frame of mind a person is in, it is exceedingly hard to prove it, therefore, courts have almost unanimously

allowed proof of similar attempts and threats to prove the intent with which a crime was committed. State v. Kent, 5 N. D. 516; 12 Cyc. 408, 412; 8 R. C. L. 201; State v. Murphy, 17 N. D. 48, 115 N. W. 84, 17 L.R.A.(N.S.) 609; State v. Miller, 20 N. D. 509; State v. Hakon, 21 N. D. 133; State v. Merry, 20 N. D. 337; 19 N. D. 337; 62 L.R.A. 194, note.

The law, as we understand it, is that the order of proof, as well as the scope of cross-examination is, and of necessity must be, largely committed to the sound discretion of the trial court. State v. Kent, 5 N. D. 516; State v. Tolley, 23 N. D. 284, 136 N. W. 784; State v. Longstreth, 19 N. D. 268; Counsel at this point cites State v. Nyhus, 19 N. D. 326.

The order of proof is largely within the discretion of the trial court and will not be disturbed by the supreme court unless the discretion is abused. The trial court heard the testimony, saw the demeanor of the witnesses, and we submit that the rebuttal examination in this case was not error. 12 Cyc. 555; State v. Bickford, 28 N. D. 36, 147 N. W. 407; Bowman v. Eppinger, 1 N. D. 21; State v. Ekanger, 8 N. D. 559; Patrick & Co. v. Austin, 20 N. D. 261; Pease v. Magill, 17 N. D. 166; State v. Werner, 16 N. D. 83; Madison v. Rutten, 16 N. D. 281.

Before counsel can complain about the argument of the state's attorney, timely objection must be made and the court given a chance to correct the error if made. State v. Frelinghuysen (Minn.) 45 N. W. 432; State v. Moeller, 24 N. D. 165; State v. Knutson, 21 N. D. 562.

Courts have always laid down the rule that a public prosecutor should prosecute a case with vigor. We call the court's attention to the court's charge on p. 267 of the transcript wherein he cautioned the jury as to the remarks made by counsel. State v. Kent, 5 N. D. 559; State v. Moeller, 24 N. D. 165; State v. Knutson, 21 N. D. 562; State v. McGahey, 3 N. D. 293; State v. Browman (Iowa) 182 N. W. 835; State v. Frelinghuysen (Minn.) 45 N. W. 432; People v. Tubbs (Mich.) 110 N. W. 132; People v. Lambert (Mich.) 108 N. W. 345; People v. Sanders (Mich.) 102 N. W. 959.

Statement.

BRONSON, J. Defendant was convicted of the crime of assault with intent to kill. He has appealed from the judgment and order denying

new trial. The facts are: The chief witness against the defendant was his wife. She and the defendant have been married some five years. They have three children, ranging in ages from nine months to three years. While they were going homeward, in an auto, from a visit to some neighbors, the defendant and his wife got into a dispute. The wife gave testimony to the following effect: As the dispute grew more intense, the defendant abused her and hit her and the baby; he stopped the car near a coulee; he threatened to kill her and to drown her so that she would tell no stories. He jumped out of the car, grabbed her and proceeded to drag her towards the waters of the coulee. She resisted his efforts and fought with him. He overcame these efforts, got her down to the bottom of a little hill, and dragged her body on the ground and in the mud towards the water. There she became unconscious. When she revived he was pulling her up the hill. There he left her alongside the roadside. She found herself in a ditch some distance from the place. He was up ahead and she could see the lights turn around in the road. He started homeward. She complained that she was hurt. Finally he took her to Minto. There she received temporary medical aid and went to the home of a neighbor for the night. Next day she was taken to a hospital at Grafton where she remained for some three weeks. It was found that she had sustained a simple fracture of the humerus in the left arm. The defendant denies any abuse, threats, or assault. He asserts that on this homeward ride his wife started the trouble; she hit him several times; he stopped the car to quiet her; when he started it again, she jumped out; he went to get her and found her lying on the bank of the coulee.

In the testimony, it developed that at both places where the defendant and his wife visited they had imbibed intoxicating liquor. The dispute apparently arose from some transactions between defendant and his sister. Defendant wanted to return in the morning with the car to do some business for his sister. It developed in the testimony that his sister had manufactured some whisky and wanted defendant and his car for purposes of its disposition. Testimony was adduced concerning various disputes and assaults between them during the course of their married life; evidence also, that each had accused the other of unfaithfulness. Once the wife left the defendant, but returned. The wife testified to an incident about a month and a half before the alleged

crime when he threatened to tie a stone to her neck and drown her; also to another incident about two years previous when he grabbed her, pushed her to a stove and threatened to kill and burn her. Defendant, likewise, testifies to incidents at different times when the wife got angry and assaulted him with various instrumentalities.

Upon oral instructions, the jury were requested to return a verdict of simple assault, of assault with intent to kill, or a verdict of not guilty.

The defendant has urged some thirty-four errors. These have been grouped. In brief, the defendant contends:

1. Error in permitting the wife to testify to the conclusion that defendant was going to drown her.

2. Error in permitting testimony connecting the defendant with the illicit sale of whisky and in permitting testimony to show unfaithfulness by defendant to his wife and attempting to prove ill will by defendant against the wife's parents.

3. Error in permitting evidence of other alleged attempts to kill the wife.

4. Misconduct of the state's attorney in propounding, on cross-examination, insinuating questions and in making statements unsupported by the evidence.

5. Abuse of discretion in the trial court in not granting a new trial through insufficiency of the evidence to establish any intent to kill.

In a memorandum decision denying a new trial, the trial court has found that there was ample evidence in the record to justify the finding of the jury concerning intent to kill his wife. That the state's attorney endeavored to give the defendant a fair trial and that there was not any misconduct on his part such as would prejudice defendant's rights.

Decision.

1. It is true the wife testified to some conclusions of law wherein she volunteered the phrase "He was going to kill or drown me" as descriptive of the place or the time and otherwise; but she testified directly in this regard concerning her husband's declarations at the time of the alleged crime. Under the circumstances, we are of the opinion that prejudicial error did not occur in this regard.

2. We are also of the opinion that no prejudicial error occurred in

the admission of testimony concerning the disposition of the manufactured whisky, unfaithfulness, or ill will of defendant towards the parents. Some of this testimony formed a part of the res gestæ. Otherwise, we are of the opinion that it was properly admitted, to show intent and motive. State v. Miller, 20 N. D. 509, 511, 128 N. W. 1034; State v. McGahey, 3 N. D. 293, 55 N. W. 753.

3. Evidence, concerning other alleged attempts of the defendant to kill his wife and the relations of the parties was reasonably well within the rule, in our opinion, permitting the admissibility of evidence to show relationship, motive, and intent. State v. Kent (State v. Pancoast) 5 N. D. 516, 558, 35 L.R.A. 518, 67 N. W. 1052; State v. McGahey, supra; State v. Merry, 20 N. D. 337, 127 N. W. 83.

4. The scope of cross-examination is largely committed to the sound discretion of the trial court. State v. Tolley, 23 N. D. 285, 291, 136 N. W. 784. Ordinarily, this court will not interfere unless its exercise results in manifest prejudice. State v. Foster, 14 N. D. 561, 567, 105 N. W. 938; State v. Longstreth, 19 N. D. 268, 276, 121 N. W. 1114, Ann. Cas. 1912D, 1317. We do not find that the learned trial court abused its discretion in this regard.

Upon examination of the statements made by the prosecution in the argument to the jury, concerning which a record and an objection have been made, we likewise find no prejudicial error when considered in connection with the cautions and instructions given by the trial court. Erickson v. Wiper, 33 N. D. 193, 222, 157 N. W. 592.

5. Upon a consideration of the entire record, we are of the opinion that the verdict rests upon some evidence of a substantial nature proper to submit to a jury; therefore this court may not interfere. State v. Foster, 14 N. D. 561, 567, 105 N. W. 938. In his briefs, the defendant has urged many objections to the testimony offered and received by the prosecution. Urgently he contends that prejudicial error has occurred. Stress particularly is laid upon the contentions that many of these questions serve purposes merely of conclusions at law, serve to vilify the defendant in the eyes of the jury concerning other transactions had with his wife and, in connection with insinuating remarks of the state's attorney and his conduct upon argument, served to prejudice and bias the jury. We are of the opinion that these matters were properly within the control and discretion of the trial court, and that it did not abuse its

discretion. The ultimate inquiry is whether the defendant has been accorded a fair trial upon the facts adduced and the law applicable. The trial court has so found. We do not find prejudicial error that requires a contrary finding.

The judgment and order are affirmed.

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

GRACE, J. (specially concurring). It is clear that the verdict rests upon substantial evidence. Defendant predicates error upon the reception of certain evidence over his objection, relative to his conduct in certain particulars prior to the time of the assault by him on his wife.

In the circumstances of this case we think this evidence, particularly that relative to charges of infidelity, was properly admissible as showing a motive for his attack upon his wife. I, therefore, concur in an affirmance of the judgment.

Upon petition for rehearing.

BRONSON, J. In a petition for rehearing defendant complains of the facts as stated in the opinion that they are misleading when considered in connection with the whole statement of the facts. No attempt was made in the opinion to state all the facts. Those facts, favorable to the state, are stated which, presumably, from the verdict of the jury, were found to be true.

In the briefs, as well as in the petition for rehearing, defendant has set forth, at considerable length, language used by the state's attorney in his argument to the jury. There is just one assignment that covers language that is preserved by a record thereof. This court has not otherwise considered such language, as a basis for determination of misconduct, for the reason that defendant has not presented a record which shows that the state's attorney did use such language. The necessity and the method of settling a record in cases of error predicated upon misconduct of counsel has been fully outlined in Erickson v. Wiper, 33 N. D. 193, 222, 157 N. W. 592. The petition for rehearing is denied.

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

RUDOLPH ROHLIK, Appellant, v. FARMERS INSURANCE COMPANY, a Corporation, Respondent.

(191 N. W. 347.)

Insurance — standard fire insurance provisions fix measure of indemnity in fire insurance policy on personal property.

1. The provision in the North Dakota Standard Fire Insurance Policy that the insurer shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs; that such loss or damage shall be ascertained or estimated according to such actual cash value, and shall in no event exceed what it would then cost to repair or replace the same is valid as regards fire insurance on personal property and fixes the measure of indemnity in a fire insurance policy upon personal property in this state.

Evidence — yield of like crops during same season in neighborhood admissible to show loss sustained under policy insuring stacks of unthreshed grain.

2. In an action on a fire insurance policy for the loss of certain stacks of unthreshed grain, evidence of yield of like crops during the same season, in neighboring fields of like quality and character, under similar conditions and circumstances, is admissible upon the question of the amount of loss sustained.

Evidence — evidence of offer for grain not admissible where date not fixed at time of destruction by fire.

3. Certain assignments of error predicated upon rulings on evidence examined and held nonprejudicial.

Appeal and error — insured not prejudiced by correct instructions on false report of loss where sustained by evidence.

4. Certain assignments of error predicated upon the instructions to the jury examined and held nonprejudicial.

Opinion filed November 23, 1922.

Appeal and Error, 4 C. J. § 2987 p. 1006 n. 70; § 3026 p. 1042 n. 37. Evidence, 22 C. J. § 154 p. 190 n. 42. Fire Insurance, § 49 p. 56 n. 53; § 450 p. 351 n. 83; § 747 p. 533 n. 98.

From a judgment of the District Court of Stark County, *Lembke*, J., plaintiff appeals.

Affirmed.

C. H. Starke, for appellant.

Note.—On value of property fixed in fire insurance policy on personal property, see 14 R. C. L. 1305; 3 R. C. L. Supp. 379; 4 R. C. L. Supp. 959; 5 R. C. L. Supp. 811.

Instructions which have no application to any view which can be taken of the evidence should not be given whether they are correct or not. Mariner v. Dennison (Cal.) 20 Pac. 386; People v. Manning (Cal.) 79 Pac. 856; People v. Sanches, 24 Cal. 17.

But it frequently happens that judges give such instructions, then it becomes necessary to determine whether the judgment ought to be reversed on account of the instruction. And in this regard the test is not whether the instruction was erroneous, but whether it was misleading. The giving of such instruction is seldom otherwise than misleading if for no other reason, because the jury are apt to think that they are really based upon evidence, actually given but overlooked by them. Hayne, New Trial & Appeal, p. 643, § 122; People v. Maughs (Cal.) 86 Pac. 187; George v. Ry. Co. (Cal.) 78 Pac. 819.

It set prominently before the minds of the jury an element which was really nonexistent in the case, and left them at liberty to make it an ingredient in the assessment of damages. Powers v. Wheatly, 45 Cal. 113.

The rule applicable to an instruction such as these complained of, as we deduce it from the cases, is:

If an instruction is erroneous and have application to the evidence the judgment must necessarily be reversed, but if the instruction have no application to the evidence, the judgment will not be reversed unless the jury may have been misled. Hirschberg v. Strauss (Cal.) 28 Pac. 236; Comptoir v. Dresbach (Cal.) 20 Pac. 28; People v. Gleason (Cal.) 55 Pac. 123; Hagerty v. Strong (S. D.) 74 N. W. 1037; Christianson v. Hendrie, 128 N. W. 608; Jones v. Matheisen, 2 Dak. 523, 11 N. W. 109; Barron v. N. P. Ry. Co. 16 N. D. 277; Elliot Supply Co. v. Gleason, 35 N. D. 641; 38 Cyc. 1612.

T. F. Murtha and *J. M. Hanley,* for respondent.

The thresherman who lived in that neighborhood for a great many years and threshed there for a great many years, gave the averages of the neighborhood's crops that he threshed in 1921. There was no error in this. Stockwell v. Ins. Co. (S. D.) 158 N. W. 450.

In action on a hail insurance policy, evidence of crop yield in neighboring fields, held, admissible for the purpose of establishing amount of plaintiff's loss; there being evidence that conditions were practically similar before loss.

"Appellant urges that it was error to allow evidence as to the crop yield of respondent's neighbors for the purpose of establishing the amount of respondent's loss. There was evidence tending to show that the crop conditions of the neighbors were practically the same as those of respondent before the hailstorm. It is true this evidence was not as definite as it might have been. It was, however, sufficient to constitute a prima facie showing, and, being uncontroverted, we think it sufficient to justify the rulings complained of. The trial court carefully protected appellant's rights in this respect in his charge to the jury." Lone Star Co. v. Browsard, 176 S. W. 649; Evans v. Keystone Gas Co. (N. Y.) 42 N. E. 513.

CHRISTIANSON, J. This is an action on a fire insurance policy. The policy was of the usual standard form adopted in this state and was issued to the plaintiff by the defendant insurance company on August 5, 1921. By the terms of the policy the defendant insured the plaintiff against loss or damage by fire in the sum of $3,500 upon certain grain, corn, and ground feed in buildings or in stacks situated upon certain premises described in the policy. On or about August 24, 1921, all the grain in stacks on the premises described in the policy was totally destroyed by fire. This was all property of the kind covered by the policy then in existence. The plaintiff submitted proofs of loss claiming the full sum stated in the policy. The defendant failed to make payment and plaintiff brought suit. The defendant interposed a general denial. It also asserted as affirmative defenses that the policy was void because the property covered thereby was mortgaged; that the plaintiff had failed to construct a fire guard as stipulated in the application on which the policy was based; and that he had rendered a false sworn statement as to the value of the property with the intentional and premeditated design to deceive and defraud the defendant. The jury returned a verdict in favor of the plaintiff and against the defendant in the sum of $1,209, with interest from the date the loss became payable under the terms of the policy. The plaintiff moved for judgment notwithstanding the verdict for the full amount of the policy. The motion was denied. Judgment was thereupon entered pursuant to the verdict and plaintiff has appealed.

It is contended by the plaintiff that he was entitled to recover the full amount of the policy. In other words, it is contended that the policy sued on was in legal effect a valued policy. This contention is based on § 6623, Comp. Laws, 1913, which reads: "If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the full amount stated in the policy; but the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance." In our opinion the contention is not well founded. Section 6623, supra, was part of the code of the territory of Dakota of 1877 (see Civ. Code 1877, § 1633); and it has remained a part of the statutory law of this jurisdiction since that time. In 1890 the legislature of this state enacted "An act to provide for a uniform policy of fire insurance to be made and issued in this state by all insurance companies taking fire risks on property within this state;" Laws 1890, chap. 74. By this act the insurance commissioner was required to "prepare and file in his office on or before the 1st day of August, 1890, a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be indorsed thereon, or added thereto, and form a part of such contract or policy. . .. ." The act, § 1, declared that "such form when so filed shall be known and designated as The North Dakota Standard Policy." The act, § 1, further declared that "such form shall, as near as the same can be made applicable, conform to the type and form of the New York Standard Fire Insurance Policy. . . ." It was made the duty of the attorney general to aid the insurance commissioner in the preparation of such standard policy. The act, § 4, further provided that "on and after the 1st day of October, A. D. 1890, no fire insurance company, corporation or association, their officers or agents, shall make, issue, use or deliver for use, any fire insurance policy or renewal of any fire policy on property in this state, other than such as shall conform in all particulars" to the policy so prescribed.

The provisions of chapter 74, Laws 1890 were embodied in the Revised Codes of 1895. The language, however, was altered to apply to the then existing condition. That is, the language of the law was changed so as to refer to the policy which had been prepared and filed by the commissioner of insurance. The provision so embodied as part of the Revised Codes of 1895 is still the law of this state and reads as

follows: "No fire insurance company, corporation or association, their officers or agents, shall make, issue, use or deliver for use any fire insurance policy or renewal of any fire policy on property in this state other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions with the printed form of contract or policy heretofore filed in the office of the commissioner of insurance as a standard policy for this state and no other or different provisions, agreement, condition or clause shall in any manner be made a part of such contract or policy or be indorsed thereon or delivered therewith. . . ." Revised Codes, 1895, § 4608; Comp. Laws, 1913, § 6625. The North Dakota Standard Policy form, which as already stated is the policy involved here, contains the following stipulation: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained and estimated according to such actual cash value . . . and shall in no event exceed what it would then cost the insured to repair or replace the same. . . ." In our opinion this is a valid stipulation in a fire insurance policy on personal property in this state and fixes the amount of compensation to which the insured is entitled in case of loss. The provision would unquestionably be a valid one, in the absence of a statute inhibiting the parties to an insurance contract from so contracting. The provision here, however, stands upon a firmer foundation. Not only is there no statute prohibiting the parties from so contracting but the lawmakers of the state have said that this provision must be included in every contract of fire insurance (upon personal property) issued or delivered for use in this state. It is quite apparent that the legislature was of the opinion that a valued policy did not exist under the laws of this state, for in 1907 it enacted the so-called "Valued Policy Act," which provides: "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire and that property insured shall be destroyed without fraud on the part of the insured or his assigns, the stated amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured." Laws 1907, § 1, chap. 158. The act carried an emergency clause, stating that there was then no law covering the subject. Laws 1907, § 3, chap. 158. It will be noted that chap. 158, Laws 1907 is restricted to policies of insurance on *real*

property, and the then existing law relating to fire insurance policies on personal property was in no manner disturbed.

It is true the statute provides that policies of insurance in the prescribed North Dakota Standard Fire Insurance Policy form "shall be in all respects subject to the same rules of construction as to their effect or the waiver of any of their provisions as if the form thereof had not been prescribed." Comp. Laws, 1913, § 6626. This, however, in no manner detracts from the contractual force and effect of a provision like that involved here. That provision is that the insurance company shall not be liable beyond the actual cash value of the property at the time the loss or damage occurred; that such loss or damage shall be ascertained or estimated according to such actual cash value, and shall in no event exceed what it would then cost the insured to repair or replace the same. This language is too plain to require interpretation, and must be enforced according to the meaning and intent so evidenced.

It is next contended that the court erred in sustaining objections to the following two questions, which were propounded to plaintiff by his counsel:

1. "What did you pay for that straw?"

2. "What was the price agreed upon between you and Mr. Privratsky as the price to be paid for this barley?"

The first question related to a certain stack of straw which plaintiff testified he purchased in the fall of 1921. As a matter of fact plaintiff answered the question and stated that he paid $15 for the strawstack, but the answer was given after objection had been interposed, and upon the objection being sustained the answer was ordered to be stricken. Before this question was asked, however, plaintiff had been permitted to testify fully as to the amount of straw destroyed and the value thereof. Specifically, plaintiff had testified; that he knew the value of straw in that vicinity on the day of the fire; that wheat straw was worth $5 per load, and oats and barley straw $6 to $6.50 per load; that in his judgment there were between 20 and 25 loads of wheat straw, about 20 loads of oats straw and about 20 loads of barley straw destroyed by the fire.

The second question related to the price a certain Mr. Privratsky had agreed to pay the plaintiff for certain barley in stack in the fall of 1921. There was no attempt to show the date of such alleged agreement. S

far as the record shows it might have been at a date long prior to August 24th, 1921. As already stated the plaintiff was permitted to testify as to the value of the straw. He was also permitted to testify, and did testify without objection, that there was no barley for sale in the vicinity of his farm. He was thereupon permitted to prove and did prove the market value of barley in Dickinson, as based upon the Minneapolis market and the applicable freight rate, and the cost of transporting the barley from Dickinson to plaintiff's farm where the loss occurred. In these circumstances we are unable to see how the plaintiff could have been prejudiced by the rulings complained of, even though such rulings had been erroneous, which it is not apparent that they were.

Error is also assigned upon the rulings of the court in permitting the defendant to show the amount of similar grain produced in 1921 on other lands of similar character in that immediate vicinity. In our opinion this evidence was admissible. Where growing crops are destroyed, or where, as here, grain in stack is destroyed before it is threshed, we think, it is proper to receive evidence of the average product or yield of like crops upon other lands of similar character and quality in that immediate neighborhood, under like circumstances and conditions. Such evidence is of some probative force in determining the probable amount of grain which would have been produced if the crop had been threshed. 2 Sutherland, Damages, 4th ed. § 447, p. 1450; Lommeland v. St. Paul, M. & M. R. Co. 35 Minn. 412, 29 N. W. 119; Stockwell v. German Mut. Ins. Asso. Co. 37 S. D. 348, 158 N. W. 450. The record in this case, however, shows that most of the evidence offered by the defendant as to the crop yield on neighboring fields was excluded. In fact the evidence admitted was so meager that it is wholly unlikely that it had any effect whatever upon the verdict. In our opinion the plaintiff has no ground whatever for complaint so far as the rulings of the court as regards this class of evidence.

Error is also assigned on the court's instructions to the jury. The instructions complained of are those relating to the defense interposed by the defendant to the effect that the plaintiff had verified and submitted false and fraudulent proofs of loss. There is no contention that the instructions given were in fact erroneous, but it is asserted that there was no competent evidence tending to establish such defense and

hence that that issue should not have been submitted to the jury. In our opinion no prejudicial error is shown. According to the evidence adduced by the defendant the valuation made by the plaintiff in his proof of loss was greatly in excess of the real value of the property destroyed. The testimony adduced by the defendant tended to show that the property destroyed by the fire was worth only about $600, while the plaintiff in his sworn proof of loss stated it had a value of $4,000, and presented a claim against the company for the full amount of the policy, namely for $3,500. The jury in its verdict found the property to be worth $1,209. No request was made by the plaintiff that the issue in question be eliminated from the jury's consideration or that any instructions to that effect be given to the jury. We are not prepared to say that the court should have eliminated this evidence from the consideration of the jury at all, and it certainly was not required to do so of its own volition. See 19 Cyc. 856, 950. See also Guild v. More, 32 N. D. 432, 475, 155 N. W. 44.

It is apparent, however, that the plaintiff was in no manner prejudiced by this instruction. The court specifically charged that the defendant had the burden of proving to the jury that the plaintiff wilfully made false and fraudulent representations in his proof of loss. In order to return the verdict which it did, the jury must have determined this issue against the defendant, that is, the jury must have found that the plaintiff was not guilty of fraud or false swearing. Hence, we are unable to see wherein the plaintiff was in any event prejudiced by the giving of these instructions.

It is also claimed that the instructions as to the manner of determining the value of the property destroyed were confusing. In our opinion plaintiff was not prejudiced by the instructions complained of. On this question the court specifically instructed the jury thus: "These are questions of fact, gentlemen, of the jury, that you are especially fitted to pass upon, and it is for you at last to say, if you find for the plaintiff, what his actual loss by said fire was, and if you find for the plaintiff, then you will assess the plaintiff's actual loss sustained by said fire. Said loss would include the grain and straw destroyed. After having found the actual loss of each and every article, then you will apply the reasonable market value thereof. That is, the value to the

plaintiff and other people in his vicinity had to apply to buy or sell grain and straw of like nature on August 24th, 1921."

No further or additional instructions were requested by the plaintiff on this issue.

In the course of the argument it is asserted by the defendant that the policy of insurance did not cover straw and that consequently the plaintiff was not entitled to recover the value of the straw destroyed. This question, however, is not before us as the defendant has not assailed the verdict or the judgment. It is apparent, however, that the error, if any, with respect to the straw was favorable to the plaintiff. This disposes of the various questions argued on this appeal, and it follows from what has been said that the judgment appealed from must be affirmed. It is so ordered.

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

GRACE, J. (specially concurring). The verdict of the jury and the judgment entered thereon do not give plaintiff an amount of money greater than the actual cash value of the property at the time of its loss by fire, and should therefore be permitted to stand.

There is no reversible error in the record. I therefore, concur in the affirmance of the judgment.

KATHERINE MASON, Appellant, v. FRED UNDERWOOD, Respondent.

(191 N. W. 949.)

Appeal and error — ruling on motion for new trial for excessive damages not disturbed unless abuse of discretion shown.

A motion for a new trial on the ground of excessive damages appearing to have been given under the influence of passion or prejudice is addressed to the sound judicial discretion of the trial court. And the appellate court will not interfere unless a manifest abuse of such discretion is shown. In this case it

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Note.—On power of appellate court to grant new trial for excessiveness of damages, see 26 L.R.A. 391; 2 R. C. L. 217; 1 R. C. L. Supp. 453; 4 R. C. L. Supp. 93; 5 R. C. L. Supp. 83.

is *held*, that the supreme court cannot say that the trial court abused its discretion in granting a new trial.

Opinion filed November 23, 1922.

Appeal and Error, 4 C. J. § 2818 p. 836 n. 74. New Trial, 29 Cyc. p. 1009 n. 54.

Appeal from the District Court of Ransom County, *Allen*, J.
Plaintiff appeals from an order granting a new trial.
Affirmed.
C. G. Bangert, Curtis & Remington, and *E. T. Burke*, for appellant.
Kvello & Adams, for respondent.

CHRISTIANSON, J. This is an appeal from an order granting defendant's motion for a new trial. The action is one to recover damages for false imprisonment. The plaintiff recovered a verdict in the sum of $3,250. The motion for a new trial was made on the ground, among others, of excessive damages appearing to have been given under the influence of passion or prejudice. The trial court granted the motion on this ground and the plaintiff has appealed.

The rules governing the respective functions of trial and appellate courts in considerations of motions for a new trial on a discretionary ground have been so thoroughly considered by this court that we shall not restate these rules but content ourselves by citing some of the many cases in which the applicable principles have been stated. See Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249; 91 N. W. 63, 12 Am. Neg. Rep. 619; Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; State v. Cray, 31 N. D. 67, 153 N. W. 425; Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707; Blackorby v. Ginther, 34 N. D. 248, 158 N. W. 354; Reid v. Ehr, 36 N. D. 552, 162 N. W. 903; First International Bank v. Davidson, 36 N. D. 1, 161 N. W. 281. Stated generally, the fundamental rule applicable to motions of this kind is that such motion is addressed to the sound, judicial discretion of the trial court and that the appellate court will not interfere unless a manifest abuse of such discretion is shown. In actions like the one before us, actions for personal torts, the law does not fix any precise rule for admeasurement of damages, and from the necessity of the case their assessment is left to the good sense and unbiased judgment of the jury. The parties, how-

ever, are entitled to have such judgment exercised, and when the jury instead of exercising cool and deliberate judgment permit the verdict to be dictated by passion and prejudice, the trial court not only has the power, but it is a duty incumbent upon it to set the verdict aside. Of course, the trial court has no right to substitute its judgment for the judgment of the jury as to the amount of damages to be awarded. Its inquiry is limited to whether the jury in arriving at the amount allowed, was actuated by passion or prejudice. That is, the trial court is not authorized to grant a new trial in cases of this kind merely because it deems the damages awarded too large; it is authorized to do so only when it reaches the conclusion that an excessive amount was awarded as a result of passion or prejudice. It is the function of the trial court to determine whether the verdict was actuated by passion or prejudice. The function of the supreme court is to review,—not the action of the jury but,—the action of the trial court. And as the trial court is limited to a determination of the existence of passion or prejudice, so the supreme court in turn is limited to a determination of whether the trial court's decision upon this question is manifestly correct or incorrect. That is, the appellate court is limited to a consideration of whether the decision of the trial court is so clearly and manifestly wrong as to amount to an abuse of discretion. Or as has been stated the question presented to this court in a case like this is whether the verdict returned by the jury for the injuries sustained by the plaintiff is so reasonable that this court can say, upon the cold paper record before it, that the trial judge was clearly and unquestionably in error when he said that the verdict was so large that it appeared to him to have been given under the influence of passion or prejudice,—that is to say of excited feeling rather than of calm, sober, deliberate judgment; or of prejudice, that is to say of a state of mind partial to the successful party or unfair to the other. The appellate court is not justified in reversing the order merely because it differs from the trial court as to what would have been just compensation unless the difference of opinion is such as to justify the conclusion that the trial court abused its discretion. Hayne, New Tr. & App. § 95; Lee v. Southern P. R. Co. 101 Cal. 118, 35 Pac. 572.

Appellant lays stress on the fact that this case has been twice tried and that the verdict under consideration here is the second verdict re-

turned in the case. Ordinarily the effect of a former verdict upon the same set of facts is entitled to considerable consideration in determining whether a second verdict is so excessive as to evidence passion or prejudice. That is, when a trial court has set aside one verdict on this ground and a second trial has resulted in a verdict in substantially the same amount, the court will necessarily have some hesitancy in interfering, and at least one court seems to hold that a new trial will not be granted on this ground after a third verdict. 26 L.R.A. 391, note. However, the first verdict in this case was returned not only against Underwood but against Harper,—the owner of the property involved in the controversy which resulted in the arrest. On the second trial no verdict was returned against such owner. In fact the action was dismissed as to him and the verdict was returned against the police magistrate alone. Again, the first verdict was not set aside on the ground of excessiveness. The question as to whether the verdict was or was not excessive was in no manner considered by this court on the former appeal. The first verdict was set aside on the ground of errors of law occurring upon the trial, and this is the first verdict that has been set aside on the ground of excessive damages appearing to have been given under the influence of passion or prejudice. Manifestly the trial court, who saw and heard the witnesses and parties, and was familiar with every incident which occurred during the trial, was in a better position to determine whether the verdict was influenced by passion or prejudice. The favorable position so occupied by the trial judge is the principal reason for the wide discretion vested in him in determining motions of this kind. As a new trial merely affords the parties an opportunity to submit the questions to another jury it is rarely indeed that an appellate court is justified in preventing such new trial. Upon the record before us here we do not feel justified in saying that the trial court abused its discretion in ordering a new trial. Hence the order appealed from is affirmed.

BIRDZELL, Ch. J., concurs.

ROBINSON, J. (specially concurring). This is an action for an alleged false imprisonment of three hours in the city jail at Enderlin. The plaintiff recovered a verdict for over $3,000, though she sustained

no material injury, and though it does appear that she and her husband wrongfully provoked the imprisonment of which she complains. The court set aside the verdict as excessive and given under the influence of passion and prejudice, and the plaintiff appeals. Manifestly the court was right. The verdict was so grossly excessive that it must have been given under some evil influence. Quite possible the plaintiff cast a spell over the jurors; quite possible her skilful counsel made some passionate, unfair, hypnotic, and prejudicial appeal to the jurors, asking them for smart money, while he posed as a disinterested minister of justice. Quite possible this case was prosecuted for a contingent fee of 50 per cent and that counsel, having a personal interest in the case, should have been joined and made a party plaintiff so the jury might know his motive for demanding smart money. In the conduct of such a case, counsel for defense should not allow professional courtesy to prejudice the rights of his client. It is hard to conceive of such a verdict in case the action had been properly defended.

The statute is that damages must in all cases be reasonable. In an action such as this, exemplary damages may be given a plaintiff whose conduct has been exemplary, not to one whose conduct has invited and provoked the alleged injury. Thus in an action for a common assault, the plaintiff should not recover exemplary damages if he had provoked the assault by the use of vile and abusive language or by withholding or trying to steal the property of the defendant.

With this in mind, let us consider the conduct of the plaintiff and her husband in provoking and causing the arrest. They had purchased a house at Enderlin occupied by one Harper and brought suit to dispossess him. That was in June, and in his absence they had stealthily taken possession of the house by going in through a back window, and then they had accepted and retained a deposit of rent to July 13th. Then they insisted on retaining a small tent which Harper owned and had on the premises. They knew well that they did not own the tent and that it belonged to Harper, and still they insisted on retaining it and refused to let the officer remove it. Such was the conduct which caused the chief of police to arrest them. Such conduct was very far from being exemplary or in any way deserving exemplary damages.

The order appealed from is clearly right and should be affirmed.

GRACE, J. (dissenting). This is the second trial in which the plaintiff has recovered a judgment on the same cause of action against the defendant, in substantially the same amount. The trial court granted a motion for a new trial on the ground of excessive damages, appearing to have been given under the influence of passion or prejudice.

There is nothing in the record to indicate any passion or prejudice on the part of the jury. As it appears to me, the court abused its discretion in granting a new trial.

BRONSON, J., concurs.

E. B. KLEIN, Appellant, v. W. H. HUTTON, Respondent.

(191 N. W. 485.)

Constitutional law — act providing for conciliation of controversies where amount involved $200 or less held constitutional.

Chapter 381, Session Laws, 1921, which provides for the conciliation of controversies, where the amount involved is $200 or less, is a valid enactment and in no manner contravenes, as contended, certain provisions of the Constitution of the United States or of the state of North Dakota. (The appellant claimed that the act was invalid as contravening some of the provisions of the Constitution of the United States and many of the provisions of the state Constitution. The grounds on which the unconstitutionality of the statute is asserted are so numerous that it would be impracticable to state them all in a syllabus. In the opinion they are fully analyzed and decision made of them.)

Opinion filed November 25, 1922.

Constitutional Law, 12 C. J. § 164 p. 744 n. 94; § 855 p. 1128 n. 17; § 864 p. 1138 n. 5, 6; § 997 p. 1220 n. 82. Courts, 15 C. J. § 179 p. 857 n. 38 New. Juries, 35 C. J. § 17 p. 151 n. 43; § 146 p. 226 n. 33.

An appeal from the District Court of Burleigh County, *Nuessle*, J. Judgment affirmed.

Theodore Koffel and *R. C. Morton*, for appellant.

Section 260 of the Territorial Code of 1862 provides that issues of fact arising in action for the recovery of money, or of specific real or personal property shall be tried by a jury so that the plaintiff's cause of action comes directly within the class of cases guaranteed by the

state Constitution under the above section of the Territorial Code. City Fuel & Transfer Co. v. Young, 185 N. W. 934; State v. Fischer, 184 N. W. 774; Widen v. State, 124 N. W. 509; State v. Grunke, 59 N. W. 452; Goyke v. State, 117 N. W. 1126.

The guaranty by the Constitution for a trial by jury has been held to mean "that it shall not be destroyed or annulled by legislation, nor so hampered or restricted as to make the provision a nullity." "Inviolate" constitutes freedom from substantial impairment. 16 R. C. L. 196.

The rights of suitors ought to be determined by the law existing when the cause of action arose, and such rights cannot be abridged either by judicial decision or by statute. Schafner v. Young, 10 N. D. 245, 86 N. W. 733; Conrad v. Smith, 6 N. D. 337, 70 N. W. 815; Dak. Inv. Co. v. Sullivan, 9 N. D. 303, 83 N. W. 233; Eaton v. Guaranty Co., 11 N. D. 79, 88 N. W. 1029; Diver v. Cornwall, 10 N. D. 123, 86 N. W. 227.

It has been held that an agreement in advance of the arising of a controversy to submit the question of law to a private party is invalid. Sanitary Dist. v. McMahan & M. Co. 110 Ill. App. 510.

Therefore this statute is an additional burden upon the small claimants and instead of favoring small claimants it casts a greater burden and hardship upon them, which is not required of the larger claimants, and also shortens the statute of limitations upon small claims. Adams v. Kenoyer, 17 N. D. 302, 116 N. W. 92, 16 L.R.A.(N.S.) 681; Clark v. Doyle, 17 N. D. 340, 116 N. W. 348; State v. Devine, 98 N. C. 778.

A law which displaces constitutional officers by whatever officials during a portion of the time is unconstitutional. Ex parte Corliss, 16 N. D. 470, 114 N. W. 962.

(b) This statute makes no provision for a review of its decisions by writs of error or otherwise. On the contrary it absolutely prohibits writs of error or appeals from being taken from said board, prohibiting any records of its proceedings being kept, and therefore, having no record there is nothing upon which an appeal can be taken. Const. of North Dakota, § 109; Larson v. Dutton, 40 N. D. 230, 168 N. W. 625; Christianson v. Farmers Warehouse Assn. 5 N. D. 438, 67 N. W. 300.

John H. Wigmore (of counsel) for the American Judicature Society, and *Herbert Harley* and *Albert Kocourek,* amici curiæ.

"When the legislative assembly repeatedly construes or interprets a constitutional provision, such construction or interpretation should be followed by the courts when it can be followed without doing violence to the fair meaning of the words used, in order to support the legislative action and give effect thereto, if the language construed admits of such construction."

If it might be supposed that §§ 7 and 120 are in conflict, the later provision would control because of its position in the constitution. If two provisions are in conflict the last in order of time or of position will prevail. Ex parte Mascolo (Cal. 1914) 142 Pac. 903; Quick v. White Water Twp. (1856) 7 Ind. 570; Hope v. New Orleans, 106 La. 345, 30 So. 842; Hoag v. Washington-Oregon Corp. 75 Or. 588, 144 Pac. 574, 147 Pac. 756; Cent. Dig. Const. Law, § 9; Dec. Dig. Const. Law, Key 15.

A. The people of North Dakota intended to have a tribunal of conciliation, if the legislature saw fit to establish it. As this court has said, the object sought by the Constitution to be accomplished must be kept in mind. State v. Robinson (N. D.) 160 N. W. 514; Jarrolt v. Moberly, 103 U. S. 580, 26 L. ed. 492; Knox v. Lee, 12 Wall. 457, 531, 20 L. ed. 287; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Dorman v. State, 34 Ala. 238.

B. The legislature is the exclusive judge of the means to be provided for the promotion of a constitutional object. Zikos v. Oregon R. Co. 179 Fed. 893.

C. There is even a presumption in favor of constitutionality by the mere fact of enactment of a statute. O'Laughlin v. Carlson, 30 N. D. 218, 27 N. W. 675; State v. Taylor, 33 N. D. 85, 156 N. W. 561; State v. Armour, 27 N. D. 177, 145 N. W. 1033, L.R.A. 1916E, 380; Bradley v. Richmond, 227 U. S. 477, 485, 33 Sup. Ct. Rep. 318, 57 L. ed. 603.

It is well settled that in judicial proceedings, whether civil or criminal, a state may, if it chooses, dispense with trial by jury. Even in criminal cases, it may dispense with indictments, and may permit a conviction in felony cases by a jury of less than twelve. Maxwell v. Dow, 176 U. S. 581; Walker v. Sauvinet, 92 U. S. 90.

Even the compulsory feature of the Compensation Act does not oper-

ate to deny trial by jury as guaranteed by any constitution. Grand Trunk R. Co. v. Industrial Commission, 291 Ill. 167.

The second of these recent statutes is the Arbitration Act. Many of the constitutional objections raised on this record were advanced against that act. In the same year (1921) that act was held constitutional in Illinois and in New York. White Eagle Laundry Co. v. Slawek (1921) 296 Ill. 240, 129 N. E. 753; Berkovitz v. Arib & Houlberg (1921) 230 N. Y. 261, 130 N. E. 288.

Zuger & Tillotson, for respondent.

The courts hold that the constitutional guaranty of a jury trial is satisfied if a party is afforded a jury trial on appeal though not in the tribunal of primary jurisdiction. Flour City Fuel & Transfer Co. v. Young (Minn.) 185 N. W. 934.

GRACE, J. This is an appeal from a judgment and for costs and disbursements. It will be conducive to a clear comprehension of the issues involved to set forth a concise statement of the material facts necessary to be stated: On the 6th day of December, 1920, at Bismarck, North Dakota, the defendant executed and delivered to plaintiff, his promissory note of that date in the sum of $60, bearing interest at 10 per cent per annum, and due on demand. Demand for payment of the note was duly made. No payment was made, except the sum of $2. At the time the action was commenced plaintiff was the owner and holder of the note.

At the time of commencement of the action there was a duly appointed, qualified, acting conciliation board within and for the county of Burleigh, state of North Dakota, which was appointed by virtue of the provisions of chapter 38 of the Session Laws of 1921, which repealed §§ 9187–9192 of the Comp. Laws, 1913. The plaintiff before commencement of this action did not file in any court a certificate of a conciliator, showing any attempt to effect a settlement of the claim upon which the action is brought. He made no attempt to have his claim submitted to conciliation. In the action no provisional or ancillary remedy was sought nor was there involved therein title or possession of real estate; nor has any district judge directed the issuance of process therein without recourse to conciliation proceedngs. There are no other material facts.

The complaint is in the ordinary form in such cases before the passage of the Conciliation Act. In substance the defense set forth in the answer is: That at the time of the commencement of the action, there was a duly appointed, qualified acting conciliation board within and for the county of Burleigh, as provided for under chap. 38 of the Session Laws of 1921, referred to in the answer as Senate Bill No. 158 of the 17th legislative assembly; that plaintiff before the commencement of the action did not file in any court a certificate of a conciliator, showing an attempt to effect a settlement of the claim upon which the action is founded; that such attempt has failed; that the action is not one in which a provisional or ancillary remedy is sought; that it does not involve title or possession of real estate, and, that no district judge directed the issuance of any process in the action without recourse to conciliation proceedings.

Were it not that the ultimate issues, and innovation in the administration of justice, provided for in the act in the kind of controversies to which it relates concerns, not only the social welfare of the citizens of this state, but indirectly may concern the welfare of the citizens of other states of the Union, should such other states or any of them at some future time see fit to follow the example of North Dakota in the enactment of a conciliation act, the first of the states to establish a state wide tribunal of conciliation, the case would be of minor importance, but in the circumstances the case is one of unusual public interest. The case has been ably briefed by the counsel of both parties, and especially able and helpful is the brief filed by Honorable John Wigmore of counsel, author of the well-known work on evidence, which bears his name, who, from public interest, appeared on behalf of the American Judicature Society, and Herbert Harley and Albert Kocourek, who appear as amici curiæ, and whose participation is also from public interest.

The manifest purpose of the act is to facilitate, regulate, and encourage a voluntary adjustment of matters which otherwise would or may become the subject of legal controversies, where such amount does not exceed $200, and to provide a means to accomplish that end, the use of which will not necessitate invoking the powers and functions of the ordinary and regularly constituted courts of justice. Perhaps in this state from one third to one half of all civil causes involve not to exceed $200, any of which may be litigated from the lowest to the highest

court, many of which in fact are so litigated, and which, had just a little common sense been applied to the facts by the litigants, would not have resulted in litigation. Neither is it an unreasonable statement that the expenses of such litigation to the parties concerned will approximate the amount involved therein. However, the monetary loss in this class of litigation is not the full measure of the whole loss; to ascertain the whole loss, there must be included loss of time, for time is of great value; if it were possible to get an accounting of all the time consumed or lost by litigants in this state in all actions involving not more than $200 plus the loss of time by all witnesses and that were applied to production of what may be termed necessities of life, the amount of such production and its value would be astounding. In addition to this, every law suit is a minature war, in which the respective combatants are bringing into action all their ingenuity, energy, and resourcefulness for the purpose of acquiring victory, and like war, when the battle is ended there still remains in the breasts of the participants a certain amount of resentment against their late adversaries. The principle of encouraging private adjustments of legal controversies embodied in the act was in all probability derived from the laws of Norway and Denmark, where a conciliation system has been in use since 1797. Many thousands of citizens of each of those countries later became citizens of our country, and of our state in particular, constituting therein a great body of our most respected citizenship, now, as at the time of the adoption of our Constitution.

The purpose of the act being praiseworthy, seeking to maintain amicability between those who otherwise might be compelled to resort to expensive litigations over claims within the amount specified by the act, it should be sustained unless its provisions are inhibited by the fundamental law of the United States or of this state. That the act in various respects and for various reasons contravenes in certain respects, the Constitution of the United States and that of the state of North Dakota is the contention of the appellant. Appellant's contentions challenging the validity of the act are eight in number; each will be considered in the order adopted in appellant's brief.

Point "1."

Appellant contends that the act is unconstitutional and contravenes § 61 of the Constitution of North Dakota, in that its title is defective.

The title of the act reads thus: "An Act to Provide for Conciliation of Controversies and to Repeal Sections 9187, 9188, 9189, 9190, 9191 and 9192 of the Compiled Laws of North Dakota for 1913." The provisions of § 61 of the Constitution are as follows: "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed."

The subject of the bill which became chapter 38 is Conciliation of Controversies, that is, the subject-matter or object of the bill is conciliation of controversies. It is evident that there could be no conciliation of controversies, unless there were a tribunal, conciliation board, or a conciliator or conciliators with powers to be exercised in a definite territory, and before whom such controversies could be taken for conciliation; it is also clear, that in order for the tribunal or board to properly function, some form of organization would necessarily have to be provided and the powers and duties of the conciliators or a conciliator defined and his or their compensation fixed. Again, in order for the board of conciliation or the conciliators to function and to accomplish the purpose intended, there would need to be some method of procedure prescribed through which proceedings might be brought before them. A proper bill for the conciliation of controversies would designate some authority empowered to establish a conciliation board in definite territory. It would specify a means of designating conciliators and their number, their eligibility, compensation, and in what manner they should qualify before entering upon the discharge of their duties, the extent of their jurisdiction and any limitations of it; provide for conciliation proceedings, as a prerequisite to process and provide for the repeal of other laws or sections of other laws in conflict with the act. All of these matters would be germane to the organization, jurisdiction, and procedure of a tribunal or board, created for the conciliation of controversies. The bill under consideration contains all these essential matters or things and perhaps more of similar import to which specific reference has not been made. It consists of fifteen sections, all of which are germane to the organization, jurisdiction, and procedure of the tribunal or board for the conciliation of controversies created by the act. In short, the whole subject-matter of the bill relates to the conciliation of controversies. The subject of the bill is expressed

in the title. The bill is valid and does not contravene the provisions of § 61. State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; State v. Haas, 2 N. D. 202, 50 N. W. 254; Martin v. Tyler, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392; Bye v. Stafford, 4 N. D. 304, 60 N. W. 401; State ex rel. Kol v. North Dakota Children's Home Soc. 10 N. D. 493, 88 N. W. 273; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112; Powers Elevator Co. v. Pottner, 16 N. D. 359, 113 N. W. 703; State v. Minneapolis & N. Elevator Co. 17 N. D. 23, 138 Am. St. Rep. 691, 114 N. W. 482; State ex rel. McCue v. Blaisdell, 18 N. D. 55, 24 L.R.A. (N.S.) 465, 138 Am. St. Rep. 741, 118 N. W. 141; State ex rel. Poole v. Peake, 18 N. D. 101, 120 N. W. 47; McKone v. Fargo, 24 N. D. 53, 138 N. W. 967; State v. McGillic, 25 N. D. 27, 141 N. W. 82; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924; State v. Brown, 38 N. D. 340, 165 N. W. 520; Brown v. Steckler, 40 N. D. 113, 1 A.L.R. 753, 168 N. W. 670; State ex rel. Amerland v. Hagan, 44 N. D. 306, 175 N. W. 372; Herrmann v. Mobile County, 202 Ala. 274, 80 So. 112; Reese v. State, 16 Ala. App. 431, 78 So. 461; Henry v. State, 200 Ala. 475, 76 So. 417; Longshore v. State, 200 Ala. 267, 76 So. 33; Park v. Pacific Fire Extinguisher Co. 37 Cal. App. 112, 173 Pac. 615; Anderson v. Douglas County, 67 Colo. 403, 186 Pac. 284; Re School Code of 1919, 7 Boyce (Del.) 406, 108 Atl. 39; Rushton v. State, 75 Fla. 422, 78 So. 345; Crowell v. Akin, 152 Ga. 126, 19 A.L.R. 51, 108 S. E. 791; Crawley v. State, 150 Ga. 86, 102 S. E. 898; Baltimore & O. Ry. Co. v. Whiting, 161 Ind. 229, 68 N. E. 266; Stewart v. Brady, 200 Ill. 425, 133 N. E. 310; Mitchell v. Lowden, 288 Ill. 327, 123 N. E. 566; People ex rel. Gash v. Sweitzer, 282 Ill. 171, 118 N. E. 477; People ex rel. Fitzgerald v. Stitt, 280 Ill. 553, 117 N. E. 784; State Bd. of Charities & Corrections v. Combs, 193 Ky. 548, 237 S. W. 33; McGregor v. Allen, 33 La. Ann. 870; Sunderlin v. Ionia City, 119 Mich. 535, 78 N. W. 651; Gillitt v. McCarthy, 34 Minn. 318, 25 N. W. 637; State v. Women's & Children's Hospital Asso. 150 Minn. 247, 184 N. W. 1022; Payne v. Mahon, 44 N. J. L. 213; Hayes v. Hoboken, 93 N. J. L. 432, 108 Atl. 868; State ex rel. D'Alton v. Ritchie, 97 Ohio St. 41, 119 N. E. 124; Couch v. State, 140 Tenn. 156, 203 S. W. 831; Jackson v. Bell, 143 Tenn. 452, 226 S. W. 207; State v. McCornish, 59 Utah 58, 201 Pac. 637; Richmond v. Pace,

127 Va. 274, 103 S. E. 647; Traveler's Ins. Co. v. Oswego Twp. (8th Cir.) 7 C. C. A. 669, 19 U. S. App. 321, 59 Fed. 58; Daly v. Beery, 45 N. D. 287, 178 N. W. 104; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263; State ex rel. Board of Education v. Kramer, ante, 190 N. W. 271.

Point "2."

It is contended that appellant was denied the right of trial by jury secured by § 7 of the state Constitution, which provides so far as material here: "The right of trial by jury shall be secured to all, and remain inviolate." Section 5 of the act provides: "After the expiration of said ninety days, no process shall be issued in commencement of a civil suit by any justice of the peace or by any other trial court unless the moving party shall file in court, a certificate of a conciliator showing that an attempt has been made to affect a settlement of the claim and that such attempt has failed; but the foregoing shall not apply to actions known as provisional or remedial remedies, actions involving title to or possession of real estate and suits involving over $200. Provided, however, that any district court judge in chambers may in a particular instance, on a proper showing, direct the issuance of any such process in any trial court without recourse to conciliation proceedings."

Section 6 deals with the application for a conciliation and the notice to be given by the conciliator to the party complained of and of the requirement of the party to appear before the conciliator. Section 12 provides: "In case the party complained of shall fail to appear at the conciliation hearing or for any other reason there shall be no settlement of the controversy by agreement of the parties, then the conciliator shall give to either or both parties, upon request, his certificate to the effect that an attempt had been made in good faith by the moving party to affect a settlement of the controversy, which shall be concisely described, and that the attempt has failed."

The meaning of these sections, as we view them, is simply this That no action involving $200, or less shall be commenced in any court, unless it come within some of the exceptions specified in the act, until the moving party, that is, the party who claims to recover first, shall have complied with the provisions of the act, and has received a certificate of the conciliator to the effect that an attempt had been made in

good faith to effect a settlement of the controversy but, that such attempt has failed. The certificate may be given to either or both parties. It is clear from the language of the act that after the procuring of such certificate by either or both of the parties, process may be issued, actions maintained and the right of jury trial obtained by the parties or by either of them in the same manner as before the enactment of the conciliation act; hence the right of jury trial is not denied. The right of "trial by jury" as that term is used in § 7 of the Constitution means a trial in court whether that court be a court of record or one not of record. A conciliation board such as is provided for under § 120 of the Constitution is not a court; it is a tribunal, a board, a table of peace where those who have certain kinds of controversies are invited to sit; this tribunal possesses none of the attributes of a court. There are various kinds of courts with varying powers and jurisdiction. Courts have the power in a greater or lesser degree of issuing process. Their power in this respect is derived from fundamental law, statutory law, enacted in pursuance of fundamental law, the common law, and their own inherent powers. Black, in his dictionary in defining process, uses the following language, after giving limited definitions of it: "But in its more comprehensive signification it includes not only the writ of summons, but all other writs which may be issued during the progress of an action. Those writs which are used to carry the judgments of the courts into effect, and which are termed 'writs of execution,' are also commonly denominated 'final process' because they usually issue at the end of a suit."

Courts, in addition to the power of issuing process have the right to hear, determine, and decide legal controversies presented before them. Where any of these powers is lacking there is no court. The board of conciliation or any conciliator has not the power of issuing process. Upon an application for conciliation made, there is no power to issue process compelling the person against whom the claim is, to appear before the board or a conciliator. All the conciliator may do is to inform the party complained of by letter, telephone, or personally, to appear before him at a certain time; but, if he does not appear, all the conciliator can do is to certify to that fact and to such facts as under § 12 may be properly included in this certificate. He cannot determine nor decide the controversy, if there is objection by either party, as a

court could. He may hear the controversy if both parties appear for the purpose of effecting an amicable settlement between them where they agree in writing to submit their controversy to him; and when so authorized he may make an award. His power to make the award is derived through the written consent of the parties, while a court acquires its jurisdiction of the parties through process which it may lawfully issue. The conciliator exercises what may be termed his good offices not judicially, but in the manner prescribed by law in order to effect a settlement of the controversy, while a court proceeds by process and determines and decides the controversy regardless of the consent of the parties but through and by the exercise of judicial power.

Points "3" and "4."

It is contended that the act violates § 13 of the Constitution of the state of North Dakota, and articles 5 and 14 of the amendments to the Constitution of the United States. § 13 relates to due process in criminal prosecutions. It defines certain rights possessed by one charged with the commission of the crime. It has no application here as this matter is a conciliation proceeding, relating to a promissory note. As to the 5th Amendment of the Federal Constitution, it is sufficient to say that defendant may not invoke it. It is, we believe, quite firmly established by the decisions of the Federal Supreme Court, that the 5th amendment is a limitation of power of the Federal government, and not of the power of the states. The proceeding here is one before a board of conciliation, or before a conciliator, acting wholly under state legislation. Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672.

The act is not, as contended, a denial of due process of law under either the state or Federal Constitution. All process and every remedy which the appellant had at law, he still has. These have been in no way abridged nor taken away from him. All that is required of him is, that before resorting to such process and the use of such remedies as a condition precedent, he must possess the certificate of a conciliator, showing that the matter was submitted for conciliation, as required by the Act and no conciliation effected; unless the case is one which comes within some of the exceptions specified in the Act and in such event, no such certificate is required. Requiring such a condition pre-

cedent to be performed before litigation may be initiated is not a denial of due process of law, for after compliance with the terms of the Act, he may resort to process and employ whatever remedies at law he formerly had. Requiring the performance of a condition precedent to litigation, such as contained in the Act, relates to the remedy to enforce the obligation and not the obligation; and where an act such as this in some respects affects the remedy applicable to the enforcement of the obligation at the time of the passage of the act, it is not invalid, if—as this Act does—it provide, and permits to remain in force and effect, an adequate remedy for the enforcement of the obligation. Oshkosh Water Works Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. Rep. 234; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; Memphis v. United States, 97 U. S. 293, 24 L. ed. 920; National Surety Co. v. Architectural Decorating Co. 226 U. S. 276, 57 L. ed. 221, 33 Sup. Ct. Rep. 17, 6 R. C. L. p. 359 § 354.

The plaintiff claims the act unconstitutional on the ground that the attorneys of this state have a valid and existing contract with the state to represent litigants in all courts and in all proceedings and that the act impairs that contract. The law cannot be asserted to be invalid for this reason. The authority granted by the state to persons to practise law, after proof of proper qualifications prescribed by law, and after compliance with any statutory enactments in that respect, is not a contract right, but merely a privilege or license. The record does not show that appellant is an attorney. We assume therefore, that he is not one, and hence is not in a position to question the validity of the statute on the ground that it denies the right and privileges, which it is claimed, are secured to attorneys.

Points five to eight both inclusive may be disposed of together. Appellant contends that the act contravenes § 20 of the state Constitution which reads: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." An examination of the act discloses that no privileges or immunities are granted except such as are applicable to all citizens or any of them under the circumstances and conditions expressed in the Act. All who are in the same situation are similarly

affected. These principles, we believe, are fairly supported by the following cases: Vermont Loan & T. Co. v. Whithed, 2 N. D. 82, 49 N. W. 318; State ex rel. Amerland v. Hagan, 44 N. D. 306, 175 N. W. 372.

Point 6 to the effect that the act denies litigants whose claims are within and subject to the provisions of the act due process of law, has been above disposed of and needs no further consideration. Point 7 is to the effect that the act is unconstitutional in that the legislature attempted to create a court with powers to hear and determine cases submitted to it, which court was not contemplated in the adoption of the Constitution; and on the further ground that the act takes away the supervisory powers of the supreme court over all courts of the state. These and objections of a similar nature are easily disposed of by stating in substance what has already been stated, which is that the act does not create a court. It confers upon the conciliation board or the conciliators no judicial power. It simply established a tribunal by providing for the appointment of conciliators whose duties are defined by the act and relate to the settlement and not litigation of claims of the character of those mentioned in the act. The act in no way interferes with the powers of any court. It only requires certain preliminary steps to be taken with reference to the kind of claims mentioned in the act before the powers of the courts are invoked in the enforcement of them.

Under point 8, appellant contends that the conciliation act is not framed in accordance with § 120 of the Constitution, and further, that the procedure is so defective that a plea of res judicata cannot be asserted after the conciliation board has acted. Section 120 provides: "Tribunals of conciliation may be established with such powers and duties as shall be prescribed by law or the powers and duties of such may be conferred upon other courts of justice; but such tribunals or other courts when sitting as such, shall have no power to render judgment to be obligatory on the parties, unless they voluntarily submit their matters of difference and agree to abide the judgment of such tribunals or courts." The legislature, in accordance with this section, did establish a tribunal of conciliation and by law duly prescribed its duties and powers. Under the provisions of the act it cannot render

its award binding on the parties unless the parties agree in writing to submit their matters of differences to and agree to abide the judgment by award of such tribunal. The judgment by award when so made may be entered upon the docket of the district court as a judgment by award and shall then have full force and effect as a judgment of the court. The provisions of the act in this respect, we think, are within § 120 of the Constitution. In all of the proceedings which may be or are required to be taken under the act there is nothing of the nature of litigation in them, nothing has been adjudicated in a judicial sense. The acts of the board and of the conciliators are administrative in character. The act does not confer upon them judicial power, but only power to bring about settlement if the opportunity offers in the manner contemplated by the provisions of the act. If a settlement is effected under § 14 of the Act, it is authorized to be filed in the district court and becomes a judgment by award of the same force and effect as a judgment of the court. But in doing these acts there is no exercise of judicial power by the board or a conciliator, but the award when filed in the district court is very similar to a confession of judgment in that court by the parties against whom the award is made.

The claim of appellant that it would be impossible for a suitor or litigant in a subsequent action to plead a former adjudication upon a claim determined by the board will not be considered; it is not here involved. Appellant has asserted that conditions might arise, whereby if one is compelled to first submit his claim to the conciliation board, that the claim in the meantime might become barred through the expiration of the time within which under existing law he is required to commence his action. The appellant is in no position to raise that question, as it is not involved in this case. Appellant contends that the right of appeal is denied since there is no right of appeal from the conciliation board. This is effectively answered by again stating that a conciliation board is not a court. The Act is a valid enactment.

The judgment appealed from is affirmed. Respondent is entitled to his costs and disbursements on appeal.

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

PETER OHLQUIST, Respondent, v. A. F. TURNER, Sheriff of Grand Forks County, North Dakota, Appellant.

(191 N. W. 481.)

Fraudulent conveyance — conveyance from daughter to father held not to hinder or defraud creditors.

Under a writ of attachment and execution, the defendant sheriff levied on certain land of the plaintiff as the property of his daughter, Celia Rostad. The claim was that she had conveyed the property to her father to defraud creditors. *Held*, that the conveyance was made and taken in good faith and for a fair and valuable consideration, and not to hinder or defraud any creditor.

Opinion filed December 5, 1922.

Fraudulent Conveyances, 27 C. J. § 775 p. 827 n. 99, p. 828 n. 9.

Appeal from the District Court of Grand Forks County, *Cooley, J.* Affirmed.

Feetham & Fraine, for appellant.

The court have consistently and times without number set aside as fraudulent, attempted transfers when earmarked with badges of fraud.

Some of the facts, conditions and circumstances constituting such badges of fraud are:

Incorrect statement of consideration. Lombard v. Dows, 23 N. W. 649; Taylor v. Wendling, 24 N. W. 40; Rice v. Momar, 25 N. W. 668; Williston v. Desenberg, 2 N. W. 204.

Suits pending against grantor at time of execution of instrument of conveyance. Weir v. Day, 10 N. W. 304.

That property conveyed was all of debtor's property, when insolvent, or being pressed for payment. Leffel v. Schermerhorn, 14 N. W. 418; Bathgate v. Perry, 10 N. W. 820; Welch v. Bradley, 48 N. W. 440; Beels v. Flynn, 44 N. W. 732; Karl v. Kuhn, 57 N. W. 379; Rindskopf v. Myers, 57 N. W. 967.

Note.—It is generally held that an insolvent debtor has the right to prefer his creditors and that a bona fide creditor may in good faith obtain a transfer of property from an insolvent debtor to secure himself, where the value of the property does not exceed the debt, as will appear by an examination of the authorities collated in a note in 36 L.R.A. 335, on right of creditor to buy property from his debtor in satisfaction of the debt; 12 R. C. L. 576 et seq.; 2 R. C. L. Supp. 1458.

A secret reservation in favor of grantor. Newell v. Wagness, 1 N. D. 62; 20 Cyc. 559.

It is immaterial that the interest is not of great value. 20 Cyc. 565, note 30.

Conveyance absolute when intended as mortgage. 20 Cyc. 446.

Consideration less than fair value of property. 20 Cyc. 441 and cases cited.

Chas. A. Lyche, for respondent.

Parties to a transaction may always come into court and show the utmost good faith, even when the circumstances are such as to excite suspicion. Williams v. Harris (S. D.) 54 N. W. 926.

Appellant has entirely overlooked the next section of the Code (5600) which reads as follows: "No instrument is to be avoided under the last preceding section in favor of a subsequent purchaser or incumbrancer having notice thereof at the time his purchase was made or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended." Barnhart v. Anderson (S. D.) 118 N. W. 31; Feder v. Ervin (Tenn.) 36 L.R.A. 335.

"A person in embarrassed circumstances, but capable of contracting, may sell his property for the purpose of discharging his debts, for such consideration as he may agree to accept; and if there be nothing illegal in the transaction, it will stand as against his creditors, and mere inadequacy in honest family settlements is not a badge of fraud." Voorhees v. Blanton, 83 Fed. 234; Bank v. O'Leary, 13 S. D. 204, 83 N. W. 45; Dalrymple v. Trust Co. 9 N. W. 306, 83 N. W. 245.

"A slight excess in value will not invalidate a conveyance or transfer. In such cases the law allows room for ordinary differences of opinion, and will not weigh the estimates of values in too exacting a balance." Levy v. Williams, 79 Ala. 179.

The pendency of a suit will not overturn a conveyance made in good faith and for value. Ray v. Roe, 18 Am. Dec. 159.

"The burden is upon the contesting creditor to establish by competent evidence the fact of a secret trust or reservation for the profit of the seller or grantor." 20 Cyc. 565, and cases cited.

Robinson, J. The plaintiff sues to enjoin the levy of an attachment and execution in an action in which Hamilton company, a corporation, is plaintiff and Celia M. Rostad and H. Rostad are defend-

ants. The levy was made on a one-third interest in certain land which Celia Rostad had owned and had conveyed to her father, the plantiff. The answer charges that the conveyance of Celia to her father was made and accepted with intent to delay and defraud Hamilton Company, the plaintiff in the attachment suit. The trial court gave judgment in favor of plaintiff and the defendant appeals. The defense is based on this statute:

Comp. Laws, 1913, § 7220: "Every transfer of property or charge thereon made, every obligation incurred and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor and their successors in interest and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

The case presents only a single question of fact, namely; was the deed from Celia to her father made and taken with intent to delay or defraud creditors? The testimony is quite voluminous and to some extent it is conflicting, but on the whole it shows that the conveyance in question was not made or taken with intent to delay or defraud creditors.

The land in question is a part of a half section adjacent to the village of Northwood, and some lots in Northwood on which the plaintiff has for many years resided. The title to all of the property was in the name of plaintiff's wife. She died, leaving her husband and two daughters, each of whom succeeded to a one-third interest in the estate. On February 19, 1916, his daughter, Celia, sold and conveyed to the plaintiff her one-third interest in the property by deed recorded March 6, 1916. The deed was made in consideration of $4,000 or more, which was actually paid. On March 25, 1917, under warrant of attachment issued in the suit of Hamilton Company against Celia Rostad and H. Rostad, the defendant, as sheriff of Grand Forks county, levied an attachment against the one-third interest which Celia had inherited from her mother and conveyed to her father, the claim being that her conveyance was in fraud of creditors.

As the testimony shows, the daughter was in needy circumstances. For a year prior to the conveyance she had been living on money borrowed from her father. She owed at a bank in St. Johns, Oregon, a large sum secured by a mortgage on her title to the land. The bank

threatened to foreclose. The father refused to pay the mortgage or to give her any more money only on condition that she sell him her title to the land. So she made the deed in question. The father paid on her mortgage to the bank, $1,729.46. He made several other payments to the daughter, making the total sum of $4,000. It was purely a business transaction. The father wanted to preserve intact the property which he had held and occupied for nearly two score years. He wanted to protect himself and do the fair thing by his daughter. His deal was one of common sense and a common honesty. It was far from anything in the nature of a fraud or a sham.

Judgment affirmed.

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

BRONSON, J., concurs in result.

MARTIN PAULSON, Respondent, v. S. E. HAMMOND, Appellant.

(191 N. W. 462.)

Specific performance — of contract for deed held properly awarded.

In a proceeding for specific performance of a contract for a deed, where the vendee alleges a defense and introduces evidence of misrepresentation concerning the distance of the land from vendee's home farm, it is *held*, for reasons stated in the opinion, that the findings for, and judgment of, specific performance were properly rendered.

Opinion filed December 5, 1922.

Specific Performance, 36 Cyc. p. 784 n. 15 New.

Proceeding for specific performance in District Court, Richland County, *McKenna*, J.

Defendant has appealed from the judgment.

Affirmed.

W. S. Lauder, for appellant.

The plaintiff having elected to cancel and terminate the contract is estopped to use the contract as a basis for a recovery of a money judgment against the defendant, or any other judgment except the cancel-

ation of the contract. Warren v. Ward, a Minnesota case reported in 97 N. W. 886.

This precise question was involved in the case of Rooney v. Halvorson, 29 N. D. 13. As will be seen, in that case this court cited with approval the Minnesota case above referred to. In that case the defendants sought to cancel the contract, and discussing the question this court said:

"Nor do we believe that the counterclaim was availing in this case. The defendants had clearly elected *to cancel the contract,* and not abide by it. Such being the case, it is clear that the defendants *could not sue for the unpaid balance of the purchase price.* Warren v. Ward, 91 Minn. 254, 97 N. W. 886; Gillilan v. Oakes, 1 Neb. (Unof.) 55, 95 N. W. 511; Shenners v. Pritchard, 104 Wis. 287, 80 N. W. 458.

It is well settled, indeed, that a party may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. Thompson v. Howard, 31 Mich. 309; McNutt v. Hilkins, 80 Hun, 235, 29 N. Y. Supp. 1049; Welsh v. Garder, 95 Mo. App. 41, 68 N. W. 580.

"It is elementary that the specific performance of a contract is decreed as a matter of favor rather than of strict legal right, etc." Easten v. Lockhart, 10 N. D. 181–193; Hunter v. Goe, 12 N. D. 509.

In the case of Beebe v. Hanson et al. as will be seen, this court said: "Even when a contract is fair and honest specific performance is not a matter of course. It rests in the sound discretion of the court." 36 Cyc. 544–548. "But when a contract is not in all respects fair and honest, just and reasonable, and based on *an adequate consideration,* then specific performance must be denied, etc."

Inadequacy of consideration affords ample reason for a court to refuse specific performance. Phalen v. Neary, (S. D.) 117 N. W. 142; Trapaagen v. Kirk, (Mont.) 77 Pac. 55; Morrill v. Everson, (Cal.) 19 Pac. 87; Stein v. Archibald, (Cal.) 90 Pac. 538; Wilson v. White, (Cal.) 119 Pac. 895; 2 Warvelle, Vendors, §§ 741–745.

Wolfe and *Schneller,* for respondent.

Statement.

BRONSON, J. This is an action for specific performance against a vendee in a contract for a deed. The complaint alleges the making of the contract between the parties on August 9th, 1919, for 160 acres of land whereby defendant paid $1,000 cash, assumed a mortgage for $1,800, and agreed to pay $2,000 on or before Sept. 20th, 1920; the failure of defendant to make such payment of $2,000; the tender to defendant of a warranty deed of the land, pursuant to the contract; and the readiness and ability of the plaintiff to perform; specific performance is demanded and the recovery from defendant of $2,000.

The answer admits the making of the contract, but denies plaintiff's ownership in the land. It alleges a mistake in the description of the land due to the scrivener's error. As a defense, it alleges that plaintiff falsely represented to defendant that the land was located not more than 7 miles from the farm then owned and occupied by defendant; that the defendant, relying upon such representation, purchased the land; that the land, in truth, is located more than 10 miles from defendant's land. This defense is also set up as a counterclaim wherein defendant seeks to recover $1,000 paid upon the purchase price of such land. In his reply, plaintiff admits the mistake in description and alleges that the same was made through a mutual mistake. The affirmative defense and counterclaim are denied.

The facts are: Plaintiff is a real estate agent. Defendant is aged fifty-three years and has been a farmer throughout his life. He owned and operated a farm in South Dakota which he sold. Pursuant to correspondence had with his brother-in-law, Peniston, defendant came to Richland county, North Dakota, in August, 1919. Peniston was plaintiff's agent in selling land. Plaintiff, defendant, and Peniston examined the east half of section 11 in township 132, range 52, and the east half of section 7, township 133, range 52. Through plaintiff he purchased the east half of section 11 for a consideration of $120 per acre, and the east half of said section 7. Two contracts for a deed were made for said land in section 7: One, covering the northeast quarter thereof, is the contract involved herein. The other contract, by reason of plaintiff's inability to secure the land, pursuant to the contract, was surrendered and the same annulled. Defendant bought

the land in section 11 on the day before he went to see the land in section 7. Pursuant to defendant's testimony, he talked about buying some more land for pasture and hay. Plaintiff said that he would show him a half section 7 miles out. He went with plaintiff and Peniston in an automobile to see the land. Upon their return that day, before the contract was signed, defendant asked his brother-in-law what he thought about the deal; he replied that he thought it would be all right. Defendant said the land was quite a distance away; Peniston said "It is only 6 miles from your place." Defendant relied on what Paulson and Peniston told him. He intended to farm all of this land in sections 7 and 11 as one farm, using the land in section 7 for hay and pasture and the land in section 11 for a ranch. Otherwise, defendant testified that he was familiar with the government survey of lands; he knew how the sections were located in different townships; how the townships were located in the different ranges; he knew that this land in section 7 was several miles northwest of his farm in section 11. Further, he testified that there was an angling road between the land in sections 7 and 11; that there was a graded road traveled by the public that ran to the northwest along the "Soo" Railroad line. As the map discloses, the "Soo" Railroad line runs northwest about a mile east from the land in section 7 and in section 11. Plaintiff testified that he owns another half section of land a mile west from the land in section 11, on the north side of the railroad. It does not appear when he purchased such land. Apparently, from the testimony, it has reference to land north of the N. P. Ry. which runs, east and west, just north of section 11. About March 3d, 1920, plaintiff moved upon the land in section 11 and has there lived ever since. In the spring of 1920 defendant directed plaintiff to rent the land in section 7 for hay or to sell the hay. Plaintiff, however, made no arrangements in that regard. Otherwise, plaintiff testified that the land was sandy soil, was fitted only for pasture, and was worth about $15 per acre. Another witness for defendant testified that the land in 1900 was fairly worth just what it was worth for pasturage, and that $10 per acre would be a big price for it. The testimony in plaintiff's behalf is to the effect that no representation was made concerning the distance of this land from section 11. Plaintiff tendered warranty deed of the land, together with an abstract of title. It is undisputed that a mutual mistake in the contract was made

by erroneously designating the township number as "132," instead of the proper number "133."

The trial court found that defendant knew he was buying the northeast quarter of section 7 in a congressional township north of the township wherein his farm in section 11 was situated; that the evidence was insufficient to establish any false representations for the reason that defendant knew it was a physical impossibility for any such representations to be true. The court awarded a reformation of the contract and specific performance thereof. Pursuant thereto judgment of specific performance was rendered including the right to recover the unpaid purchase price with interest. Defendant has appealed from the judgment and has demanded a trial de novo.

Defendant contends that this is an action to cancel or terminate the contract and, as such, cannot be used as a basis for specific performance. That defendant was induced to make the contract through misrepresentations as to the distance to the land from his other land; that the land was grossly overvalued and therefore it is inequitable to enforce specific performance; that the plaintiff agreed to convey a quarter section of land all of which he never owned by reason of a right of way reservation upon the land.

Decision.

The action is plainly an action for specific performance to enforce, not to cancel, the contract. There is neither pleading nor proof of any misrepresentation concerning the value of the land. In the change of title there appears a deed from the N. P. Ry. Company to the Johnston Land Company conveying the quarter involved together with other lands wherein a reservation of 7.97 acres is made of a strip of land 100 feet wide from the center line of the "Soo" Railway line as now located. Manifestly, this reservation does not concern this land as the right of way of the railroad does not cross section 7. Following section lines, as a road, from the nearest corner of the east half of section 11 to the east half of section 7, the distance is about 9 miles. Applying a simple formula of mathematics to secure the diagonial distance, a result is obtained of about 6.4 miles. Traversing the distance along the road paralleling the railroad the distance is apparently about 8 miles. From

the evidence it is indeed difficult to determine that there was any misrepresentation of fact, conceding plaintiff's testimony to be wholly true. The actual distance depends upon the basic point taken from each tract of land and the route to be traveled. If defendant's land west of section 11 and north of the railroad be considered, the distance is even less. In view of defendant's knowledge of the governmental survey and the location of the respective tracts, and his personal examination thereof, the facts are insufficient to establish that he was misled. The findings of the trial court are proper. The judgment is affirmed with costs.

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

JAKOB K. JAKOBER, Respondent, v. COMMERCIAL UNION ASSURANCE COMPANY, a Corporation, Appellant.

(191 N. W. 480.)

Insurance — finding as to value of insured property held sustained by the evidence.

1. The defendant issued a fire insurance policy, whereby it insured plaintiff's granary for the sum of $800. Thereafter it was totally destroyed by fire. In an action to recover, defenses were interposed to the effect that plaintiff made false statements and representations in the application for the insurance, with reference to the value of the granary. The jury in a special verdict found against the defendant in this respect and in its verdict fixed the value of the building at $800, which was equal to the amount of insurance on the granary stated in the policy.

It is *held:* That these findings of the jury are supported by substantial evidence.

Insurance — where loss under fire policy total insured entitled to recover amount of policy.

2. There was no fraud in the destruction of the property. The loss was total. In these circumstances, under the provisions of § 6624, Comp. Laws 1913,

Note.—On what special verdict must contain, see note in 24 L.R.A.(N.S.) 7; 27 R. C. L. 875.

On what amounts to total loss under fire insurance policy, see 14 R. C. L. 1302; 3 R. C. L. Supp. 379.

plaintiff was entitled to recover the amount of insurance written in the policy, or $800.

Opinion filed December 5, 1922.

Fire Insurance, 26 C. J. § 452 p. 354 n. 9; § 757 p. 541 n. 91.

An appeal from a judgment of the District Court of Morton County, and from an order denying a motion for judgment non obstante, or for a new trial, *Lembke*, J.

Judgment and order affirmed.

Pierce, Tenneson, Cupler & Stambaugh, for appellant.

Where one makes a false representation, knowing it to be false, the law infers that he did so with intent to deceive. When the scienter is shown, the intent to deceive is conclusively proven. Quinn v. Mutual L. Ins. Co. 158 Pac. 82; Boddy v. Henry, 101 N. W. 447.

By reason of our "Valued Policy Statute" (Comp. Laws 1913 § 6624) nothing is more important to the insurance company than the statement of the insured as to the value of the property, because the insurance company is forced to agree in advance that the property is worth the amount for which it is insured. Solomon v. Federal Ins. Co. (Cal.) 167 Pac. 859; Duncan v. National Mut. F. Ins. Co. 20 L.R.A. (N.S.) 340.

It being established that the misrepresentation was made with intent to deceive or that the matter misrepresented increased the risk of loss, the question of waiver becomes the controlling question, and a failure of the jury to find on this question at least renders the verdict insufficient to support the judgment. Crandin v. Home Insurance Co. 163 Pac. 458; Richards v. Continental Ins. Co. 47 N. W. 350.

A special verdict must cover all the issues and leave to the decision of the court only questions of law. Morrison v. Lee, 13 N. D. 591; Sonnesyon v. Akin & Babcock, 14 N. D. 248; 27 R. C. L. page 875.

Halpern and *Rigler*, for respondent.

GRACE, J. This is an appeal from a judgment of the district court of Morton county and from an order denying a motion for judgment non obstante, or for a new trial. The plaintiff had judgment in the sum of $800. The action was upon a fire insurance policy to recover

for total loss of a certain granary by fire. The complaint is in the ordinary form in such actions. The principal defense is: That the plaintiff, in his application, made false statements and representations with reference to the value of the granary at the time of the application; that the plaintiff represented the value of the granary to be $1,200; that this amount grossly exceeded the true cash value on the date of the application; that the said false statements and representations were material to the risk and increased the risk of loss; that defendant had no knowledge of the falsity of these statements and relied upon them, until after the loss.

The granary was totally destroyed by fire. Certain issues of fact were submitted to the jury in the form of a special verdict. We find it unnecessary to set forth the special verdict. The jury found in it that the plaintiff did not sign the application with the intent to misrepresent the facts nor deceive the defendant. They also found that the value of the granary at the time of the application, and at the time of the loss was $800.

There is substantial evidence in the record to sustain the first of these findings. That question is, therefore, disposed of and needs no further consideration. We are further of the opinion that there is substantial evidence to sustain the second finding. It is not necessary, we think, to review the evidence in this respect. But if there were not a finding by the jury to the effect that the granary was worth $800, at the time of its destruction by fire, we think, plaintiff would have been entitled to recover $800, as that was the amount for which the granary was insured; and since it was wholly destroyed by fire, the amount stated in the policy must be taken conclusively to be the value of the granary.

Section 6623, Comp. Laws, 1913, provides: "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire and that property insured shall be destroyed without fraud on the part of the insured or his assigns, the stated amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured."

It is not claimed nor contended here that the building was destroyed by any fraud on the part of the plaintiff. The jury determined that he made no false statements or representations in the application, hence,

under the terms of the above section, the plaintiff was entitled to recover $800, or the stated amount of the insurance written in the policy. The loss was total, and hence, the language of the section became applicable. In the circumstances of this case, and as we view the matter, it was not incumbent upon plaintiff to prove the value of the building at the time of destruction, since the value of it at that time was fixed by the provisions of the above section. Horswill v. North Dakota Mut. F. Ins. Co. 45 N. D. 600, 178 N. W. 799.

The verdict is sufficient to support the judgment. We have examined all the assignments of error and conclude there are none that constitute reversible error. The judgment and order appealed from are affirmed. Respondent is entitled to his costs and disbursements on appeal.

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

CHRISTIANSON, J. (concurring). I concur in an affirmance. Under § 6624, Comp. Laws, 1913, the value of insured real property is fixed; in case of a total loss, the insurer is liable for the payment of the value so fixed; and he cannot assert as a defense that the property destroyed was or is of less value than that stated in the policy. In other words, under this statute (unless he was induced to overvalue the property in the policy as a result of fraudulent representations by the insured) the insurer, in case of a total loss, cannot avoid liability for the full amount stated in the policy by showing that the property was or is of less value that that stated. Wood, Ins. § 41; 26 C. J. pp. 354, 355; 14 R. C. L. pp. 1305, 1306.

Whether § 6624, supra precludes the insurer from asserting as a defense that he was induced to overvalue the property in the policy as a result of fraudulent representations on the part of the insured need not be determined in this case. The policy in suit was based upon a written application signed by the plaintiff. Such application contained a description of the premises to be insured and a statement of their value. The case was submitted to the jury for a special verdict. In response to specific questions in such verdict, the jury found that the plaintiff did not sign the application for insurance with any "intent to misrepresent the facts and deceive the defendant company." Such finding has ample support in the evidence.

J. R. HILSDORF, Respondent, v. THE FIRST STATE BANK OF REGAN, a Corporation, and A. M. Davenport, Appellants.

(191 N. W. 478.)

Chattle mortgages — evidence held to support finding of trial court that plaintiff's lien was prior to that of defendant.

In an action of claim and delivery, where the plaintiff claimed a lien, prior to that of defendant, on the proceeds of a crop of rye, the evidence is examined, and it is held to support the finding of the trial court to the effect that the plaintiff's lien was prior.

Opinion filed December 6, 1922.

Chattel Mortgages, 11 C. J. § 412 p. 662 n. 17.

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

Affirmed.

James A. Hyland, for appellant.

McCulloch & McCulloch, for respondent.

BIRDZELL, Ch. J. This is an appeal from a judgment and from an order denying a motion for a new trial, in an action of claim and delivery. The action was tried in the district court of Burleigh county, before the court, without a jury. The subject-matter is a check for $2,050.50, representing the proceeds of the sale of a car load of rye. The facts are as follows: The plaintiff was the owner of the land upon which the rye was raised; the land was leased to A. N. and Lloyd Davenport; the rye was seeded in the fall of 1918, and the lease, executed about the time of the seeding, contained a stipulation to the effect that the lessees mortgaged their interest in all crops raised on the premises during the life of the lease to secure all money advanced, paid to, or out for, the lessees, by the lessor, and to secure the plowing back of the lands in the fall. Another lease, containing the same stipulation, was executed on the 10th of April, 1919. Under these leases, the plaintiff was entitled to one half the crop as rent. The check in question was given for rye raised under the lease, and was made payable to the order of A. N. Davenport, J. R. Hilsdorf, and the First State Bank of Regan. By stipulation of the parties, the check was cashed

and one half the proceeds paid over to the plaintiff. The balance is in dispute, the plaintiff claiming it under the lien clause of his lease, on account of advances made, and the defendant bank claiming it under a chattel mortgage executed by the Davenports. The bank claims that there was a concurrent understanding between it and the plaintiff that its mortgage should constitute a prior lien on the rye. The Davenports, lessees, are in default and are in reality not interested in this litigation, for the reason that, regardless of the outcome, the proceeds of the rye check will be used to discharge a lien, or liens, in favor of one or another of their lien creditors.

Both parties upon this appeal concede the priority of a mortgage lien existing in favor of the Fishman Mercantile Company, to secure the payment of two notes aggregating $283.30, with 10 per cent interest.

In the court below judgment was entered in favor of the plaintiff for the amount of his advances, which were found to be $506.14, with interest from April 1, 1920, and costs.

The principal contention upon this appeal is that the evidence is insufficient to support the finding and conclusion of the trial court, to the effect that the plaintiff's lien for advances under the lease is prior to the defendant's chattel mortgage lien on the rye. In support of this contention it is urged that the testimony of one Garness, and of both the Davenports, clearly establishes a waiver of the plaintiff's lien in favor of the mortgage lien of the bank, and that their testimony is further supported by additional circumstantial evidence, while it is controverted only by the testimony of the plaintiff. Garness testified that Lloyd Davenport, A. N. Davenport, and the plaintiff all came to the bank together, when they made, or renewed, the leasing contract covering the west half (W½) of section 33–144–79; that it was understood between all of them that Lloyd Davenport was buying a team from Hilsdorf, the plaintiff, for which the latter required security, and that as additional security, he, the plaintiff, should have a first mortgage on the Davenport's share of the flax crop. He further testified "we had talked it over between us that Davenports would give us a first mortgage on the crop, but Mr. Hilsdorf was to have first on the flax as additional security with (for) the team, and that the bank took a chattel mortgage covering the crop while all four were present." The testimony as to the understanding that the bank should have a first

mortgage on the crop, excepting the flax, is corroborated by the Davenports, who testified that there was such an understanding. In addition to this, the appellant claims that further corroboration of the agreement is established by the conduct of the plaintiff upon at least two occasions. It seems that the bank promptly forwarded its mortgages to the register of deeds for filing, whereas the plaintiff was not so diligent in this respect. When the plaintiff learned that defendant's mortgages were filed first, it appears that he protested, while evidently laboring under a mistaken idea of the law, and thinking that, as between him and the bank, the first mortgage filed would be prior. Garness says he told the plaintiff that his mortgage was nevertheless first on the flax, and on the horses. But we are of the opinion that the conduct induced by the order of filing is of no value as corroboration of the defendant's view, for the reason that the plaintiff apparently did not concede the defendant's mortgage was to be first upon any part of the crop, except as he might have thought that it acquired priority by reason of having been first filed. Another circumstance referred to is that when the plaintiff desired to pay a thresh bill, he presented orders upon the defendant so that he might secure a waiver of the defendant's lien, in so far as the thresh bill was concerned. Neither, in our opinion, is this circumstance of any particular value as corroboration, for prudence might well dictate such a course on the part of the plaintiff, who knew that the defendant was making some claim to the property adverse to his own. On the other hand, it appears in the record that the bank had been doing business with the Davenports for some time; that it had, in fact, recommended them to the plaintiff as tenants; that they had become indebted to the bank, and that the bulk of the indebtedness, for which the bank claims a prior lien by virtue of its crop mortgage, was incurred before the crop season in question, and it further appears that the plaintiff was the principal factor in financing the cropping operations. There is no strong probability that this plaintiff, who, according to the record, is a party showing considerable ability to protect his own business interests, would voluntarily waive a lien, which he had under his leasing contract, in favor of an existing creditor, and especially when there was every prospect that the tenants would require further assistance by way of advances before the crop could be matured. As we view the record, therefore, we are

of the opinion that the findings of the trial court are well supported by the evidence and should not be disturbed.

There is a further contention to the effect that the plaintiff, through neglect to enforce the security, which was admittedly first, upon the flax crop, should be prevented from taking priority over defendant as to the rye. We think the record clearly shows that the flax crop was dissipated more through agencies over which the defendant had no control, than through his own negligence. It was practically destroyed by reason of early snows and the opening of the range for pasture purposes. At any rate it turned out to be of little value, and it does not appear that the plaintiff is primarily responsible for its loss. The judgment appealed from is affirmed.

ROBINSON, CHRISTIANSON, and BRONSON, JJ., concur.

GRACE, J. (specially concurring). My understanding of the evidence and of the meaning of the principal opinion is, that the defendant bank had actual notice of plaintiff's mortgages, which he has by reason of the mortgage clause in each of the leases. If this is true, and I think it is, the matter of the time of filing defendants' chattel mortgages or the lease, is immaterial.

I agree with the conclusions of the principal opinion.

ANNETTA I. E. ERICKSON, Respondent, v. OSCAR BACKMAN, Special Administrator of the Estate of Peter Larson, Deceased, Eina Topp, nee Larson, Nilma Nilson, nee Olson, Frida Olson, and Sigrid Larson, nee Olson, and Eina Topp, nee Larson, Nilma Nilson, nee Olson, Frida Olson and Sigrid Larson, nee Olson, Appellants.

(191 N. W. 343.)

Wills — judgment of district court allowing probate of will properly triable to jury not triable de novo in supreme court.

1. Following Riedlinger v. Feil, 48 N. D. 908, an appeal from a judgment in

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Note.—On review of findings to trial court generally, see 2 R. C. L. 203; 1 R. C. L. Supp. 442; 4 R. C. L. Supp. 91; 5 R. C. L. Supp. 81.

district court allowing the probate of a will properly triable to a jury, is not triable de novo in the supreme court.

Wills — findings of court presumed to be correct, unless clearly opposed to preponderance of evidence.

2. In such case, the findings of the trial court are presumed to be correct unless clearly opposed to the preponderance of the evidence.

Wills — evidence held to support findings of genuineness.

3. For reasons stated in the opinion, findings, determining a will to be genuine and allowing its probate, are upheld.

Opinion filed December 8, 1922.

Wills, 40 Cyc. p. 1285 n. 26; p. 1356 n. 49; p. 1358 n. 72, 75.

Action in District Court, Burleigh County, *Nuessle*, J., contesting the probate of a will.

The heirs have appealed from the judgment.

Affirmed.

Newton, Dullam & Young, for appellants.

The proponent of the will has the burden of rebutting such presumption, and this is especially true where the beneficiary occupies a confidential relation to the testator. Busch v. De Lano (Mich.) 71 N. W. 628; Hughes v. Meridith (Ga.) 71 Am. Dec. 127; Tyler v. Gardner, 35 N. Y. 559; 40 Cyc. 1153.

Fraud may be inferred from the circumstance alone that the draftsman is a beneficiary thereunder. See also Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235.

The testimony in this case took a wide range, and that is permissible and necessary in a case of this kind. 28 L.R.A.(N.S.) 275, 284, 288.

Elliott on Evidence in § 1100, on the subject of handwriting states: "By nature and habit individuals contract a system of forming letters which give a character to their writing as distinct as that of the human face." Re O'Conner, 179 N. W. 401.

E. T. Burke, for respondent.

Statement.

BRONSON, J. This is a proceeding contesting the probate of a will. The county court, after extended hearings, allowed the will. Upon

appeal to the district court, the allowance of the will was reaffirmed. An appeal has now been taken to this court from the judgment entered in the district court. Plaintiff is the beneficiary in the will. Defendants, appealing herein, are, respectively, a sister and three nieces of the deceased.

The facts are: Peter Larson, the deceased, of Swedish nationality, settled in Burleigh county, some thirty-five years ago, upon a homestead; there, as a bachelor, he lived and died in October, 1919; the Erickson family were his neighbors; the will in question is dated Jan. 29th, 1900; it was written with pen and ink by the beneficiary, and was signed by her mother and her brother as witnesses; it is in the Swedish language. Translated, it reads as follows: "I, the undersigned, bequeath all my property to Miss Annetta I. E. Erickson, daughter of Mr. N. Erickson of Grass Lake township, Slaughter, Burleigh county, North Dakota, which she shall be heir to after my death." In county court, the special administrator objected to the allowance of the will upon grounds of fraud, undue influence, and that the will was not the will of the deceased. The heirs objected upon grounds of fraud and undue influence. The county court found that the deceased was a citizen of Burleigh county and of the United States for twenty years prior to his death. That he was on friendly terms with the petitioner's family; that he was of sound and disposing mind up to and including the time of making the will; that he lived alone during the last fifteen years of his life; that he received friendly assistance in his farm labor and housekeeping from the plaintiff and her brothers, and was very friendly to the plaintiff; that at the time of making the will he was entertaining the firm belief that his sisters in the old country had divided up the property left by his father and mother and had given him no portion thereof; that at the time of the execution of the will it was his intention not to give his relatives in Sweden any portion of his property; that the will was duly executed by deceased, free from fraud or undue influence.

At the trial in the district court it was stipulated that a jury be waived and the proceeding tried to the court; that the testimony of any witness taken in the county court might be offered and received in evidence in the district court in lieu of the oral testimony of the witnesses; that, further, if either party desired to further cross-examine

such witnesses they would be produced for such purpose and either party reserved the right to introduce further testimony. Accordingly, the record in district court is composed of the testimony of the witnesses with exhibits, as taken in the county court, and the oral testimony of three witnesses offered in district court. The district court found that the deceased was a citizen of Burleigh county and of the United States for at least twenty years immediately prior to his death; that he had never been married and had no children; that, during all of this time, the deceased and the family of the plaintiff were neighbors and very friendly; that on Jan. 29th, 1900, the deceased was in good health and of sound memory and possessed a sound and disposing mind; that the will was duly executed without any duress, fraud, or undue influence and has never been revoked. In the judgment, the trial court sustained an allowance for the costs of the witnesses whose testimony was transcribed and used in the district court. The appellants demand a trial de novo; they maintain that the findings of the trial court are not justified by the evidence; that the will is spurious and a forgery; that trial court erred in allowing fees of witnesses in county court.

Opinion.

This appeal is not triable de novo in this court. It is before this court with the presumptions that attach to the findings of the trial court with a jury waived. Such findings are presumed to be correct unless clearly opposed to the preponderance of the testimony. Riedlinger v. Feil, 48 N. D. 908, 187 N. W. 963, and cases cited. Upon a review of the entire record which is voluminous, we are unable to find that the findings of the trial court are clearly opposed to the preponderance of the testimony. The sole question involved is whether the signature to the will is a forgery. The banker, with whom the deceased did his business, pronounces it genuine. Likewise, two other bankers so agreed. The Erickson family, including the petitioner, testify directly that the deceased signed such will at their home and detail circumstances concerning the wishes and desires of the deceased to give his property to the plaintiff. Three other witnesses including a doctor who had been the physician of the deceased during his lifetime, testified to conversations with the deceased wherein he had declared

that he had made a will leaving his property to the plaintiff. There were two witnesses for the appellant who relate conversations with the deceased to the effect that he made no will and desired his property to go to his relatives. Two handwriting experts for the appellants testified to the effect that the signature to the will was not the signature of the deceased. The testimony of one of these handwriting experts, however, was somewhat discredited through his inability to identify the signatures of counsel proffered to him upon a test. Both the county court and the district court have apparently given extensive consideration to the voluminous evidence and we are not prepared to find that their findings are incorrect. In our opinion the trial court did not err in its allowance of costs. The parties stipulated for the use of testimony. Apparently, the trial court allowed the costs for the testimony used as a disbursement necessarily incurred in the procuring of evidence. Comp. Laws, 1913, § 7793.

In a dissenting opinion, it is stated that it is the duty of this court to try the case anew; yet the author of such dissent signed the opinion in Riedlinger v. Feil, 48 N. D. 908, 187 N. W. 964, where this court unanimously and specifically held that a will contest is not triable anew in this court. The dissenter departs from the record in building up an individual theory that the signature of the testator was valid, but that the contents of the will was written over the genuine signature. There is neither any issue, nor any testimony in the record in this regard. The parties do not even suggest in their briefs such matter. The dissenter states that there was neither claim nor proof that the deceased was under any special obligation to the beneficiary, or to her brother, or her mother. The record is voluminous. No attempt will be made to set forth the evidence at length. Suffice it to say that the record discloses evidence prior to, and ever since the making of the will that the Erickson family sustained very friendly relations with the deceased; that they furnished to him help and assistance. Particularly was the deceased friendly to beneficiary, ever since her childhood. In his loneliness he was comforted by them. There is evidence that the deceased felt a debt of gratitude towards the Erickson family. There is not even one letter in the record to show that his relatives had any solicitude whatever for him. As stated before three witnesses gave evidence that deceased had stated that he had made a will in behalf of the beneficiary.

There is testimony in the record that on Saturday, one or two days before they discovered his body a member of the Erickson family had visited the deceased. When found the deceased was well supplied with groceries, as well as fuel. The fallacy of the dissent is solicited by the improper assumption of the facts. The judgment is affirmed with costs.

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

ROBINSON, J. (dissenting). This is an appeal from a judgment allowing a purported will in favor of Miss Erickson. The case was properly tried before the court without a jury and the duty of this court is to try the case anew. In any event, we may not wash our hands and sanction a wrong. The will is a manifest forgery. It is written over the genuine signature of the alleged testator. It is written on a thin scrap of paper about 4x6 inches. It is written by the beneficiary and witnessed by her mother and her brother, who is likewise a beneficiary, though not named as such in the will. If sustained, each witness receives several thousand dollars, a big reward for testimony which, whether true or false, was given with perfect safety. The testimony has no convincing force because of its inherent improbability and because in this age men and women have little or no fear of God or Devil. For much less than a thousand dollars men will testify to most anything when they can do it with perfect safety. In this case there are probabilities which far outweigh the oral testimony. The plaintiff had living brothers and sisters, and blood is thicker than water. A man does not give away a good property to a stranger unless he has some special reason. There is no claim or proof that the deceased was under any special obligations to either the beneficiary named in the will, the person who wrote it, or to her brother, who signed it as a witness, or to her mother. She was not his affianced wife, his common-law wife, or even his lady friend. There were no ties or obligations of love, either hallowed or unhallowed. There was not even a shade of romance, and when the poor man died within almost a stone's throw of these beneficiaries. They did not discover his remains for several days, until the cats had eaten a large part of his body.

Besides the lapse of twenty-three years from the date of the will, the change of conditions and of property values, and the inheritance of some good property from a brother, the strong presumptions are against the little scrap of paper. Assuredly no court should take the risk of sanctioning titles made up in that way and resting on such a basis.

FIRST STATE BANK OF DUNN CENTER, NORTH DAKOTA, a Corporation, Respondent, v. THE NORTHERN TRUST COMPANY and CHARLES J. HEEN, Appellants.

(191 N. W. 470.)

Principal and surety — evidence held insufficient to establish embezzlement by bank cashier in action by bank on fidelity bond.

In an action to recover on a fidelity bond where the plaintiff bank seeks to recover by reason of the embezzlement of its cashier in making large loans to a customer with whom he was jointly associated in farming operations, it is *held*, for reasons stated in the opinion, that the evidence is insufficient to establish any embezzlement.

Opinion filed July 7, 1922. Rehearing denied December 14, 1922.

Principal and Surety, 32 Cyc. p. 138 n. 54 New.

Action in District Court, Dunn County, *Berry*, J.

Defendant has appealed from the judgment and an order denying judgment non obstante or, in the alternative, for judgment and new trial.

Judgment reversed and action dismissed.

James P. Cain, for appellant, Heen, and *Pierce, Tenneson, Cupler & Stambaugh*, for appellant, The Northern Trust Co.

Fraud will never be presumed, but must be clearly proved. It cannot be based on mere suspicion or conjecture. Redpath Bros. v. Lawrence, 48 Mo. App. 427; Braddock v. Louchheim, 87 Fed. 287.

Note.—For authorities discussing the question as to what amounts to embezzlement or larceny within fidelity bond, see note in 16 A.L.R. 1493, where it appears that an employee who becomes indebted to his employer by using funds of the employer for his personal use with no intent to defraud, is not guilty of embezzlement within the meaning of a fidelity bond; 14 R. C. L. 1267, et seq.; 3 R. C. L. Supps 374, et seq.; 4 R. C. L. Supp. 955.

Fraud must be proven with some degree of certainty, and cannot be inferred or presumed from ambiguous evidence. Denoyer v. First Nat. Acci. Co. (Wis.) 130 N. W. 475.

It cannot be based on conjecture. Priest v. Wade, 87 Mo. 16; Maples v. Burns, 72 Mo. App. 411.

The evidence to establish fraud must be unequivocal and convincing. The evidence must be "clear, precise, and indubitable." Maxwell Land Grant Case, 121 U. S. 325, 30 L. ed. 949; American Nat. Bank v. Supplee, 115 Fed. 657, and other cases cited in note to 33 L.R.A. (N.S.) at page 833 to 829.

Fraud must be proved "by clear and satisfactory evidence, and the more serious the nature of the fraud charged, the more rigidly should that rule be applied." Maldaner v. Smith, (Wis.) 78 N. W. 140; Neacy v. Milwaukee County (Wis.) 128 N. W. 1063.

Fraud should not be found when the facts and circumstances proven are consistent with honesty of purpose. Smith v. Branch Bank, 21 Ala. 125, and other cases cited in note to 33 L.R.A.(N.S.) at page 840.

"The courts presume that a man acts honestly in his dealing with his fellowmen, and to establish fraud it is necessary that the evidence be strong enough to overcome this presumption." Note to 33 L.R.A. (N.S.) page 841, and cases cited.

"The evidence of fraud must be such as generates a belief, not merely raises a suspicion. Lewen v. Thurber, 62 Ga. 25; Waddingham v. Lokger, 44 Mo. 132, 100 Am. Dec. 260.

"The law presumes every man honest until the contrary is shown. We do not think the evidence establishes that the discrepancy arose from the fraud or dishonesty of Smith (the bank employee) amounting to larceny or embezzlement." United States Fidelity Co. v. Batesville Bank (Ark.) 112 S. E. 957.

"Astute as courts should be in the detection of fraud, they are not justified in finding it on the grounds which show no more than its possible existence. When the acts of parties admit of a reasonable interpretation in favor of honesty and fair dealing, they should receive it." Murehide v. Smith, 35 N. J. Eq. 303, page 309. See also McCarthy v. Scanlan, 176 Pa. 262, 35 Atl. 189.

"It is not enough to create a suspicion of wrong, *nor should a jury be permitted to guess at the truth.* Church, C. J., in Jaeger v. Kelley,

52 N. Y. 274, 276. See also Gauge v. Burns (Neb.) 111 N. W. 791; Jacobs v. Van Syckle, C. C. A. 127 Fed. 62, 67.

The matters covered by the warranties being material and having increased the risk, it is wholly immaterial whether they were made fraudulently and with intent to deceive, although it is apparent that the warranty as to Mr. Heen's indebtedness was knowingly false. Van Woert v. Modern Woodmen of America (N. D.) 151 N. W. 224.

"One applying for fidelity insurance for his employees cannot withhold from the insurer information that the employee is in the habit of overdrawing his account and that it is overdrawn at the time the application is made." National Surety Co. v. Globe Grain & Mill. Co. (C. C. A.) 256 Fed. 601, 4 Am. L. Rep. 552, and note at 558.

A breach of warranty to the effect that the employee is not indebted to the employer is material and prevents the bond from becoming effective. Fidelity & Casualty Co. v. Bank of Timmonsville, 71 C. C. A. 299, 139 Fed. 101; Bank of Hardingsburg & T. Co. v. American Bonding Co. (Ky.) 156 S. W. 394; Willoughby v. Fidelity & D. Co. (Okla.) 85 Pac. 713, 7 L.R.A.(N.S.) 548, 8 Ann. Cas. 603.

In Willoughby v. Fidelity & C. Co. supra, it is said: "It must be assumed that any substantial deviation from the truth in such answers is material to the risk and renders the policy void." And in the same case, quoting from American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co. (C. C. A.) 95 Fed. 111, it is said: "When there is a distinct agreement that an application for insurance is a part of the contract, and the statements in the application are expressly declared to be warranties, they are to be treated as such, and not merely as representations, and must be strictly true, or the policy will not take effect."

The breaches of warranty obviously increasing the risk, it is immaterial whether there was any intention to deceive the trust company. The question of increase of risk is one of law for the court, and not for the jury, in this case. Van Woert v. Modern Woodmen of America, (N. D.) 151 N. W. 224; March v. Metropolitan Life, 186 Pa. 629, 65 Am. St. Rep. 887, 40 Atl. 1100; Fidelity Mut. Life Asso. v. Miller, 92 Fed. 63, 34 C. C. A. 211; 14 R. C. L. p. 1034; Johnson v. National Life, (Minn.) 144 N. W. 218, Ann. Cas. 1915A, 456.

And the question whether notice was given, as required by the bond,

is a question of law where the facts are undisputed, as in the case at bar.

"The general rule is that the question of reasonable time is one of fact, and must be submitted to the jury with proper instructions; but when the facts are undisputed, and only one reasonable conclusion can be drawn therefrom, it is the duty of the trial judge to instruct the jury accordingly." Hormel v. American Bonding Co. (Minn.) 128 N. W. 12, at page 14.

In the following cases, it was held that the notice was not given "immediately" or within a reasonable time in view of all the circumstances. Burnham v. Royal Ins. Co. 75 Mo. App. 394. (Seventeen days under fire policy); Lake Geneva Ice Co. v. Selvage, 73 N. Y. Supp. 193 (sixty days under fire policy); Foster v. F. & C. Co. (Wis.) 75 N. W. 69 (twenty-nine days under accident policy); Ermon Trout v. Girard F. & M. Ins. Co. (Minn.) 65 N. W. 635, 30 L.R.A. 346, 56 Am. St. Rep. 481; Underwood v. London G. & A. Co. (Wis.) 75 N. W. 996; National Paper Box Co. v. Aetna L. Ins. Co. (Mo.) 156 S. W. 740; Emory v. Glenn Ins. Co. (Del.) 76 Atl. 230; Erenson v. Frankfort Ins. Co. (Cal. App.) 99 Pac. 537; Barclay v. London G. & A. Co. (Colo.) 105 Pac. 865; Oakland Motor Car Co. v. American Fidelity Co. (Mich.) 155 N. W. 729; Los Angeles Athletic Club v. U. S. F. & G. Co. (Cal.) 183 Pac. 174 (sixty days after becoming aware of defalcation on fidelity bond).

"Ordinarily a trial judge is not obliged to prepare forms of verdict, but may do so if a party is not prejudiced thereby; *but if he does so, the forms should be complete as the case requires,* and where the issues are different between plaintiff and several defendants, it is error for the court to decline a form of verdict, whereby the jury might find for plaintiff against one defendant and in favor of the other defendants."

T. F. Murtha and *Alf. O. Nelson,* for respondent.

The proposition raised by the appellant as to the construction of the bond, is wholly immaterial. The facts clearly establish embezzlement. 25 C. J. 1093, note 45; City T. S. D. & L. Co. v. Lee (Ill.) 68 N. E. 485; Rankin v. Guaranty Co. (Ind.) 99 N. E. 314; 20 C. J. 426 to 438.

Continuous series of acts. 20 C. J. 429.

An embezzlement may consist of a continuous series of conversions,

or the conversion of money or property received at different times from different sources.

"Settlement by giving a note for money embezzled does not effect the criminal liability of the guilty person." Guenther v. State (Wis.) 118 N. W. 640.

"In a prosecution for larceny by a bailee of money left with defendant to invest in first mortgages, it is no defense that the owner of the money attempted to collect the money or obtain a surety therefor." State v. Chapin (Or.) 144 Pac. 1187.

Statement.

BRONSON, J. This is an action on a fidelity bond. The jury returned a verdict in plaintiff's favor for $10,000, the amount of the bond. Defendants have appealed from the judgment and from an order denying judgment non obstante, or, in the alternative, a new trial.

The complaint alleges a breach of the bond in the years 1919, 1920, and up to January 14th, 1921, through the embezzlement of plaintiff's cashier, the principal in the bond.

The record is voluminous. Numerous exhibits were introduced. A week was consumed in taking evidence. The record has been carefully examined. Only the facts, necessary for the consideration of the decision, will be stated. They are as follows: From May, 1914, until about June 1st, 1921, the defendant Heen was cashier of the plaintiff bank. During that time the defendants were obligated to the plaintiff upon a fidelity bond. This bond provides that the employee shall, in the position of cashier, make good to the employer within thirty days, any loss sustained by the employer through larceny or embezzlement committed by the employee. One Schriver was a farmer engaged in operating around 2,000 acres of land near Dunn Center. He did business with the plaintiff bank and other banks in Dunn Center and Werner. In May, 1918, from the plaintiff bank, he made a loan for $100. Schriver testified that he and Heen, in that year, were jointly interested in a flax crop upon 40 acres of land rented by Schriver. The agreement, not in writing, was that Heen should let Schriver have money and Schriver was to give Heen part of the crop; that Heen would loan him some money from the bank. In 1919 they were again jointly inter-

ested; they sowed wheat on this same ground. Schriver borrowed the money from the bank through Heen. The record discloses that on May 26th, 1919, Schriver borrowed $200 from the bank.

Schriver further testified that, in September or October, 1919, he and Heen bought some hogs together; the deal involved some $600 or $700; he issued a check on the bank; it went through; later, he gave a note therefor; Heen was entitled to receive half of the profits and agreed to furnish the money; they bought about thirty sows and pigs; Schriver contracted for buttermilk with a creamery and received it; Heen knew about this arrangement; finally he sold some of the hogs at a sale, killed some of them, and shipped some of them to St. Paul; he has two full blooded sows left; during the big snow storm in 1920 he lost 100 head of hogs and pigs and other property; upon the hogs that he bought, the bank had a first lien.

On October 6th, 1919, Schriver gave to Heen a bill of sale of one-half interest in the hogs. Then, as he testified, Heen did not know he was giving a bill of sale of his interest in the hogs. On August 25th, 1921, Heen transferred his interest, received from Schriver, to the bank. Heen denies any partnership arrangement concerning the hogs. He explains that this bill of sale was taken to protect the bank. The record does not disclose that he received any moneys or profit in this hog venture excepting hog meat brought by Schriver for Heen's personal consumption. The record further discloses that from September, 1919, to January 1st, 1920, the indebtedness of Schriver at the bank through loans increased to $2,700. Among the loans constituting this increased indebtedness are four notes aggregating over $1,500, which, from the record, apparently, concerned the hogs.

Schriver further testified: In the fall of 1919 he advised Heen that he was going to sell out; he had insufficient money to continue farming; he told Heen that he would furnish all machinery, horses, time, and everything, if Heen would furnish the money and pay half of the expenses excepting groceries, Heen agreed to go in with him. Later, in April or May, 1920, a contract dated January 12th, 1920, was made between Schriver and Heen. It transfers to Heen half of all grain raised during the season of 1920 upon some 2,000 acres of land; it requires Heen to pay for half of the seed grain and half of the hired expenses such as gasolene, oil, sharpening plow lays, and feed for spring

work. It requires Schriver to perform all the work and deliver half of the grain at elevators at Dunn Center and Werner free of any charge or expense. This contract was witnessed by Schulberg, director of the bank, and Hintz, the assistant cashier. It was recorded in the office of the register of deeds by Heen, on May 8th, 1920.

Schriver further testified: In 1919 he threshed around 2,000 bushels of wheat, receiving from one bushel to two bushels per acre; he did not cut his flax, oats, or speltz; there was nothing left after the thresher was paid. In 1920, pursuant to this contract, he put in about 1,000 or 1,100 acres; he got the money to carry on his farming operations from the plaintiff bank; every nickel he received from the bank was used in his farming operations. During the fall and the early part of 1920 Schriver shipped in corn, oats, speltz, and hay. Money was secured from the bank to pay bills of lading therefor. Schriver figured on selling some of the grain and making a profit thereupon. He did sell some grain. All moneys received in such sales were paid into the bank. Schriver received no money from such transactions. The proceeds were credited to his account. However, concerning corn sold, he received a profit in the form of five or six loads which he hauled to the farm and used for feed. Also he exchanged some seed speltz for seed wheat.

Throughout 1920, Schriver issued checks from time to time. These were paid by the bank. Overdrafts occurred. From time to time notes were given by Schriver to take up these overdrafts. On March 29th, 1920, Schriver gave a note for $2,400 secured by chattel mortgage on fifty-one head of cattle and increase. Schriver advised Heen that he could not give a first mortgage. Heen said it would be satisfactory as security just the same. This note for $2,400, apparently, he credited on Schriver's account March 29th, 1920. At that time his account showed an overdraft of $1,100. The abstract of chattel mortgages against Schriver's cattle at that time showed a chattel mortgage on three head of heifers, another on five head of cattle, another for two cows, another for one bull, and another to the plaintiff for five head of cattle. Schriver testified that in the fall of 1919 he had fifty-one head of cattle. He sold two and lost thirteen in the spring of 1920.

In 1920, upon Schriver's crops, extensive hail insurance, both state and old line, was secured. The old line insurance was approximately $5,000. The state, $4,200. Some hail insurance was issued jointly to

Heen and Schriver with a mortgage clause in favor of the bank. Some application blanks for such insurance were signed by Heen and Schriver. To some extent Heen and Schriver both signed notes for the premium. Through these farming operations in 1920 the indebtedness of Schriver at the bank increased until it was, on October 1st, 1920, $14,269.05. On May 15th, 1920, Heen borrowed, personally, from the bank, $1,000, which amount was credited to Schriver's account. On July 19th, he borrowed from the bank $490.45 which he paid for seed flax. Besides these amounts he was otherwise indebted to the bank for $450, a loan extending back to 1917. All of these loans were made by Heen excepting the sum of $1,980 made in various loans to Schriver by the assistant cashier. From the record it apparently appears that the total loans made to Schriver up to October 1st, 1920, excluding renewals, amounted approximately to $17,200. In 1920 Schriver's crops suffered severe hail losses through four hail storms. In August and September, 1920, $4,388.80 was received through the insurance against hail losses. It was credited to a deposit account known in the bank as the Heen & Schriver account. In August, 1920, an insurance note, interest included, for $916.15 was paid out of this account. Also $760.52 out of this account was paid to Heen and a like amount credited to Schriver's account. Later the bank officials, without objection of Heen, on October 23d, 1920, charged to this account several notes of Schriver's and expense items concerning the farming operations aggregating $1,950.50. Later Heen received about $1,500 out of the warrant of $2,368.45 payable by the state to Heen, Schriver, and the Merchants State Bank, dated January 3d, 1921. With such money he paid one of his notes and interest. In the fall of 1920, pursuant to Schriver's testimony, the crops amounted to about 2,000 bushels in which he and Heen were interested. They were placed in elevators at Werner. They became subjected to threshing and other liens. No settlement was made with the bank.

W. A. McClure testified: He has been president and director of the bank since its organization in 1913. For about eighteen months or two years prior to August, 1919, he was actively engaged in the bank. Heen generally made all loans. Once in a while McClure would make a small loan. In January, 1920, the board of directors considered the Schriver loans. Mr. Heen assured them that the loans were well secured and

were all right. Likewise, in July, 1920, the Schriver loans were considered and the board of directors were assured by Heen that the loans were safe and would be paid. He described the crop and the security. The first intimation he had about the contract between Heen and Schriver was about December 20th, 1920. Then he wrote the trust company on January 14th, 1921. He brought the matter to the attention of the state's attorney in May, 1921. He always found Heen to be reliable, honest, and trustworthy. He never found any false entries on the books by which any transactions were concealed or covered up. As far as he could discover the records and books in the bank were kept correctly and truly show all transactions that Heen had as cashier. He was present at several director's meetings during September and October when Schriver's notes were considered. They met in October, 1920. Schriver's notes were considered and Heen was criticized severely for letting Schriver borrow the money. The directors had an examining committee. Heen was intrusted with the management of the bank and was authorized to make loans and to use his judgment in making them. In examining paper they went through the note pouch, examined the notes, talked about the security and checked them with the book. He was present at the meeting of the directors in January, 1921. Then he knew that the trust company denied any liability on the bond and that Heen denied that he was guilty of any embezzlement. Heen never disclosed to him that he was interested in farming operations with Schriver in 1918, 1919, or 1920.

F. E. McClure testified: He has been a stockholder since the organization of the bank. He was a director from January, 1921, until June, 1921. He came to the bank in September, 1920, to assist in collections generally. He was there assisting the cashier, after consulting with the board of directors and the president of the bank. While there he and Heen went to see Schriver about his obligations; they saw him in Werner in October, 1920; Schriver stated that it was impossible for him to pay any amount then; that the grain in the elevator could not be sold without Heen's consent, nor could Heen sell it without his consent; that it was stored in the name of Heen & Schriver. At the bank in December, 1920, he saw the contract between Heen and Schriver. Heen produced it without hesitation.

Bailey testified: He has been a director since 1917. He was present

at a meeting of the directors on October 16th, 1920, when a chattel abstract of the Schriver property was ordered. He did not know about the contract between Heen and Schriver until about the last of December, 1920.

Schulberg testified: He was a director from February, 1917, until May, 1921. He learned about the contract between December 1st and 15th, 1920. The minutes of the board of directors show that in January and July, 1920, the examining committee certified that the assets of the bank were not being carried in excess of actual value. Minutes of October 16th, 1920, authorized an abstract of the Schriver property to be obtained and to proceed to collect indebtedness due the bank. On December 1st, 1920, a special meeting of the directors was held but no consideration of the Schriver loan was made. The minutes of the meeting January 25th, 1921, show that Heen and Hintz were continued respectively as cashier and assistant cashier, to receive for their services the same wages paid them the past year. Also, that the examining committee made a thorough examination of the bank and found the assets not to be carried in excess of their actual value.

Baker testified: He was a director from February, 1917, until May, 1921. He was a member of the auditing committee. At the meeting in January, 1920, Heen told him the Schriver loans were good loans and well secured. He first met Schriver in October, 1920. He was present at a meeting of the board of directors on October 16th, 1920. He was at the bank assisting in collections from that time until about March 1st, 1921, excepting election time when he was away about three weeks. He first learned of this contract between Heen and Schriver some time between December 1st and 15th, 1920. He had some talk with Heen about the Heen & Schriver account in October, 1920. He talked with Heen about charging off some memorandum notes signed by Heen and Schriver against this Heen and Schriver account. He and Mr. Heen, during the winter of 1920–21 endeavored to make a settlement with Schriver concerning this indebtedness. He was willing to make a deal with Schriver and allow him to have seed wheat to plant for the crop of 1921, to secure the indebtedness of the bank by a mortgage on that crop, and to make settlement in that way but not to advance any money to Schriver for expenses.

Thoreson testified: He is the state's attorney; he was attorney for

the bank. Some time before the auction sale of Schriver he saw the contract between Heen and Schriver in the bank, when Mr. Baker, McClure, and Hintz were present. He told Frank McClure that there was such a contract. He advised the bank to charge against this Heen & Schriver account the Schriver notes.

On January 14th, 1921, McClure, the president, sent to the trust company a telegram and letter to the effect that Heen had misappropriated funds belonging to the bank, in that he had made loans to Schriver in large amounts the proceeds of which went to his benefit. A meeting was held at Dickinson attended by the president of the trust company, the president of the bank, and Heen. The loans made by Heen were considered. Heen stated there was no criminal intent; that the loans would work out. The president of the trust company advised that no criminal intent appeared and there was no liability under the bond; that the directors should get together and work the matter out.

Heen continued to work at the bank. He and the directors attempted to adjust the Schriver loans. The 1920 crop was still unliquidated. Schriver desired to secure seed for the farming season of 1921 and also assurance of financial aid. Liens upon the 1920 crop needed adjustment. The directors of the bank were willing that an adjustment be made with Schriver but were unwilling that any more moneys be furnished him for the season of 1921. Finally, in March, 1921, a written contract signed by Schriver and the bank, through Heen as cashier, was made. It provides that the bank shall pay out of the 1920 crop certain liens thereupon and shall apply the balance upon Schriver's account with the bank; that the bank shall loan to Schriver, during the season of 1921, not exceeding $950 for purposes of paying expenses incidental to seeding the 1921 crops upon some 1,600 acres of land.

Accordingly, all of the outstanding loans were renewed and evidenced by new notes signed by Schriver totaling $14,269.05. Additional security was taken upon the 1921 crop and all of the former notes and chattel security therefor were retained as collateral to such new notes. These notes were registered, or entered, in April and May, 1921. In April, 1921, another new note for $950 was made by Schriver and his account credited with such amount. The directors deny any authority on the part of Heen to make such agreement with Schriver. In May, 1921, one Davis, an examiner for the Bank of North Dakota, appeared

at the bank. He made investigations concerning the Schriver loans. Prior to June 1st, 1921, he arranged to purchase a majority of the stock in the bank. On May 17th, 1921, Heen filed a written resignation effective June 1st, 1921, since which time he has not been connected with the bank. On June 1st Davis became, and since has been, cashier of the bank. The directors held a meeting in May, 1921. Davis and the directors claim that they did not know about this written agreement with Schriver. On May 14th, 1921, the trust company was advised by registered letter of the president, McClure, to the effect that Heen had misappropriated funds belonging to the bank; that the bank expected the company to make good any losses sustained. The letter charges that Heen had been guilty of embezzlement as cashier of the bank and that the company was liable as surety upon this bond. Proof of liability was furnished, wherein it was claimed that Heen had advanced large sums of money to Schriver for purposes of financing farming operations of Heen and Schriver and that they were individually responsible for the amount of such loans, all without the consent of the board of directors. Attached thereto is an affidavit by Heen to the effect that, under the contract made, Schriver was permitted to draw checks upon the bank in payment of his expenses in conducting farming operations; that Heen admits himself liable for half of the money so expended, pursuant to the contract; that the funds used were moneys of the bank without authorization of the board of directors. Davis, after he became cashier and after he learned about this contract, took new security from Schriver. On June 2d, he loaned him $405.69 representing the balance then due the bank on various checks that were carried as cash items. On June 4th he loaned him $360 for hail insurance. On July 1st he loaned him $50. On July 18th, 1921, he loaned him $360 on account of hail insurance. On July 23d, 1921, he loaned him $750 upon some binders that it was necessary for Schriver to purchase. The bank took a mortgage proportionately upon the binders and upon one fourth of Schriver's crop. Again in 1921 Schriver suffered hail losses. All of the loans made by Davis to Schriver have been paid excepting the note for $750. When the loans were made to Schriver by Davis there was sufficient insurance moneys already in sight to reduce Schriver's indebtedness down to a point lower than it was in September, 1920. Since September, 1920, the aggregate of

new loans made to Schriver, including the $950, amounts to $2,875.69. Prior to the trial the bank had collected for hail insurance of 1921 approximately $1,770. It had available but not collected an assignment for hail insurance amounting to about $2,400. This would wipe out the new indebtedness since September, 1920, and leave a net credit to be applied on old indebtedness of around $1,200.

At the time of the trial Schriver was threshing the 1921 crop. The bank had a man checking the operations. There was testimony to the effect that the bank would receive something out of this 1921 crop. There is also testimony in the record to the effect that the chattel mortgages taken by Heen as security for the loans made to Schriver were inadequate to cover the amount of the advances and in many instances were upon property, or some property, previously mortgaged to other parties. No criminal proceedings were ever instituted against Heen.

Decision.

The defendants have specified a volume of errors. Principally they contend that the evidence fails to establish embezzlement; that the acts of the bank directors and other officials show knowledge and ratification.

In justification of the judgment, the plaintiff maintains that the loans to Schriver were really loans to Heen; that these loans were poorly secured and practically worthless; that he took security appearing on its face to be a first loan when he knew it, in fact, not to be; that he represented these loans to be good when he knew they were not; that he permitted hogs and cattle covered by mortgages to be shipped and the proceeds dissipated; that he used some hay and feed in his enterprise with Schriver; that he tried to get away with insurance moneys and did get away with over $2,200; that he acted under a contract which no business man could make in good faith.

The transactions are much involved. It is difficult to state the facts without extending the recital into a volume. The gist of plaintiff's action is embezzlement through misappropriation. The action is not one for negligence or violation of instructions. The embezzlement must be established by facts showing wrongful misappropriation at the time of commission and not by the consequent results. If Schriver had prospered and the bank had collected all loans and suffered no loss,

embezzlement nevertheless would have existed if fraudulent and wrongful acts were proved at the time of commission. Embezzlement, again, is not to be determined by the extent or certainty of the pecuniary loss. Dominion Trust Co. v. National Surety Co. 137 C. C. A. 342, 221 Fed. 618, Ann. Cas. 1917C, 447.

Heen may have been negligent. He may have violated instructions express or implied. He may have shown a lack of good faith. He may have displayed an overweening optimism and extremely poor business judgment. Nevertheless, the question is,—was he, upon the record, an embezzler?

If he was, then Schriver, who performed the transactions and received the bank's money, perhaps might be equally chargeable with guilt. Wrongful commissions of Schriver are necessary to establish wrongful commissions by Heen. As an accessory, his guilt is the same as that of the principal. Comp. Laws 1913, § 10,705.

If Heen was an embezzler, then the directors and other officials of the bank continued Heen in employment with full authority to act and continue his wrongful commissions, after full knowledge of his relations with Schriver.

There is no evidence shown and there is no claim made that Heen wrongfully secreted the bank's property. It is not asserted that Heen made any wrongful misappropriation of bank funds by loans to himself. It is not asserted nor shown that Heen in any respect falsified any of the records or books in the bank. All the transactions had between Heen and Schriver were a matter of record, entered either in the bank's books or in the public record.

The charge of embezzlement depends solely upon the transactions that Heen had with Schriver in farming operations. To uphold this charge, the plaintiff relies upon misappropriation with fraudulent intent concerning loans apparently good on their face, but, in fact, poorly secured and practically worthless; upon permitting Schriver to sell mortgaged property and to borrow money and dissipate the proceeds; upon permitting Schriver to use hay, feed, and grain in a joint farming enterprise; in receiving insurance moneys for his own personal use and in making a contract not in good faith.

It is evident that this criminal charge cannot be upheld so far as the association of Heen and Schriver is concerned in 1918 concerning the

flax crop. The same comment may be made concerning the wheat crop of 1919 upon the flax land.

Concerning the hog venture, Schriver testifies that Heen was jointly interested. Heen denies any connection. In any event this discrepancy in the testimony is deemed immaterial. There is no showing in the evidence of misappropriation of any bank funds or hogs by Heen. He never received any profit thereupon. The bank had a first chattel mortgage upon the same. It received whatever proceeds accrued in the disposition of the hogs. The venture apparently was unsuccessful. Schriver sustained a large loss in a snow storm in 1920. The bank received the interest that Schriver transferred to Heen in 1920 by bill of sale.

The transactions had with Schriver in 1920 in farming operations are more involved. It appears clear that the crops of Schriver in 1919 were poor. It was necessary for him to become, if he continued farming, a large borrower. He was an extensive farmer. He enjoyed good credit at four different banks. Neither his ability as a farmer nor his credit as a customer has been questioned, except as the fatalities of nature have brought it into question. Heen was in full control of the bank. He enjoyed a wide discretion in making loans. He had been engaged for two seasons with Schriver in a joint venture. Through crop losses Schriver had become a debtor. He was unable to pay such indebtedness. It was necessary for him either to have credit or to quit farming operations. There was no concealment practised in the execution of the contract for the year 1920. It was witnessed by the assistant cashier, who simply explained that he paid no attention to its contents, and by a director of the bank who does not testify at all concerning his signature thereto. It was then recorded by Heen with the register of deeds. Pursuant to this contract, large amounts of hail insurance were placed. No concealment was practised. A joint note was given for hail insurance premium. A joint application was made for hail insurance and a policy issued to Heen and Schriver jointly. Loans in increasing amounts, pursuant to this contract, continued to be made. Security was taken upon these loans for the bank. The security upon the personal property may have been inadequate and quite insufficient. The security upon the crops was a question of promise; one for nature's fulfilment. In May, 1920, Heen borrowed $1,000 from

the bank and credited it to Schriver's account. It is difficult to assume no knowledge of this transaction when it appears that the assistant cashier kept the books and the board of directors, at their meetings, examined the assets and paper in the bank. When hail losses occurred they practically destroyed the 1920 crop. The proceeds of the insurance came in the bank. The record fails to show any concealment in regard to the disposition of such proceeds. It is true that Heen took credit and gave credit to Schriver for items amounting each to about $760. It is true that he otherwise received some $1,400 for his personal use. But no concealment was practised. He used such moneys in part to pay on notes he owed the bank. The balance, in excess of half the amount, to which Heen was entitled, was either credited to Schriver, or charged against the Heen & Schriver account covering expenses of farming operations. These farming operations, for seed, grain, feed, hay, gas, and oil, etc., cost at least $4,700, for half of which Heen admitted his liability. No settlement ever took place between Heen and Schriver. Heen has frankly admitted a liability for half of the indebtedness. He has shown no disposition to avoid payment of such liability, or to secrete any assets of Schriver or any of the bank's moneys, or the proceeds thereof, so as to escape such liability.

No moneys of the bank were received by him. Whatever moneys Schriver received were expended in farming operations. If they were expended for Heen's benefit, he assumed, and was willing to assume, responsibility. He was given a large discretion in making loans; he possessed the right to loan to himself and such loans are not questioned.

In the fall of 1920 it is evident that the effect of the crop returns, available or promised, jeopardized the line of credit extended to Schriver. When explanations were requested from Heen by the directors and other officials of the bank, he readily gave the same and produced, without hesitation, the contract with Schriver. Even after the directors and the other banking officials had become fully cognizant of Heen's relations with Schriver, Heen, nevertheless, was continued in his office with the same control and discretion as he formerly had. The acts of the banking officials concerning these farming operations, after full knowledge of Heen's relations with Schriver, do not show anywhere an interpretation of criminal intent upon the acts of Heen.

It must be noted that in the fall of 1920 frequent meetings of the

directors were had. McClure and Baker were then active directors working in the bank. Although the report was made to the bonding company in January, 1921, Heen, nevertheless was re-employed at the annual meeting of the directors and continued in employment until about June 1st, 1921. Together with the directors he consulted with Schriver, attempting to adjust the loans. A new contract was made. Heen had authority to make this contract. It was recognized by the banking officials by taking new security, by not denying liability for the $950 loan made by Heen to Schriver, and by further loans thereafter made when Davis took control as cashier. Furthermore, the evidence discloses that the situation has improved although Schriver again suffered hail losses in 1921. The increased loans made to Schriver in 1921, even including the $950, is offset by hail insurance moneys paid or available; thereby, some reduction will be made on his present indebtedness. This may be further reduced when an accounting is had concerning his crops of 1921. Furthermore, the contract of 1920 may have afforded, in some respects, a protection to the bank and not a detriment; for in 1920, when extensive hail losses occurred, crop detriments were suffered and financial stringency ensued. The crop interest of Heen may have served as a protection to the bank, as against other creditors of Schriver interested in such crop, unless it be claimed, or the evidence should show, that Heen had intended to repudiate any liability for Schriver's indebtedness. On the contrary, the evidence shows admission of liability by Heen for part of Schriver's indebtedness in the farming operations and no concealment practised in connection with the collection of the insurance moneys.

Although it may not be said or be held that the business judgment or practices of Heen may be commended in thus permitting the large extension of credit to Schriver in 1920, nevertheless, the conclusion cannot be escaped that the directors and other officers of the bank both recognized and countenanced this extension and continuation of credit. During the time of the extension and continuation of such credit at least two directors and two officers of the bank, other than Heen, were actively engaged at work in the bank. It is quite evident that these banking officials jettisoned many business practices and much business judgment, consonant with good or conservative banking, in order to

save the Schriver cargo, and carry it into a port of financial safety. As the extension of credit mounted higher and higher, the fact of such extension of credit could not escape the attention and consideration of the banking officials. Some of them were actively engaged in the bank. No misappropriation of moneys loaned is shown. Every dollar was used for the purposes for which it was loaned. The evidence wholly fails to show any fraudulent intent or design either on the part of Heen or Schriver to misappropriate the money or defraud the bank. The fact that Heen was interested with Schriver in the farming operations does not per se show fraudulent intent. In the absence of such joint interest between Heen and Schriver, the extension of such credit to Schriver would not otherwise be justified. The bank books evidenced a relation between Heen and Schriver. The contract between them was filed in a public record. The banking officials, after full knowledge of all of the relations between Heen and Schriver, continued Heen's employment, recognized Heen's responsibility and interest, and acted thereupon. The presumption of no fraudulent intent appears in the record, as it apparently did to the banking officials, who, after full knowledge of the facts, continued Heen's employment and authority, and the extension of credit to Schriver.

If it be conceded that the evidence discloses the exercise of poor judgment against the best interests of the bank and in some transactions a lack of the best faith, nevertheless, we are convinced that there is a total failure to show any criminal intent or acts on the part of Heen sufficient to constitute embezzlement. See Ann. Cas. 1917C, 429, note; Farmers State Bank v. Title Guaranty & T. Co. 133 Mo. App. 705, 113 S. W. 1147. Judgment notwithstanding the verdict should be entered in favor of the defendant. The judgment is reversed and the action ordered dismissed with costs.

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

GRACE, J. (specially concurring). I am of the opinion that the principal opinion is correct in its holding to the effect that defendant Heen was not an embezzler.

A. E. ANDERSON, Respondent, v. S. J. TABOR COMPANY, Appellant.

(191 N. W. 778.)

Principal and agent — agent held not entitled to receive profit on sale of tractor made by distributor after mutual cancelation of sales contract.

In an action brought by plaintiff to recover profits on the sale of a certain tractor and certain money deposited with the defendant to indemnify the defendant, in certain conditions set forth in the opinion, plaintiff had judgment for such profit and the amount of money so deposited.

Held, for reasons stated in the opinion, that plaintiff was not entitled to receive profit on the sale of the tractor.

Opinion filed December 14, 1922.

Agency, 2 C. J. § 421 p. 756 n. 67.

An appeal from a judgment of the District Court of Cass County, and an order denying a motion for judgment, notwithstanding the verdict or in the alternative for a new trial, *A. T. Cole*, J.

Judgment modified and affirmed.

Pierce, Tenneson, Cupler & Stambaugh, for appellant.

It is also true that where no exclusive territory is granted, the principal is not precluded from the right to make sales within the territory himself, or to appoint other agents within the same territory. King Powder Co. v. Dillon, 96 Pac. 439; Schroeder v. Fine, 131 N. Y. Supp. 575; J. I. Case Threshing Mach. Co. v. Wright Hardware Co. 130 S. W. 729; Hilliker v. Northwest Thresher Co. 122 N. W. 906; Roberts v. Minneapolis Threshing Mach. Co. 67 N. W. 607.

W. J. Courtney, for respondent.

GRACE, J. This is an appeal from a judgment of the district court of Cass county in favor of plaintiff for $457, and from an order denying defendant's motion to vacate the verdict and for judgment in defendant's favor, or for a new trial.

The facts necessary to be stated in the disposition of this case are in substance as follows: The defendant, during the time of the agreement hereinafter mentioned, was engaged in handling Allis-Chalmers, 18-30, Tractors. The method of conducting the business was substan-

tially as follows: It made sales agreements with those desiring to sell tractors through it. In the sales agreement the net cost and selling price of the tractors were stated. It made such agreement with plaintiff. The agreement is defined as a contract order or an agreement of sale. Plaintiff ordered five tractors at the list price of $1,885 each. The tractors were manufactured at Milwaukee, or in any event were to be shipped from there. The order provided that one tractor should be shipped January 20th, 1920, and four on April 20th, 1920. One tractor was shipped and settled for by the plaintiff. No controversy arises here concerning it. The plaintiff had also endeavored to sell a tractor to one, P. G. Duncan, who lived in the village of Sharon. He was not successful in closing a deal with him. Thereafter the defendant did sell Duncan a tractor and plow for $2,000. In this deal Duncan paid the freight. Defendant set up the tractor for Duncan, on its arrival at Sharon. Though plaintiff made no sale to Duncan, he nevertheless claims a profit on the transaction, equal to what he would have made had he sold it. Whether he is entitled to such profit is one of the principal questions presented.

The agreement contained the following: "I agree to solicit and sell machinery only in the territory as outlined as follows: Sharon, North Dakota, and vicinity, also Aneta, North Dakota, and vicinity." "I agree to thoroughly canvass for business and to do all in my power to properly promote the trade and business of Allis-Chalmers Company, and their best interests in my territory." "If I sell any of these machines outside the territory described above, you will deduct from my bond an amount equal to my commission on the machine so sold. If my bond be not sufficient I will pay you the shortage." "You reserve the option of taking away from me any portion of the territory covered by this contract provided in your opinion it is not being organized properly by me."

The terms of settlement for the tractors were contained in a special agreement made part of the general agreement. These stipulations, together with others not necessary here to mention, were agreed to by the plaintiff and the agreement signed. As above in substance stated, one tractor was shipped to plaintiff, sold by him in his territory and settled for. No question arises in this case concerning that tractor.

On March 16th, 1920, the plaintiff wrote the defendant the follow-

ing letter: "I want to remind you that you must not send in any tractors until I send you an order. I have a man on that is going to buy a tractor and plow. He said that he had been in to see you and all the others, but that he had not decided which one to get, after being to Fargo three times to look them over. If you send a man by here be sure to have him stop off. I wanted one follow up to-morrow only that we are having a regular blizzard, therefore, will let it go.

"Yours very truly,

"A. E. Anderson."

The defendants in answer to this, wrote a letter dated March 17th, as follows: "We have your letter of the 16th and in compliance with your request, will not ship any more tractors to you unless on your written order.

"We are pleased to learn that you have a few good prospects, and are advising Mr. Bergan accordingly. He will arrange to call on you in the near future, and will be glad to assist you in the sales in sight.

"Trusting you will have a few good sales in sight for spring delivery, we remain,

"Yours very truly,

"S. J. Tabor Company."

The plaintiff never ordered any more tractors.

We are quite clear that the plaintiff is entitled to no profit of the sale made by defendant to Duncan. In the first place, to all intents and purposes, he had canceled his order for the remaining tractors, and that cancelation was accepted by the defendant, and this very promptly as will be seen from the letters above set forth. The plaintiff sent in no more written orders and none were to be shipped, unless he did. This, in effect, releases him from his order for the tractors. Defendant does not seek to hold him liable on that order for the tractors he ordered, but which, at his request were not shipped. In these circumstances, we see no reason why the defendant did not have a perfect right to proceed to make any sales in the territory described in the agreement that were available. In addition to the reasons given why plaintiff may not recover the profit claimed, there may be added another: Allowing for t he reasonable cost of a plow, the tractor and plow were sold to Duncan

approximately at the factory price. No greater profit was made by the defendant in the transaction than if plaintiff had performed his contract. The contract is loosely drawn with reference to the definiteness of territory in which plaintiff had the right to sell, and in view of what already has been stated, it is unnecessary to give further attention to that matter.

However, as to plaintiff's rights to receive back the $200, which he deposited as a guaranty of his good faith in the performance of the contract, we reach the conclusion that plaintiff is entitled to receive back this sum. There is no charge that he has not acted in good faith and, as we have seen it, the contract was virtually canceled and the cancelation accepted. It then became the duty of the defendant to return the $200. We think there is no other question in this case that needs any further consideration. Those we have considered and determined dispose of the case. We are of the opinion, therefore, that plaintiff is entitled to recover nothing except the $200, and the judgment is modified accordingly; and as so modified is affirmed. Neither party is entitled to costs or disbursements on appeal.

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

DIXON-REO COMPANY, a Corporation, Respondent, v. HORTON MOTOR COMPANY, a Corporation, Appellant.

(191 N. W. 780.)

Assignments — provision not to assign goes only to performance and does not affect assignment of money due thereon made after cancelation.

A provision in a contract between an automobile distributor and an automobile dealer to the effect that the dealer will not assign the contract or any rights thereunder without the written consent of the distributor goes only to the rights and duties incident to the performance of the contract, and does not render void an assignment by the dealer of the money due on the contract,

Note.—On property and rights assignable, see 2 R. C. L. 299; 1 R. C. L. Supp. 584; 4 R. C. L. Supp. 120.

made after the contract has been canceled, and the obligations assumed by the dealer thereunder have been fully discharged.

Opinion filed December 16, 1922.

Assignments, 5 C. J. § 31 p. 865 n. 20; § 44 p. 877 n. 7 New; § 47 p. 883 n. 39.

Appeal from the district court of Grand Forks County, *Englert*, J.

Action to recover moneys due upon a contract.

Defendant appeals from a judgment and from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

Affirmed.

Lawrence, Murphy & Nilles, for appellant.

While counsel feels there is merit in the other assignments of error, yet we feel that the propositions hereinafter urged are so conclusive in favor of the defendant that we are satisfied to permit the judgment of this court to rest upon the determination of such question.

The general rule with respect to assignments of contracts, and stipulations forbidding the same is stated in 5 C. J. pp. 874–876.

The rule is also well stated in the case of American Bonding Co. v. R. R. Co. 124 Fed. 87, where the court said in part:

"In Pollock on Contracts, p. 201, it is stated that the origin of the rule that the benefit of a contract, i. e., the right of one party thereto to have the other perform an obligation on his part arising therefrom could not be assigned at common law, so as to enable the assignee to sue in his own name for a breach thereof was attributed by Coke to the 'wisdom and policy of the founders of our law' in discouraging maintenance and litigation. In opposition to this the author states: 'But there can be little or no doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor.' . . .

"In the case of Devlin v. New York, 63 N. Y. 8, Judge Allen says: 'Parties may, in terms, prohibit the assignment of any contract, and declare that neither personal representatives nor assignees shall succeed to any right in virtue of it, or be bound by its obligations.'" The rule is also so stated in 2 R. C. L. p. 599.

And in the case of Carter v. State, involving certain rights under an assignment of a contract of printing with the state (8 S. D. 156), the court cites with approval the following language used by the court in 63 N. Y. 8:

"As said by the court of appeals of New York in Devlin v. Mayor, 63 N. Y. 8, the 'assignability of a contract must depend upon the nature of the contract and the character of the obligations assumed, rather than the supposed intent of the parties, except as that intent is expressed in agreement. Parties may, in terms, prohibit the assignment of any contract, and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations."

Carter v. State, 8 S. D. 156.

And in the famous and leading case of Mueller v. Northwestern University, 195 Ill. 236, 88 Am. St. Rep. 194, 63 N. E. 110, it was said:

"The parties to a contract may, in terms, prohibit its assignment so that an assignee cannot succeed to any rights in the contract by virtue thereof to him."

McIntyre, Burtness & Robbins, for respondent.

Where a contract is wholly executed the balance which may be due thereunder may be assigned notwithstanding restriction in the contract against assignment thereof. Butler v. San Francisco Gas & E. Co. 141 Pac. 818.

The mere assignment of moneys due or to become due although the contract may not be assigned, is held not to be an assignment of the contract. 141 Pac. 818.

The same rule has been laid down in the following cases: National Surety Co. v. Maag, 86 N. E. 862; Chapin v. Pike, 68 N. E. 42; Taylor v. Black Diamond Mine Co. (Cal.) 25 Pac. 51.

Where the contract contemplated the performance of personal services involving the exercising of knowledge, taste or skill it is not assignable by the party under obligation to make such performance. Money due under contract or personal services can be assigned notwithstanding the contract itself is not assignable. 5 C. J. 882. 1 Williston, Contr. p. 787; Fortunato v. Patten (N. Y.) 41 N. E. 572.

A provision that a contract shall not be assigned or sublet will not

invalidate an assignment of the money earned by the contractor under the contract. Bank of Harlan v. Bayonne (N. J.) 21 Atl. 478; Johnson v. Eklund (Minn.) 75 N. W. 14; Sharp v. Edgar, 3 Sandf. 379.

The defendant has waived its right to insist that the Dixon Motor Company could not assign to plaintiff the money due from defendant, even conceding for sake of the argument that defendant's construction of the clause in question is the correct one. Williams v. Corey, 21 N. D. 509; Griggs v. Landis, 21 N. J. Eq. 494; Barker Auditing Co. v. Bennett, 106 N. E. 990.

CHRISTIANSON, J. On June 30th, 1919, the defendant entered into two written contracts with George Dixon and Homer Dixon, doing business as copartners under the firm name of Dixon Motor Company. Under these contracts the defendant granted to said Dixon Motor Company the exclusive right to sell Maxwell automobiles and trucks in certain specified territory in the northeastern part of North Dakota and the northwestern part of Minnesota. The prices to be paid the defendant by said Dixon Motor Company for such automobiles and trucks, and the discounts or commissions to be paid by said defendant to said Dixon Motor Company for the sales made were specifically stated in the contracts. According to their terms the contracts were to continue in force and govern all transactions between the parties thereto until June 30, 1920; but the contracts contained provisions to the effect that either party should be at liberty to cancel and terminate the same at any time upon written notice to the other party. The Dixon Motor Company was required to make, and did make, a deposit with the defendant of $250 "as a guaranty of the payment of his repair parts account and to avoid the necessity of C. O. D. shipments of such repair parts, etc." The contracts, however, provided that at the expiration of the agreement such deposit, less any amount due the defendant, should be returned to the Dixon Motor Company. Each of the contracts contained the following stipulation on the part of the Dixon Motor Company: "That he will not assign this agreement nor any rights hereunder without the written consent of the distributor (Horton Motor Company), and that if he makes any change in any car or truck supplied by the company, the liability of the company under its warranty shall

cease." The defendant sold to the Dixon Motor Company a large number of automobiles and trucks, and also certain repairs, and received payment therefor according to the terms of the contracts. On April 13, 1920, the defendant canceled the contracts by giving written notice of cancelation. At the time of the cancelation the defendant was indebted in certain sums to the Dixon Motor Company as a result of the business relations existing under the contracts. On or about the 18th day of December, 1919, the members of the Dixon Motor Company organized the plaintiff corporation, and the corporation thereupon succeeded to the business of the copartnership. On October 13, 1920, the Dixon Motor Company, by written instrument, duly assigned to the plaintiff any and all sums of money due to the Dixon Motor Company from the defendant. The plaintiff thereupon brought this action to recover such moneys. The case was tried to a jury. A verdict was returned in favor of the plaintiff. Defendant moved in the alternative for judgment notwithstanding the verdict or for a new trial. The motion was denied, and defendant has appealed.

The sole question presented on this appeal is whether the assignment from the Dixon Motor Company to the plaintiff corporation was valid. In other words whether such assignment was inhibited and rendered invalid by the provision in the contracts to the effect that the Dixon Motor Company would not assign the agreement or any rights thereunder without the written consent of the Horton Motor Company.

The question so presented is primarily one of interpretation or construction of the contracts (1 Williston, Contr. p. 789); that is of ascertaining and giving effect to the intention of the contracting parties. (5 C. J. p. 877). A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful. Comp. Laws, 1913, § 5896. And the whole of the contract must be taken together so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others. Comp. Laws, 1913, § 5901. However broad may be its terms a contract extends only to those things concerning which it appears that the parties intended to contract. Comp. Laws, 1913, § 5908. And particular clauses of a contract are subordinate to its general intent. Comp. Laws, 1913, § 5910.

The contracts involved in this controversy related to the sale of auto-

mobiles and trucks. The defendant granted to the Dixon Motor Company the right to sell automobiles and trucks in certain allotted territory. The primary object of the contracts was the sale of automobiles and trucks. The contracts contained many provisions outlining the respective duties and obligations of the parties as regards the business relations thus assumed. The provisions were all intended to effectuate the main purpose of the contracts. There were good reasons why the defendant should insist that the Dixon Motor Company must not have the right to assign the contracts or any rights thereunder, except with the written consent of the defendant, as long as the contracts remained in force and the business relations to be controlled thereby continued to exist. But it is quite clear that most of these reasons would not exist after the business relations intended to be controlled by the contracts had been terminated. The contracts were executed on account of the business relations between the parties. Their purpose was to fix the obligations and rights of the contracting parties. The stipulation against assignment was merely collateral to the main purpose of the contracts, and designed as a means of securing and enforcing to the defendant performance of what the Dixon Motor Company had agreed to perform under them. Johnson v. Eklund, 72 Minn. 195, 75 N. W. 14. The business relations between the parties have ceased to exist. The contracts have been terminated. There is nothing further to be done by the Dixon Motor Company under it. The chief object of the contracts, that is, the subject-matter of the contracts, has been fully executed. At the time the Dixon Motor Company executed the assignment to the plaintiff corporation there was nothing left except the obligation resting on the defendant to pay the amount which it owed the Dixon Motor Company. There is nothing personal in the right to receive money due under a contract. 5 C. J. 564. And there is no reason readily apparent why the parties should have contracted that the right to receive moneys due under the contracts should be nonassignable. An assignment of the right of such moneys could not prejudice the defendant, for by the express terms of our statute the assignment would be without prejudice to its rights to any set-off or other defense which it had against the Dixon Motor Company at the time or before notice of the assignment. Comp. Laws 1913, § 7396.

Our statute, also, provides: "The burden of an obligation may be

transferred with the consent of the party entitled to its benefit, but not otherwise." Comp. Laws 1913, § 5782.

"A right arising out of an obligation is the property of the person to whom it is due and may be transferred as such." Comp. Laws 1913, § 5783.

"A thing in action is a right to recover money or other property by a judicial proceeding." Comp. Laws 1913, § 5445.

"A thing in action, arising out of the violation of a right of property or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except when in the cases provided by law it passes to his devisees or successor in office." Comp. Law 1913, § 5446.

While these statutory provisions do not nullify stipulations against assignments contained in contracts, 5 C. J. 876, they evidence a clear intention on the part of the legislature to distinguish between the burden of an obligation and a right arising out of an obligation, as regards the right of a party to transfer the same. The legislature has specifically said that the restrictions which the statute (§ 7382) places on the transfer of the burden of an obligation, shall not apply to the transfer of the right arising out of an obligation; that such right is the property of the person to whom it is due and may be transferred as such. § 5783, supra. The rule embodied in the statute is in harmony with that generally applied by the courts in dealing with contracts nonassignable in character. Thus, Corpus Juris (5 C. J. 882) says: "Money due under a contract for personal service can be assigned notwithstanding the contract itself is not assignable. See also 5 C. J. 864, 865.

In our opinion the stipulation against assignment under consideration here was not intended to prohibit the Dixon Motor Company from assigning the right to moneys due them from the defendant under the contracts, after the contracts had been canceled, and the business relations to which they related had been terminated. It will be noted that the stipulation is merely a part of a sentence. The remainder of the sentence relates to warranties given by the company as to cars and trucks sold under the contracts. We believe that the stipulation was intended to apply to the duties and rights of the parties as regards the performance of the contracts. That is, for instance, the Dixon Motor

Company could neither assign the contracts as a whole nor could they assign any rights thereunder, such, for instance, as the right to purchase cars or repair parts from the defendant at the prices stipulated in the contracts without the written consent of the defendant. After the contracts had been canceled and the business relations terminated certain moneys were due the Dixon Motor Company. The right to such moneys was the property of the Dixon Motor Company which they were entitled to transfer as such. § 5783, supra. It will not be assumed that they have deprived themselves of the right to transfer such property. In other words the stipulation prohibiting the assignment of the contracts and rights thereunder will not be construed as prohibiting the assignment of moneys which had been earned by the Dixon Motor Company, and which remained due to them, unless the language used evidenced a clear intention on the part of the contracting parties that it was to have that effect.

In considering the effect of a stipulation against assignment in a building contract, the supreme court of California, Butler v. San Francisco Gas & E. Co. 168 Cal. 32, 41, 141 Pac. 822, said: "One of the causes of action set up by plaintiff as a basis of a recovery against defendant was an assignment by William A. Butler to him of all moneys due or to become due under the original contract which was made after the work was fully performed and accepted by the defendant. The theory of the trial court was that this assignment of these moneys due under the original contract was void, as controverting the clause of the contract against assignment. But it is apparent from the terms of the prohibition against assignment that this went only to the performance of the work itself, which was to be personally supervised by William A. Butler. It did not apply to the benefits accruing on performance of the work. He was to perform the work before any liability could exist for the final payment. That work was done, and all that was assigned was the final payment earned, but not yet due. The mere assignment of moneys due or to become due, although the contract may not be assigned, is held not to be an assignment of the contract. National Surety Co. v. Maag, 43 Ind. App. 16, 86 N. E. 862; Re Wright, 18 L.R.A.(N.S.) 193, 85 C. C. A. 206, 157 Fed. 544; Dickson v. St. Paul, 97 Minn. 258, 106 N. W. 1053; Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572."

See, also, 1 Williston, Contr. pp. 787–789; 3 Cal. Jur. pp. 239–240; Johnson v. Eklund, 72 Minn. 195, 75 N. W. 14; Lowry v. Duluth, 94 Minn. 95, 101 N. W. 1059; Shively v. Semi-Tropic Land & Water Co. 99 Cal. 259, 33 Pac. 848.

It follows from what has been said that the judgment and order appealed from must be affirmed. It is so ordered.

BIRDZELL, Ch. J., and ROBINSON, GRACE, and BRONSON, JJ., concur.

BINGENHEIMER MERCANTILE COMPANY, a Corporation, Respondent, v. LOUIS WEBER, Appellant.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Garnishee.

(27 A.L.R. 1392, 191 N. W. 620.)

Garnishment — situs of debt not necessarily domicil of creditor.

1. For purposes of garnishment under § 7567, Comp. Laws, 1913, the situs of a debt is not necessarily the domicil of the creditor.

Garnishment — courts have jurisdiction to garnish railroads doing business in state.

2. Where a resident of this state sues a resident of Montana, obtaining substituted service, and where he garnishees a railroad company doing business in both states, but not organized under the laws of either, and the latter makes a return, showing indebtedness owing to the defendant, it is *held:*

The courts of this state have jurisdiction to render a valid judgment in garnishment.

Opinion filed December 18, 1922.

Garnishment, 28 C. J. § 242 p. 194 n. 68, p. 196 n. 76 New.

Note.—On place of payment of debt as affecting jurisdiction to garnish the same, see notes in 3 L.R.A.(N.S.) 608, and 20 L.R.A.(N.S.) 264.

On jurisdiction to garnish a debt due from a foreign corporation doing business within the state to a nonresident, arising from business outside the state, see note in 27 A.L.R. 1396.

On situs of debt for purpose of garnishment, see L.R.A.1915F, 880; 12 R. C. L. 819 et seq.; 2 R. C. L. Supp. 1490; 5 R. C. L. Supp. 655.

On the question of situs of a debt for the purpose of garnishment, see notes in 69 Am. St. Rep. 117; and 72 Am. St. Rep. 188.

Appeal from an order of the District Court of Morton County, *Berry*, J.

Affirmed.

A. T. Faber, for appellant.

Where there is no personal service upon the defendant within the state, the court must have jurisdiction of the property or debt sought to be reached by process of garnishment, and in order to warrant a judgment against a garnishee, it is absolutely essential, that at the time of the process he should have property of the defendant in his possession within the state, or be indebted to him in an amount certain, payable therein. 20 Cyc. p. 1036 (5); Montrose Pickle Co. v. Dobson, 40 N. W. 705; Am. Cent. Ins. Co. v. Hattler, 56 N. W. 711; Buckley Pipe Line Co. v. Fee, 62 Ohio St. 543.

A court has no jurisdiction or power to acquire a garnishee having property of a defendant in its possession without the state to surrender the same into the custody of the court. Bates v. Chicago etc. R. Co. 19 N. W. 72; McShane v. Knox, 114 N. W. 955; Kuehn v. Nero, 130 N. W. 56; Swedish Am. Nat. Bank v. Blecker, 75 N. W. 740.

Sullivan, Hanley & Sullivan, for respondent.

All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no locus or situs, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere. Chicago, R. I. & P. R. Co. v. Sturm, 43 L. ed. 1144.

Even in the case of a debt payable at a place certain, it is suable wherever the debtor may be found and served with papers. Tootle v. Coleman, 107 Fed. 41, 57 L.R.A. 120; Wyeth v. Lang (Mo.) 27 L.R.A. 651; Kansas City, P. & G. R. Co. v. Parker (Ark.) 86 Am. St. Rep. 205, 63 S. W. 996; Dinkins v. Crunden-Martin Woodenware Co. (Mo.) 73 S. W. 246; Pomeroy v. Rand, McN. & Co. (Ill.) 41 N. E. 636; Bragg v. Gaynor, 85 Wis. 468, 21 L.R.A. 164, 55 N. W. 919; Sexton v. Phœnix Ins. Co. (N. C.) 43 S. E. 479.

A creditor has the right to garnish, in a proceeding in rem, and upon constructive service of process, a debt due to a nonresident from a foreign corporation doing business within the state where the garnishment proceeding was instituted, and liable to service there. Stone v. Drake (Ark.) 96 S. W. 197; Persons v. Williams-Echols Co. (Ark.)

169 S. W. 223; Sutton v. Heinzle, 84 Kan. 756, 34 L.R.A.(N.S.) 238, 115 Pac. 560; Wiener v. American Ins. Co. (Pa.) 23 L.R.A. (N. S.) 593; E. L. Wilson Hdw. Co. v. Anderson (Tex.) 54 S. W. 928; Bristol v. Brent (Utah) 110 Pac. 356.

The criterion seems to be, not the place of payment of the debt, but the ability of the principal defendant, under the local statutes, to have maintained an action in the state in which the garnishment proceedings are commenced, against his debtor. Mooney v. Buford & G. Mfg. Co. 72 Fed. 32; Lancashire Ins. Co. v. Corbetts (Ill.) 36 L.R.A. 640, 56 Am. St. Rep. 275, 46 N. E. 631; German Bank v. American F. Ins. Co. (Iowa,) 32 Am. St. Rep. 316, 50 N. W. 53; Pittsburg, C. C. & St. L. R. Co. v. Bartels (Ky.) 58 S. W. 152; Howland v. C. R. I. & P. R. Co. (Mo.) 36 S. W. 29; Datz v. Chambers, 3 Pa. Dist. R. 353; Neufelder v. German American Ins. Co. (Wash.) 22 L.R.A. 287, 33 Pac. 870; Harris v. Balk, 49 L. ed. 1023.

Birdzell, Ch. J. This is an appeal from an order entered in the district court of Morton county, denying a motion of the defendant to dismiss garnishment proceedings. The plaintiff is a North Dakota corporation, the defendant a resident of Montana, and the garnishee a corporation doing business and authorized to do business in both North Dakota and Montana, but not organized under the laws of either state. The action is one to recover upon a promissory note and substituted service was obtained upon the defendant in Montana. Garnishment summons was served upon the Northern Pacific Railway Company and a disclosure made showing an indebtedness of $87.18 owing by the garnishee to the defendant. The defendant appeared specially by his attorney and moved to dismiss the garnishment. The debt owing by the garnishee to the defendant is for wages earned in Montana. The sole question presented is whether or not the indebtedness of a foreign corporation, authorized to do business in this state, to an employee for wages earned in another state, of which the employee is a resident, is subject to garnishment in this state, in a suit brought by a resident against the employee, where substituted service upon the latter is had.

Our garnishment statute, § 7567, Comp. Laws, 1913, provides:

"Any creditor shall be entitled to proceed by garnishment in any court having jurisdiction of the subject of the action against any per-

son, including a public corporation, who shall be indebted to or have any property whatever, real or personal, in his possession or under his control, belonging to such creditor's debtor, in the cases, upon the conditions, and in the manner prescribed in this chapter."

Does the garnishee corporation have in its possession, or under its control, property belonging to the plaintiff's debtor, within the meaning of the foregoing statute, so as to render such property subject to garnishment? The question of jurisdiction for garnishment, or for attachment purposes, is one that has not been found easy of solution, owing, principally, to the great variety of facts under which the question has been presented at different times, and to the seeming conflict of rights claimed under the jurisdiction of different states. For some purposes, for instance, a debt is regarded as the property of the creditor, following him wherever he may be under the maxim "mobilia sequuntur." In some jurisdictions, by force of the maxim, the situs of a debt has been held to be the domicil of the creditor and the credit could not be reached by garnishment in another jurisdiction. See, Central Trust Co. v. Chattanooga R. & C. R. Co. (C. C.) 68 Fed. 685, and cases therein cited. This, however, as will appear later in this opinion, is not the view adhered to by the weight of judicial authority. Obviously the foreign attachment and garnishment laws are framed on a theory opposed to the maxim. They presuppose that, though the debtor may be beyond the jurisdiction of the state, property left behind, in the shape of a credit, is still subject to the jurisdiction of the court to the extent that it may be applied upon such creditor's debts. Otherwise, there could be no such thing as foreign garnishment or attachment applicable to a chose in action. Harvey v. Great Northern R. Co. 50 Minn. 405, 17 L.R.A. 84, 52 N. W. 905; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 36 L.R.A. 640, 56 Am. St. Rep. 275, 46 N. E. 631.

Since, then, for the purposes of garnishment, the credit sought to be garnished does not necessarily follow or attach to the nonresident creditor, it remains to be seen whether or not it is so far controlled by the jurisdiction of the debtor that it may be rendered subject to garnishment here. Different tests to determine the answer to this question have been proposed at various times. It has been held that jurisdiction would not exist in the forum of the plaintiff's and garnishee's domicil, if the debt sought to be garnished were payable elsewhere, or if the

debt represented business done or moneys earned by the defendant elsewhere. Missouri P. R. Co. v. Sharitt, 43 Kan. 375, 8 L.R.A. 385, 19 Am. St. Rep. 143, 23 Pac. 430; Drake v. Lake Shore & M. S. R. Co. 69 Mich. 168, 177, 13 Am. St. Rep. 382, 37 N. W. 70; Keating v. American Refrigerator Co. 32 Mo. App. 293; Todd v. Missouri P. R. Co. 33 Mo. App. 110 (overruled by Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co. 127 Mo. 242, 48 Am. St. Rep. 626, 29 S. W. 1010, 27 L.R.A. 651; Bullard v. Chaffee, 61 Neb. 83, 51 L.R.A. 715, 84 N. W. 604; Wright v. Chicago, B. & Q. R. Co. 19 Neb. 175, 56 Am. St. Rep. 747, 27 N. W. 90. And too, various facts have been thought to signify that a debt was payable elsewhere when such facts would not, for other purposes, warrant such assumption.

Regardless of the conflict introduced in the authorities dealing with this question, due more or less to the consideration mentioned above, we think the true principle and rule of decision is that laid down by the United States supreme court, in the case of Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 716, 43 L. ed. 1144, 1146, 19 Sup. Ct. Rep. 797, in which it was said:

"The proposition that the situs of a debt is where it is to be paid is indefinite. 'All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no locus or situs, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere.' 2 Parsons, Contr. 8th ed. 702. The debt involved in the pending case had no 'special limitation or provision in respect to payment.' It was payable generally and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose. Embree v. Hanna, 5 Johns. 101; Hull v. Blake, 13 Mass. 153; Blake v. Williams, 6 Pick. 286, 17 Am. Dec. 372; Harwell v. Sharp Bros. 85 Ga. 124, 8 L.R.A. 514, 21 Am. St. Rep. 149, 11 S. E. 561; Harvey v. Great Northern R. Co. 50 Minn. 405, 17 L.R.A. 84, 52 N. W. 905; Mahany v. Kephart, 15 W. Va. 609; Leiber v. Union P. R. Co. 49 Iowa, 688; National F. Ins. Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663; Holland v. Mobile & O. R. Co. 16 Lea, 414; Pomeroy v. Rand, McN. & Co. 157 Ill. 176, 41 N. E. 636; Berry Bros.

v. Nelson D. & Co. 77 Tex. 191, 19 Am. St. Rep. 748, 13 S. W. 978; Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co. 127 Mo. 242, 27 L.R.A. 651, 48 Am. St. Rep. 626, 29 S. W. 1010; Howland v. Chicago, R. I. & P. R. Co. 134 Mo. 474, 36 S. W. 29."

In addition to the authorities cited in the foregoing quotation, see, also, Stone v. Drake, 79 Ark. 384, 96 S. W. 197; Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 60 L.R.A. 396, 66 N. E. 43; Leech v. Brown, 172 Iowa, 182, 154 N. W. 440; Wiener v. American Ins. Co. 224 Pa. 292, 23 L.R.A. 593, 73 Atl. 443; Biggert v. Straub, 193 Mass. 77, 118 Am. St. Rep. 449, 78 N. E. 770; Starkey v. Cleveland, C. C. & St. L. R. Co. 114 Minn. 27, L.R.A.1915F, 880, 137 N. W. 540; Wright v. Southern R. Co. 141 N. C. 164, 53 S. E. 831; National F. Ins. Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663; Bristol v. Brent, 38 Utah, 58, 110 Pac. 356; Rood, Garnishment, §§ 242–245.

Clearly the test of jurisdiction for garnishment, according to the foregoing authorities, is whether or not the debtor (garnishee) is subject to suit at the hands of the creditor, in the jurisdiction where the garnishment is sought. The United States Supreme Court applied this test in the case of Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084, in upholding the jurisdiction of the courts of Maryland to render a valid judgment in garnishment proceedings binding upon a nonresident creditor, where the garnishee was served while only temporarily within the state of Maryland. In this case the court said (page 226):

"The plaintiff in such proceeding in the foreign state is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really, in such proceeding, a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign state, his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the state where the attachment was sued out permits it.

"It seems to us, therefore, that the judgment against Harris in Maryland, condemning the $180 which he owed to Balk, was a valid judgment, because the court had jurisdiction over the garnishee by personal service of process within the state of Maryland."

We are of the opinion that this test, viz., the suability of the garnishee by the creditor, in the jurisdiction where he is sought to be garnished by his creditor's creditor, is more in harmony with the spirit of the garnishment statute than any other, for the reason that the statute is apparently designed to enable litigants to reach property of their debtors which the debtors themselves could reach if they desired to employ the remedies available to them within the jurisdiction.

An objection to this test was suggested by an able text writer, Wharton on the Conflict of Laws, § 368a, while the law was in a formative state. He remarked that until the United States Supreme Court should render a binding decision holding a judgment in garnishment proceedings, where the debtor was a nonresident, to be within the protection of the full faith and credit clause of the Federal Constitution, there would be danger that the garnishee might be involved in a double liability, being compelled to pay the judgment in the action in which he is garnished and the same claim again when sued by his creditor in another state. But this danger is entirely obviated by the decisions of the United States Supreme Court which clearly place the judgment obtained against a garnishee, where substituted service is had upon a nonresident defendant, within the protection of the full faith and credit clause. See Harris v. Balk, supra; Louisville & N. R. Co. v. Deer, 200 U. S. 176, 50 L. ed. 426, 26 Sup. Ct. Rep. 207. In the latter case it was expressly held that a foreign railway corporation, doing business in Florida, which had responded to process in garnishment proceedings there in an action against a nonresident debtor, served by publication, was protected by the full faith and credit clause of the Federal Constitution from subsequent suit in another state. See also Baltimore & O. R. Co. v. Hostetter, 240 U. S. 620, 60 L. ed. 829, 36 Sup. Ct. Rep. 475.

It follows from what has been said that the order of the trial court denying the defendant's motion to dismiss the garnishment proceedings was right, and it is affirmed.

CHRISTIANSON and ROBINSON, JJ., concur.

GRACE, J. (specially concurring). I concur with the principles of law announced in the syllabus.

BRONSON, J. (specially concurring). I concur in an affirmance in the absence of any showing of improper use of process in this state.

WILLIAM G. PAUL, Respondent, v. MARY W. GREEN, Appellant.

(191 N. W. 469.)

Process — affidavit for service of notice by publication held insufficient.

Where an affidavit for publication states that defendants are not residents of this state; that they reside in the county of Hennepin and state of Minnesota; that the affiant does not know and is unable to ascertain the particular place of residence or postoffice address of the said defendants, or either of them, and where no copy of the summons and complaint was mailed or served upon defendants, it is *held*, that such affidavit does not comply with the statutory prerequisites, §§ 7428, 7430, Comp. Laws, 1913, and that service based thereupon is invalid.

Opinion filed December 19, 1922.

Process, 32 Cyc. p. 475 n. 99.

Action upon a tax deed to determine adverse claims, in District Court, Sheridan County; *Nuessle*, J.

Defendant has appealed from an order refusing to vacate a default judgment.

Reversed and remanded.

McGee & Goss, for appellant.

The power to set aside judgments obtained by fraud is not dependent upon § 7483, but is inherent in all courts of record. Hence, the district court had power to vacate the judgment, notwithstanding that more than one year had elapsed after defendant had notice thereof.

Note.—On failure of affidavit for publication of summons to state facts required by statute as subjecting the judgment to collateral attack, see note in 25 A.L.R. 1258; 21 R. C. L. 1295; 3 R. C. L. Supp. 1224; 5 R. C. L. Supp. 1178.

Ryckowski v. Benz, 178 N. W. 284; Black, Judgm. § 321; Williams v. School Dist. 21 N. D. 198; Whittaker v. Warren (S. D.) 86 N. W. 638.

The same thing is adjudicated in Sharry v. Eszlinger (N. D.) 176 N. W. 938; Tuttle v. Tuttle, 181 N. W. 888.

This court has held under Atwood v. Tucker, 26 N. D. 622, that any qualification whatever of the required statutory statement voids it and renders service thereon invalid. It was there held that "defendant's last-known postoffice address is unknown," was insufficient and not synonymous with the statement "that the residence of the defendant was unknown." The following is from the opinion: "The fact that the plaintiff may have known the place of the defendant's residence and still have been able to truthfully declare on his oath that 'defendant's last-known postoffice address is unknown,' in itself is enough to condemn the affidavit as invalid as a substantial departure from statutory requirements." Ruby v. Pierce (Neb.) 104 N. W. 1142; Madison County Bank v. Shuman, 79 Mo. 527; 17 Enc. Pl. & Pr. 58; Minnesota Threshing Mfg. Co. v. L'Hedreux (Neb.) 118 N. W. 565; Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708; Galbraith v. Teufel, 15 N. D. 152, 107 N. W. 49.

The county auditor issued this deed without requiring any compliance for the filing of proof in his office of the provisions of our statute above quoted. Under the statute and the decisions of this court, the deed is void and a mortgagee may maintain this action. 26 R. C. L. 430; 37 Cyc. 1385, B; Bank v. Martin, 29 N. D. 269, L.R.A.1915D, 432, 150 N. W. 572.

Harry E. Dickinson, for respondent.

Statement.

Bronson, J. Defendant Green appeals from an order refusing to vacate a default judgment. The facts, necessary to be stated, are: 160 acres of land in Sheridan county are involved. Plaintiff holds a tax deed thereon issued for default, in payment of taxes levied in 1915. Defendant Green holds an unpaid mortgage thereon for $1,000 made in 1910. Plaintiff instituted an action to determine adverse claims. Defendant Green, one Fulmer, one Burkhart, a lumber company, and other persons unknown were named as defendants. Personal service

was made upon the lumber company. Service upon the other defendants was had by publication. The material portions of the affidavit for publication read:

"Wm. G. Paul, being first duly sworn, says that he is the plaintiff in the above-entitled action; that the defendants D. M. Fulmer, Mary W. Green, and Martin Burkhart, are not residents of this state; that they reside in the county of Hennepin and state of Minnesota; that the affiant does not know and is unable to ascertain the particular place of residence, or postoffice address of the said defendants or either of them."

The summons with notice of no personal claim was published six weeks, from July 23d, 1920, to August 27th, 1920, inclusive. A copy of the summons and complaint was not mailed nor served upon defendant Green. On August 18th, 1920, plaintiff's attorney made an affidavit of no answer by any of the defendants. Pursuant thereto, on October 27th, 1920, the trial court made its findings of fact and conclusions of law quieting title in plaintiff, free from any claim or lien by defendants. Accordingly, on October 29th, 1920, judgment was so entered. In February, 1922, pursuant to an order to show cause issued, defendant made a motion to vacate the default judgment. She presented to the court affidavits and a proposed answer wherein she explained her failure to pay taxes or to appear by reason of lack of notice. She attacked the validity of the tax deed and of the service by publication. She offered to make payment of the unpaid taxes and requested foreclosure of the mortgage subject to plaintiff's lien for taxes. The court made its order denying such motion. Plaintiff has appealed therefrom.

Among other grounds, defendant challenges the validity of the summons served by publication upon the defendant.

Decision.

We are of the opinion that defendants' contention concerning the service of the summons must be upheld and, therefore, this is the only question upon this appeal necessary to decide. Section 7428, Comp. Laws, 1913, provides for service by publication when defendant is not

a resident of the state. In such case it requires plaintiff to file an affidavit stating the place of defendants' residence, if known to the affiant, and, if not known, stating that fact. Section 7430, Comp. Laws, 1913, requires that a copy of the summons and complaint must, within ten days after the first publication of the summons, be deposited in some postoffice in this state, postage prepaid, and directed to the defendant, to be served at his place of residence unless the affidavit of publication states that the residence of the defendant is unknown.

It is well settled in this state that proceedings for securing service by publication must strictly comply with statutory provisions therefor. Roberts v. Enderlin Invest. Co. 21 N. D. 594, 132 N. W. 145; Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 626, 51 L.R.A.(N.S.) 597, 145 N. W. 587; Johnson v. Engelhard, 45 N. D. 11, 176 N. W. 134. Thus, an affidavit for publication which states that the whereabouts of defendant are unknown is insufficient. Krumenacker v. Andis, 38 N. D. 500, 165 N. W. 524. It will be noted that the affidavit in question states that defendants reside in the county of Hennepin and state of Minnesota. Necessarily, this presumes some knowledge by plaintiff of the residence of the defendants, and each of them. But plaintiff then states that he does not know and is unable to ascertain the *particular* place of residence, or postoffice address of defendants. The purpose of the statute is clear. Its language is definite. It requires the affidavit for publication to state the place of defendants' residence, it known, and if known to mail a copy of the summons and complaint to the defendant so that notice may be given direct. If defendants' residence is not known the statute requires such fact to be stated. The statute may not be construed to serve purposes of equivocation or to set aside rules of diligence that are required in ascertaining the residence of defendants preliminary to serving by publication. It is evident that one might know the residence of a particular defendant to be in Grand Forks or in Bismarck and yet not know the particular place of such defendant's residence. Yet, pursuant to plaintiff's affidavit and his contention, such an affidavit should be held sufficient because he did not know the particular place of residence of such defendant either in Grand Forks or Bismarck. It is sufficient to say that the affidavit does not comply with the statute, and that service predicated thereupon was invalid.

The order is reversed and the cause remanded for further proceedings with costs.

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

AMERICAN LOAN & INVESTMENT COMPANY, a Corporation, Appellant, v. JOHN A. DALEN, Respondent.

(191 N. W. 490.)

Appeal and error — where no proper or legal service of notice or of undertaking on appeal, it will be dismissed — service of notice of appeal and undertaking on a total stranger to record ineffectual.

In the above-entitled appeal, there was no proper or legal service of the notice of appeal or of the undertaking on appeal, hence, the appeal is dismissed.

Opinion filed December 21, 1922.

Appeal and Error, 3 C. J. § 1257 p. 1185 n. 26; § 1341 p. 1238 n. 53.

An attempted appeal from a judgment of the District Court of Stutsman County, *Coffey*, J.

Appeal dismissed.

William Maloney, for appellant.

GRACE, J. This is an attempted appeal from a judgment of the district court of Stutsman county. The plaintiff brought an action to cancel a certain contract between plaintiff and defendant, for the purchase of certain land. It had judgment of a cancelation. Personal service of summons was not made upon the defendant. The summons was issued and delivered to the sheriff of Stutsman county, who in his return stated that after search and inquiry he had been unable to find the defendant in Stutsman county and was unable to make personal service. E. L. Isensee, an officer of plaintiff corporation, made an affidavit on its behalf to the effect that the residence of the defendant was not known, and this, though the contract, as set out in the

complaint, shows that the defendant is of Nunda, Lake county, South Dakota. The summons was published; the matter was brought on for hearing at a regular term of the district court for Stutsman county. Defendant made no appearance and so far as this record shows, defaulted.

It is not necessary to the disposition of this case to enter into a discussion of what steps are proper and necessary under the laws of this state, relative to the procedure to be followed in obtaining constructive service of a summons. All information in that respect may be easily acquired by consulting our statutory requirements. This matter may be disposed of on other grounds. As we understand the matter, the case having been heard and it appearing that the defendant was in default, the court desired that plaintiff make findings of fact and conclusions of law covering the issues in the case. The plaintiff, however, contended that inasmuch as it was a default case, that this was unnecessary. The court then made such findings of fact as are in the record. They do not cover the real issues in the case. They merely recite what the complaint asserts, without making any actual finding as to the facts concerning the default. We think the plaintiff should have prepared findings of fact and conclusions of law covering the issues, and presented them to the court as it desired. The plaintiff feeling aggrieved at the court in this, and perhaps other matters involved, concluded the appeal from the judgment. But as there was no appearance by the defendant, either in person or by an attorney, the plaintiff desired the court to order a method of service of the notice of appeal and undertaking and that it permit the service on the clerk of court, under the provisions of § 7957, Comp. Laws, 1915; this the court declined to do, but did make the following order: "In that defendant is not a resident of this state, service of the notice of appeal and undertaking on appeal to supreme court may be made upon A. A. Eberhart, Minneapolis, Minnesota, and it is so ordered."

So far as this record is concerned, Eberhart is a total stranger to it. He does not appear in the case as an interested party, as an attorney, or in any other way. In these circumstances, service of the notice of appeal and undertaking upon him was a mere nullity and did not operate to effect an appeal, hence, there is nothing before this court. There is no useful purpose served in discussing any issues in this case

other than such as are sufficient to dispose of the appeal. The only thing that really can be properly done is to dismiss the appeal. The appeal is dismissed.

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

BRONSON, J. (specially concurring). I concur in a dismissal. It was proper for the trial court to specify a time within which the defendant might redeem. Ryan v. Bremseth, 48 N. D. 710, 186 N. W. 818.

CHRISTIANSON, J. (concurring specially). The notice of appeal states that the plaintiff "appeals from part of that certain *order for judgment* of the said district court, granted on the 28th day of August, A. D. 1922, and thereafter entered herein," etc. It is established by a long line of decisions in this state, that an appeal does not lie from an order for judgment. See, Malherek v. Fargo, ante, 123, 190 N. W. 176, and authorities cited therein. Hence the appeal must be dismissed. I deem it proper to say, however, that a careful examination of the judgment roll discloses no error.

THE STATE OF NORTH DAKOTA, Respondent, v. ARTHUR G. WEBER, Appellant.

(191 N. W. 610.)

Bastards — order denying new trial held erroneous where evidence tended to show and trial court intimated that verdict wrong.

Where a new trial is demanded in a bastardy proceeding on the ground that the evidence is insufficient to sustain the verdict which declared the defendant to be the father of the child; and the trial court in denying the motion distinctly expresses the belief that the verdict is wrong; that the evidence in the case shows that there is a greater probability that a person other than the defendant (who has been referred to in the evidence) is the father of the child; and where the transcript of the evidence adduced upon the trial fully justifies the views thus expressed by the trial court, the order denying a new trial will be set aside and a new trial ordered.

Opinion filed December 21, 1922.

Bastards, 7 C. J. § 140 p. 1000 n. 42.

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

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

Reversed.

McGee & Goss, for appellant.

J. J. Weeks, State's Attorney for Bottineau County, for respondent.

CHRISTIANSON, J. This is a bastardy proceeding. The jury returned a verdict declaring the defendant to be the father of the child. Judgment was entered in conformity with the verdict. Defendant moved for a new trial upon the grounds, among others, of insufficiency of the evidence to justify the verdict, and newly discovered evidence. The motion was denied and the defendant has appealed from the judgment, and from the order denying a new trial. After a careful consideration of the record transmitted to us on this appeal, we are of the opinion that the trial court erred in denying a new trial. In denying the motion for a new trial, the trial judge attached to, and filed with, the order, a memorandum opinion, wherein he stated:

"*The evidence is of so unsatisfactory a character and the results of the trial as a whole leaves my mind in such a state that if I had been a juror I could not have returned a verdict of guilty against the defendant. The defense was, to my mind, the most complete and satisfactory of any that I have ever heard in a case of this character, and the defendant's alibi was all but complete. It would seem more probable that the younger man suggested by the defendant as the girl's lover might be the father of the child rather than the defendant.* However, I am of the opinion that there are no errors of law in this case warranting the vacating of the judgment. The defendant has had two fair trials and two different and disinterested sets of jurors have found him to be the father of the child in question. I feel that the judgment of one man ought not to intervene to overthrow that of the twenty-four citizens of the community who have concluded otherwise after hearing all of the facts."

A careful examination of the evidence leads us to the conclusion that the views thus expressed by the trial court which we have italicized, are fully justified. Upon the preliminary examination held in the fall of 1917, the prosecutrix testified positively, and unequivocably,

that she had sexual intercourse with the defendant, at her home, on August 15th, and September 17th, 1917; that she never had intercourse, either with the defendant, or with any other man, at any other time. The undisputed evidence is to the effect that the physicians who examined her, at, or about, the time the prosecution was instituted, stated that she must have become pregnant at some date earlier than August 15th, but that she, nevertheless, persisted in her contention that the two dates stated were the only ones on which she had had sexual intercourse with anyone. She identified both of these dates positively; upon both occasions her parents were away and she at home alone. The prosecutrix admitted that she never deviated from this story until after the child was born. The child was born April 22, 1918. Upon the trial she claimed, however that the defendant also had had sexual intercourse with her on July 24, 1917. She identified that date as being one on which a certain "pie social" was held at Gardena, in Bottineau county. According to her testimony, the defendant took her home from this party. Her testimony to that effect is uncorroborated and is contradicted by the defendant and several witnesses, who, so far as this record discloses, are respectable and truthful men and women. The testimony of the prosecuting witness is also impeached by another witness, who testified that the prosecutrix made statements to her shortly after the party to the effect that a man, other than the defendant, took her home from such party. The only testimony, that, in any degree, tends to corroborate the testimony of the prosecutrix, is that of another girl, who testified that early in the evening she heard the defendant state to the prosecutrix that he would take her home. That witness, however, testified further that she did not remain until the party broke up, and that she did not know whether the defendant took the prosecutrix home.

The undisputed evidence also shows that the prosecutrix attended a dance, given by a neighbor, on July 9, 1917; that on this occasion she went with a man other than the defendant. The evidence shows that she and such other man spent part of the evening in a bedroom in the house alone; that their actions aroused the suspicions of many of those present, including the hostess; and three women, including the hostess, testified to the condition and appearance of the bed in the room, after the prosecutrix and her companion had left it; and for

the purpose of this opinion it is sufficient to say that the testimony so given tends to show that there was at least good reason for the belief apparently entertained by these women that the prosecutrix and her escort had had sexual intercourse on the bed in that room that evening. So far as the evidence shows, the women, who gave the testimony regarding the actions of the prosecutrix and her escort and the appearance of the bed, were disinterested and credible witnesses.

The prosecutrix testified that at the time the defendant had intercourse with her, she did not know anything about the possible result of the sexual act; that she did not know how children were procreated, or to use her own words: "I didn't know what was the cause of children, or anything at that time." Yet, when asked how she knew that it was on the 15th of August that the defendant had intercourse with her, she answered that she knew because she marked the date on an almanac, and when asked on her preliminary examination why she did this, she answered: "Why did I? I wanted to keep a record, only because I wanted to keep a record of it." When next asked: "Well, what did you want to do with the record?" she answered: "Wanted to keep it when I had anything to do with anybody."

The record is quite lengthy (the transcript of the testimony contains some 426 pages), and it is impracticable, and would extend this opinion to a very great length, to set forth even a synopsis of the testimony of the different witnesses. What has been set forth, is to indicate that the record justifies the views expressed by the trial judge in his memorandum opinion. One of the affidavits relating to newly discovered evidence has a direct bearing on the incident of July 24, 1917. The party who made the affidavit claims that the father of the complaining witness sought to induce him to testify that he saw the defendant and the prosecutrix on the evening of July 24, 1917, at or about the place where she claims that the act of sexual intercourse took place. Respondent invokes the well-settled rule that a motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict is addressed to the sound judicial discretion of the trial court, and that the appellate court will not interfere unless an abuse of such discretion is shown. The rule is one of general application, and has been recognized by this court in all cases where it has been called upon to review the correctness of orders granting or denying new trials on the ground of insufficiency

of the evidence or other discretionary ground. This does not mean, however, that the trial court may refuse to exercise the judgment and discretion which the law contemplates shall be exercised by him. Neither does it mean that he is vested with arbitrary power, and may, if he desires, rule contrary to his own judgment. On the contrary the terms of the rule invoked clearly imply: (1) That the trial court in deciding a motion for a new trial on such ground must exercise judgment and discretion, and that his ultimate decision as to whether a new trial shall or shall not be had is to be controlled by his own candid, sober judgment, on the merits of the particular question; he may not refuse to exercise judgment; nor may he refuse to do that which his judgment and conscience tells him is the right thing to do. (2) That there is a clear distinction between the duty of a trial court and the duty of an appellate court as regards the determination of such questions, and that the extent of inquiry of the appellate court is much more restricted than that of the trial court.

The reason for the distinction between the respective duties of a trial court and an appellate court, as concerns such motions, is not predicated alone upon the fact that the trial court is one of original, and the appellate court one of appellate, jurisdiction. While this prescribes the appellate court from ruling on a motion for a new trial in the first instance, it does not necessarily affect or limit the extent of inquiry on appeal. This is illustrated by the fact that where the motion for a new trial is decided by a judge other than the one who tried the case, the appellate court does not feel bound by his decision in the same degree as where the motion is decided by the judge who tried the case. Braithwaite v. Aiken, 2 N. D. 57, 63, 49 N. W. 419. In other words, the primary reason for the strong presumptions of correctness which the appellate courts apply in reviewing orders of this kind is that, in the very nature of things, the trial court is better qualified to decide the question involved than the appellate court possibly can be.

Says Spelling (Spelling, New Tr. & App. Pr.):

"The discretion vested in the trial court to grant or refuse a new trial is neither an arbitrary nor a general discretion. It is based on the theory that the judge who tries a case, having the parties, their witnesses and counsel before him, with opportunity to observe their

demeanor and conduct during the trial, and to note all incidents occurring during its progress likely to affect the result thereof, is better qualified to judge whether a fair trial has been had, and substantial justice done, than the appellate tribunal." 1 Spelling, New Tr. & App. Pr. p. 405.

"While the (trial) court has this broad discretion in deciding, yet it cannot evade the duty to decide. It cannot refuse to examine the evidence to ascertain whether the verdict is contrary to the evidence, that being one of the statutory grounds for a new trial, and the mere fact that the jury are the exclusive judges of all questions of facts submitted to them does not justify the judge of the trial court in declining to examine the sufficiency of the evidence upon which the verdict rests, when it is challenged by a motion for a new trial. And whenever it is manifest that the jury have found against the clear weight of the evidence, and that the party asking for a new trial has not, in all probability, had a fair trial, nor received substantial justice, it is his imperative duty to set the verdict aside and grant a new trial." 1 Spelling, New Tr. & App. Pr. pp. 403, 404.

The same rule is laid down in Hayne's work on New Trial and Appeal. See 1 Hayne, New Tr. & App. Rev. ed. pp. 469–474.

The rule so announced is not a mere *ipse dixit* on the part of these text-writers; it is predicated upon adjudicated cases in which the decisions were written by eminent jurists.

In an opinion written by Justice Brewer (Kansas P. R. Co. v. Kunkel, 17 Kan. 145, 172, 3 Am. Neg. Cas. 412), the supreme court of Kansas said:

"The one (the trial judge) has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and if it appears to him that the jury have found against the weight of the evidence, it is his imperative duty to set the verdict aside. We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and where the evidence is nearly balanced or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere

doubts of its correctness. But when his judgment tells him that it is wrong, that, whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury."

In the case of Green v. Soule, 145 Cal. 102, 78 Pac. 337, 17 Am. Neg. Rep. 8, the supreme court of California, speaking through Judge Shaw, said:

"There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions, and it is well established by the decisions of this court. The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. 'Where the decision is against the weight of the evidence it is the duty of that court to grant a new trial.' Irving v. Cunningham, 58 Cal. 309; Mason v. Austin, 46 Cal. 387; Hawkins v. Abbott, 40 Cal. 639; Bjorman v. Ft. Bragg Redwood Co. 92 Cal. 500, 28 Pac. 591. If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. He has had the same opportunity as the jury to observe the manner of the witnesses, and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of the evidence. He must exercise a wholesome and discreet supervision over the jury in this respect. . . . Of course, the judge should give due respect to the verdict of the jury, and may sometimes properly deny a new trial in cases where, if submitted to him without a jury, he might upon the evidence have made a different decision. He must be clearly satisfied that the verdict is wrong; otherwise, he should let it stand. But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are entitled to the judgment of the jury in rendering a verdict, in the first instance; but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence."

In People v. Knutte, 111 Cal. 453, 455, 44 Pac. 166, the court said: "While it is the exclusive province of the jury to find the facts, it

is nevertheless one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he nevertheless exercises a very salutary supervisory power over their verdict. In the exercise of that power he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found, and, if in his sound judgment it is not, he should unhesitatingly say so, and set the verdict aside."

In Tennessee, Coal & R. Co. v. Roddy, 85 Tenn. 400, 5 S. W. 286, Mr. Justice Lurton, speaking for the court, said:

"If he (the judge) was not satisfied that under the facts and law the plaintiff should have a verdict, it was his plain duty to set it aside and grant a new trial. The doctrine is well settled in this court, that if the circuit judge is of the opinion that a verdict is against the weight of the evidence, or is contrary to the law as charged by himself, he should grant a new trial. . . . Much of the importance and weight attached to jury trials proceeds from the presumption that an intelligent and learned circuit judge, accustomed to weighing evidence, has scrutinized the proof, looked into the faces of the witnesses, and indorsed the action of the jury. The integrity and value of jury trials will largely disappear, if the circuit judges shall endeavor to avoid the duty imposed upon them by law in this regard. If he is dissatisfied with the verdict he ought to set it aside; and this court has held that where this dissatisfaction appears in the record this court will do what he ought to have done—grant a new trial."

The rule thus announced was reaffirmed by the supreme court of Tennessee in Nashville, C. & St. L. R. Co. v. Neely, 102 Tenn. 700, 52 S. W. 167. In that case the trial court in overruling a motion for a new trial stated *"that the facts in the case were considerably mixed, but that it was a rule of his to rarely invade the province of the jury in setting aside their verdicts, if there were any substantial facts to support the same."*

In commenting on the action of the trial court, and the reasons given for such action, the supreme court of Tennessee said: "The concluding part of this recital, which we have italicized, discloses erroneous action on the part of the court. . . . The case had passed from the

jury, and had reached that stage in which the judge must approve or disapprove the verdict; and, in discharging that exclusive and independent duty, he must unavoidably determine for himself, after giving all due weight to the verdict of the jury, whether or not the evidence introduced was sufficient to sustain the verdict. Illinois C. R. Co. v. Brown, 96 Tenn. 559, 35 S. W. 560. His Honor seems to have gone far enough in his consideration of the evidence to conclude that there were some 'substantial facts to support' the verdict, and, deeming that sufficient, he considered the evidence no further. That was a misapplication of a familiar rule of long standing in the practice of this court, but wholly inapplicable in nisi prius courts. Indeed, that rule, as here applied, is based upon the fact that both the trial judge and the jury have carefully weighed the evidence, and that while doing so they have had more favorable opportunities of ascertaining the truth than this court can have."

The principles stated in these cases are in harmony with those announced by this court in State v. Stepp, 48 N. D. 566, 185 N. W. 812. In that case the defendant moved for a new trial on the ground of newly discovered evidence. The newly discovered evidence had reference to a witness who had testified at the trial. The proposed "new" evidence had a tendency to show that such witness had made certain statements inconsistent with or contradictory to the testimony she gave upon the trial. In a memorandum opinion filed with the order denying a new trial, the trial court said:

"While I am not satisfied with all the evidence in this case, there is evidence in the case which, if believed, is amply sufficient to sustain the verdict. As I understand it, the credit to be given a witness, and the weight of the evidence, is for the jury, and the court is not justified in setting aside the verdict simply because he could not have arrived at the same conclusion as did the jury."

In the certificate of probable cause the trial judge (with respect to the witness referred to in the affidavits relating to newly discovered evidence) said: "If her evidence was believed by the jury this was the strongest testimony the state had, and one of the jury men so expressed himself to me; however, for the reason stated in the order denying a new trial, a new trial was denied."

In its decision in that case this court said:

"The difficulty which confronts us in this case is one of interpreting the actual findings of the trial judge.

"It is true he denied the motion for a new trial, but according to his memorandum opinion he was not satisfied with the evidence on which the verdict was based, and apparently the controlling reason for denying the motion for a new trial was that there was sufficient evidence to sustain the verdict. In the certificate of probable cause certain language is used, which seems to imply that the trial judge believed that the conviction of the defendant was due, largely, if not wholly, to the testimony of the witness, Mrs. Manning. He was not justified in denying the motion for a new trial here merely because he was of the opinion that there was substantial evidence tending to support the verdict. If he was of the opinion that the proposed evidence was newly discovered and could not with reasonable diligence have been discovered and produced by the defendant upon the trial of the action; and if he further was of the opinion that the newly discovered evidence probably would, and ought to, bring about a different result upon another trial—in other words, if the trial judge was of the belief that the new evidence was of such character that, considered in connection with the evidence adduced upon the trial, it would be likely to create in the minds of reasonable men a reasonable doubt as to defendant's guilt—then he should have granted a new trial. Or to state the concrete proposition as it appears in this case, it is our opinion that if the trial court was of the belief that the defendant would not have been convicted except for the testimony given by Mrs. Manning, then he should have granted the motion for a new trial.

"The language utilized by the trial judge in the record transmitted to us on this appeal is such that we have some difficulty in understanding exactly what conclusions he did reach so far as the facts are concerned. And it is his judgment, his conclusions as to what the facts are which in the first instance largely, if not wholly, determine whether a new trial should or should not be had. The discretionary power with which trial courts are vested in ruling on motions for a new trial on the ground of newly discovered evidence is primarily applicable to a determination of the facts. The facts being determined, the applicable legal principles readily determine whether a new trial should or should not be had."

In State v. Stepp, supra, the members of this court were all agreed that the order denying the motion for a new trial should be set aside; two members of the court were of the opinion that this court should order a new trial; the remaining three members, however, were of the opinion that the cause should be "remanded with directions that the trial court hear such motion anew, and, by application of the principles enunciated in the opinion determine whether a new trial should or should not be had."

The record in this case, however, presents a situation quite different from that presented in State v. Stepp, supra. In that case there was no definite expression by the trial court of his views upon the facts presented for determination by the motion. There was no specific disapproval of the verdict. In this case, however, the trial court has expressed its disapproval of the verdict in no uncertain terms. The language of the trial judge can mean only that he believed the verdict to be wrong; that after a careful consideration of the evidence in the case he was of the opinion that it was improbable that the defendant was the father of the child; that on the contrary there was greater probability that the other man referred to in the testimony is the father. In other words, in this case the trial court has in reality decided the pertinent facts presented by the motion. Hence, as was said in State v. Stepp, "the facts being determined, the applicable legal principles readily determine whether a new trial should or should not be had."

The fact that the verdict under consideration was returned upon a second trial is not of controlling importance. It appears that the first trial was had before a district judge other than the one who tried the case the second time. It also appears that the first verdict was set aside on the ground of surprise. The order setting aside the verdict was made by the judge who tried the case. He doubtless was of the belief that the defendant had not had a fair trial, and that the ends of justice required that the verdict be set aside. The correctness of the order so made has never been challenged. But even if the first verdict had been set aside on the ground of insufficiency of the evidence, it would not relieve the judge who tried the case the second time from considering and deciding the question of the sufficiency of the evidence to sustain the verdict returned upon the trial had before him. He would, of course, give due weight to the verdicts; but it would never-

theless be incumbent upon him to exercise his independent judgment upon the questions presented by the motion; and, if after a full and careful consideration of all the facts and circumstances he had an abiding conviction that the verdict was contrary to the weight of the evidence, it was his duty to give effect to the conviction by setting the verdict aside. Love v. McElroy, 118 Ill. App. 412; Mason v. Underwood, 48 N. D. 122, 183 N. W. 525.

We are wholly agreed that upon the record here, the order appealed from must be reversed and a new trial ordered.

Reversed and remanded for a new trial.

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

GRACE, J. (specially concurring). In denying the motion for a new trial, the trial court rendered a memorandum opinion, wherein he stated the language quoted on page 1 of the principal opinion. It is unnecessary to restate the language here. It is such as shows, we think, that the trial court was convinced that a new trial should be granted, but, for reasons stated in his opinion, he did not do so. These reasons appear in the majority opinion in the above-mentioned quotation.

I agree with the principal opinion, that the court erred in denying a new trial. There was certainly a very grave doubt in the trial court's mind. Such doubts were expressed in his memorandum opinion. It is not necessary to review them here. I think he erred in not granting a new trial. The basis of the error is very similar to that in State v. Stepp, 48 N. D. 566, 185 N. W. 812, where I dissented from the majority opinion.

JOSEPH W. BULL, Appellant, v. W. L. SMITH, M. H. Smith, P. D. Smith, G. J. Keenan et al., Respondents.

(25 A.L.R. 1402, 191 N. W. 624.)

Mortgages — personal judgment may be rendered on foreclosure for amount due not only against mortgagor, but against one who has assumed debt; when judgment in foreclosure for amount due rendered, no further action necessary to ascertain deficiency.

In an action for the foreclosure of a real estate mortgage, personal judgment may be rendered for the amount found due upon the personal obligation secured by the mortgage not only against the mortgagor, but also against his grantee who has assumed and agreed to pay the mortgage debt. When such judgment is rendered no further action on the part of the court will be necessary to ascertain the amount of the deficiency.

Opinion filed December 21, 1922.

Mortgages, 27 Cyc. p. 1749 n. 61; p. 1754 n. 91.

From an order of the District Court of Burleigh County, *Nuessle,* J., defendant appeals.

Affirmed.

Theo. Koffel, for appellant.

E. T. Burke, for respondent.

CHRISTIANSON, J. This is a sequel to Bull v. Smith, 45 N. D. 613, 178 N. W. 426. The material facts are as follows: In May 1910 the defendant Smith, purchased from one Keenan a tract of land in Burleigh county in this state upon which there was a mortgage executed by Keenan and his wife. The plaintiff, Bull, in due course purchased such note and mortgage and the same were duly assigned to him. Later he brought this action to foreclose the mortgage, joining the mortgagors and Smith as defendants therein. In his complaint the plaintiff averred that the defendant, Smith, at the time of the purchase of the premises from Keenan and as a part of the consideration therefor, assumed and agreed to pay the note and mortgage held by the plaintiff. The trial court found that the defendant Smith, had assumed and agreed to pay

Note.—On liability of grantee assuming mortgage debt to mortgagee of one in privity with him, see note in 21 A.L.R. 439; 19 R. C. L. 666; 3 R. C. L. Supp. 965; 5 R. C. L. Supp. 1042.

such mortgage and on appeal that finding was approved by this court and the judgment entered thereon affirmed. See Bull v. Smith, supra. After the record had been returned to the district court and that court reinvested with jurisdiction, the plaintiff, Bull, caused execution to be issued, in form as prescribed by § 7714, Comp. Laws, 1913, directing the officers to execute the judgment by making sale of the premises and applying the proceeds of sale in conformity with the judgment. Such special execution was returned by the sheriff with his certificate attached thereto to the effect that a prior mortgage against the premises had been foreclosed, and sheriff's deed issued thereon; and that hence the defendants in this action had no right or interest in said real property which could be sold under the execution. The plaintiff thereupon made a motion in the district court that the court ascertain the amount of the deficiency judgment which plaintiff would be entitled to recover in this action as against the defendant Smith. The matter came on for hearing. The defendant Smith, resisted the motion. The trial court denied the motion, and the plaintiff has appealed.

The judgment rendered in this case, which has never been modified and which was affirmed by this court on the former appeal, awarded the plaintiff, Bull, personal judgment not only against the makers of the note and mortgage, but, also, against the defendant Smith. The right to such personal judgment was the first matter adjudicated by the judgment. It was specifically adjudged "that the plaintiff, Joseph W. Bull, do have and recover . . . from the defendant W. L. Smith, the sum of eight hundred ninety-seven and 75/100 ($897.75) dollars, principal and interest, and attorney's fees and costs of this action taxed and allowed at fifty-seven and no/100 ($57) dollars. . . ." It was further ordered and adjudged "that the said sum and amount is a lien upon the mortgaged premises," and that such premises be sold, and the proceeds of the sale applied in payment of the amount due to the plaintiff from the defendants. It was further adjudged that if the moneys arising from such sale shall be insufficient to pay the fees, disbursements, and amount adjudged due the plaintiff as aforesaid, with interest as aforesaid, then that the plaintiff have execution against the property of said defendants for the amount still remaining due after applying proceeds of sale as aforesaid.

It will be noted that the plaintiff sought to enforce liability not only

against the mortgagors, but also against the defendant Smith, as grantee of the mortgagors. In this respect the action is identical with McDonald v. Finseth, 32 N. D. 400, L.R.A.1916D, 149, 155 N. W. 863; and under the facts as determined on the former appeal, namely, that the defendant Smith, as a part of the consideration for the deed, specifically assumed and agreed to pay the indebtedness secured by the mortgage held by the plaintiff, he (Smith) became personally liable to the mortgagee for the amount of the debt so assumed. McDonald v. Finseth, supra; Tulare County Bank v. Madden, 109 Cal. 313, 41 Pac. 1092; Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683; 3 Pom. Eq. Jur. 4th ed., §§ 1206 et seq.; 9 Enc. Pl. & Pr. pp. 465, 466.

The judgment in this case was and is a personal judgment against the mortgagors and the defendant Smith, followed by a direction that the mortgaged premises be sold and the proceeds of the sale applied in discharge of the judgment. That is the usual judgment entered in foreclosure cases in this state against defendants who are personally liable for the indebtedness secured by the mortgage, where the court acquires jurisdiction of their persons. That procedure also prevails elsewhere. Cyc. (27 Cyc. 1754) says: "In England and in some of our states, under the blended systems of law and equity, it is permissible for the court in a foreclosure suit to give personal judgment against the mortgagor, or other defendant who is personally liable, for the entire amount of the mortgage debt and also to order sale of the mortgaged property, the proceeds being applied on the judgment, and the deficiency, if any, being thus ascertained."

In Englund v. Lewis, 25 Cal. 337, 349, the supreme court of California said: "Under our system of practice there is but one form of action 'for the enforcement or protection of private rights, and the redress or prevention of private wrongs,' and in a proper case legal and equitable relief may be had in the same action. The result in such cases is a judgment with a twofold aspect, one looking to the legal and the other to the equitable relief. Hence it has been held that in foreclosure cases a formal judgment in personam may be rendered against the defendants for the amount found due, with a provision for its enforcement against the property upon which the lien is established. Rollins v. Forbes, 10 Cal. 299; Rowland v. Leiby, 14 Cal. 156; Chapin v. Broder, 16 Cal. 403. In Rowland v. Leiby, Mr. Chief Justice

Field said: 'In this state, parties are at liberty to adopt in the foreclosure of mortgages the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises and the application of the proceeds to its payment, and apply, after the sale, for the ascertainment of any deficiency, and execution for the same; or they may take a formal judgment for the amount due in the first instance. In the latter case, the proceeds can be applied by the officer making the sale immediately upon the judgment, and no further proceedings will be necessary on the part of the court to ascertain the deficiency.' "

The judgment in this case established a definite personal liability and awarded a personal judgment against the defendant Smith for the amount of the debt with the usual relief in equity, superadded. In form, the judgment is quite like that considered by the supreme court of California in Englund v. Lewis, supra, and in our opinion this form of judgment is proper in this state in an action for the foreclosure of a mortgage upon real property. Comp. Laws, 1913, § 8100. In fact this proposition is not disputed by the respondent Smith, in so far as the mortgagor is concerned. In other words the respondent admits that the court has full authority to enter such judgment as against the mortgagor; but he asserts that the court has no power to render such judgment against any person other than the mortgagor. And in support of this contention he cites § 8102, Comp. Laws, 1913, which reads as follows: "If the mortgage debt is secured by the obligations, or other evidence of debt, of any other person than the mortgagor, the plaintiff may make such other person a party to the action and the court may render judgment for the balance of such debt unsatisfied after a sale of the mortgaged premises, as well against such other person as against the mortgagor, and may enforce such judgment as in other cases, by execution or other process." The respondent contends that under § 8102, supra, the court has no power to render a personal judgment against one who, like the respondent Smith, has assumed and agreed to pay the mortgage debt. That as to such person the court may merely enter a decree of foreclosure pursued under the old chancery system and that no personal liability is or can be adjudicated until

after the premises have been sold and the proceeds applied in payment of the mortgage debt.

In our opinion the section is not susceptible of the construction contended for. The general rule is that "in the absence of a statutory provision giving the court authority therefor, a judgment for the deficiency arising after the application of the proceeds of the sale of the mortgaged premises to the payment of the debt secured cannot be taken against any person liable for the debt, other than the mortgagor himself." Wiltsie, Mortg. Foreclosure, 3d ed. § 741. We believe that the purpose of § 8102, supra, was to change this rule, and grant specific statutory authority to render judgment, not only for foreclosure of the mortgage, but also, for deficiency in the one action, against all persons liable for the debt. There is nothing in § 8102 which indicates that the usual procedure prescribed by our statute in foreclosure cases should not obtain as to the parties referred to therein. That section does not say that the court can render a deficiency judgment only after a sale has been made of the mortgaged premises, but specifically authorizes the court to render judgment for the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against any other person who is liable for the payment of the mortgaged debt as against the mortgagor and to enforce such judgment as in other cases by execution or other process. The practice prevailing in this state is to enter a formal judgment in the first instance for the amount due on the debt, and apply the proceeds of the sale of the premises in satisfaction of the judgment. That was the practice pursued in McDonald v. Finseth, supra. And as already indicated, that seems to be the prevailing practice in California. It is also the practice prevailing in Washington. See Shumway v. Orchard, 12 Wash. 104, 40 Pac. 634.

Under the judgment in this case there was nothing for the trial court to determine upon the motion made by the plaintiff. The personal liability of the defendant, Smith, was definitely established and adjudicated in the judgment entered in the first instance. That liability has never been altered. Of course, the defendant would have been entitled to credit upon the judgment for the proceeds received from a sale of the premises, if any proceeds had been received. But it appears from the return of the sheriff filed in this case that a sale of the prem-

ises would be nugatory; that there is in fact nothing to sell; that a sale would benefit no one and would merely entail unnecessary expense. "The law respects form less than substance." Comp. Laws, 1913, § 7262. It "neither does nor requires idle acts." Comp. Laws, 1913, § 7266. See also Toby v. Oregon P. R. Co. 98 Cal. 490, 33 Pac. 550.

Under the judgment rendered in this case, no further action was necessary to ascertain the deficiency. The trial court therefore was correct in denying plaintiff's motion. Upon the record here, the plaintiff is entitled to enforce the judgment against the defendant Smith, and execution may issue thereon in the manner provided by law.

Upon the oral argument it was suggested that there were certain grounds justifying equitable interference with the enforcement of the personal judgment against the defendant Smith. Of course, we must decide the case upon the record before us; and that record discloses no grounds for equitable interference. Whether such grounds do or do not in fact exist we have no means of knowing, and cannot, and do not, determine here.

The order appealed from is affirmed. Neither party will recover costs.

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

BRONSON, J. (specially concurring). I am of the opinion that the order of the trial court should be sustained. The majority opinion holds that a personal judgment was rendered against the Keenans, as mortgagors, and against W. L. Smith who, as grantee, assumed and agreed to pay the mortgage debt; that it was and is unnecessary for the court to ascertain the amount of any deficiency; that, therefore, there was no error in denying plaintiff's motion.

The trial court has specifically found that the plaintiff is not entitled to a deficiency judgment or to any judgment against the defendant; therefore, it denied plaintiff's motion and application. Hence, the situation is presented where the majority opinion affirms the order but practically reverses the holding of the trial court.

The record shows that a personal judgment was rendered. Whether the same is enforceable is a question not necessary here to determine.

GRACE, J., concurs.

THE DAKOTA LIVE STOCK & INVESTMENT COMPANY, a Corporation, Appellant, v. K. H. BISHOP and E. M. Bishop and C. B. Palmer, Respondents.

(191 N. W. 491.)

Bills and notes — plaintiff in foreclosure action held not bona fide purchaser of note and mortgage; plaintiff in foreclosure action held not entitled to retain moneys paid on land purchase contract.

In an action by an assignee to foreclose a real estate mortgage where the defendants filed a counterclaim, seeking the recovery of certain moneys which the plaintiff retained and sought to apply upon the mortgage note,—the foreclosure action being by stipulation tacitly abandoned and the contested issue limited to the counterclaim, the evidence is examined, and it is *held* to show

(a) That the plaintiff is not a bona fide purchaser of the note and mortgage.

(b) That the plaintiff had knowledge of the rights of the defendant under the real estate purchase contract and participated in the acts resulting in failure of consideration to the defendant, wherefore it became liable to repay to the defendant any balance retained that would otherwise be applicable to the payment of the mortgage note.

Opinion filed December 22, 1922.

Bills and Notes, 8 C. J. § 1358 p. 1046 n. 9, p. 1047 n. 10. Vendor and Purchaser, 39 Cyc. p. 2058 n. 21; p. 2067 n. 94.

Appeal from a judgment of the District Court of Sioux County, North Dakota, *Lembke,* J.

Affirmed.

F. M. Jackson and *W. D. Hickman,* for appellant.

"A contemporaneous oral agreement that a note, payable to a certain person, shall not be transferred by the payee, cannot be shown in defense to an action on the instrument, as to allow such proof would be to contradict the written contract. Nor can the makers of a note defeat a recovery by the payee by showing that it has been negotiated contrary to its terms or the agreement of the parties where the makers themselves have put it in circulation." Wardell v. Hughes, 3 Wend. (N. Y.) 418; Ueland v. More Bros. 22 N. D. 283; Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209; Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652.

"1. If a person for a consideration moving to him from another, agrees to pay that or any other's debt to a third person, the law at once,

operating upon the acts of the immediate parties to the transaction, supplies the essentials of privity between such persons and such third person, establishing binding contract relations between them, even though such third party was a stranger to, and had no knowledge of the transaction.

"2. In case of the establishment of contractual relations in the manner indicated in the foregoing rule, they cannot be subsequently varied by any agreement between the immediate parties to the transaction, not consented to by the third party.

"3. The rule last above stated applies to a case where one takes a conveyance of real estate, agreeing as part consideration therefor to pay the debt of the grantor, or that of some other person, to a third party." Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056.

"Contractual relations being established in the manner indicated in the preceding paragraph, neither one nor both of the immediate parties to the transaction can rescind the same or in any way interrupt or prejudice the rights of such other party without his consent." Tweedale v. Tweedale (Wis.) 61 L.R.A. 509.

P. B. Garberg, for respondents Bishop.

BIRDZELL, Ch. J. This is an appeal from a judgment in favor of the defendants upon a counterclaim filed in an action to foreclose a real estate mortgage. The case is here for trial de novo. The action was originally begun to foreclose a mortgage on certain real estate in Sioux county, but it appeared upon the trial that the plaintiff had failed to take certain preliminary steps required by the statute to enable it to foreclose the mortgage; so, after the trial, the parties stipulated that, regardless of the decision on the plaintiff's affirmative cause of action, they desired a disposition of the defendants' counterclaim. Hence, the issues are concerned wholly with the merits of the counterclaim.

The facts necessary to an understanding of the case are as follows: The defendants K. H. and E. M. Bishop, prior to May 1918, had entered into a contract for the purchase of certain lands from the defendant C. B. Palmer. On or about May 13, 1918, Palmer and James H. Lemmon, secretary and treasurer of the plaintiff company, went to the house of the Bishops and while there a modification of the land purchase contract between Palmer and the Bishops was effected. By this

contract the Bishops agreed to or did purchase certain lands of Palmer for a consideration of $6,907, plus $1,000 in the shape of a mortgage to Barnes Brothers, which the purchasers assumed and agreed to pay. Palmer, at the time, was indebted to Lemmon or to his company, the plaintiff, and Lemmon held a mortgage of $15,000, covering, among other lands, the land which the Bishops were purchasing. The two Bishops are husband and wife. The principal negotiations on May 15th were conducted by Palmer and Mrs. Bishop. At the conclusion, however, Bishop was consulted. Lemmon drew a note for the $6,907 consideration payable to Palmer or order November 10, 1918. He also drew up a mortgage on the land securing this note; also a chattel mortgage on live stock owned by the Bishops, all running in favor of Palmer. No deed was drawn or executed at the time, due to the fact, as testified by Lemmon, that he had no North Dakota form, but there was an understanding that the deed would later be executed and delivered to the Bishops. The note and real estate mortgage were respectively indorsed and assigned to the plaintiff in payment of obligations owing it by Palmer.

The Bishops were indebted to the plaintiff on account of a cattle loan to the amount of $5,617.19. In September 1918, they paid $2,000 on the cattle loan note, and on December 5, 1918, they turned over to the plaintiff the proceeds of a sale of some cattle amounting to $5,662.63. The plaintiff contends that the proceeds of the cattle sale were applied on the Bishops' indebtedness so as to discharge parts of the different obligations—$3,000 being applied on the real estate mortgage note, the balance on the cattle note and some other small indebtedness; whereas, the Bishops claim that they specifically directed application to the cattle note and some other small indebtedness so as to completely discharge these obligations, and that the balance of something over $1,500 might be held subject to the performance of the land contract by Palmer and Lemmon. Palmer upon one or more occasions tendered a deed to the Bishops, which they refused to accept, and they justify their refusal on the ground of the record incumbrance of $15,000. In March 1919, they conducted a sale of personal property and abandoned the premises. Palmer was there at the time, and it is claimed that he resumed possession. The subject-matter of the counterclaim involved on this appeal is the $1,500 balance in the hands of

Lemmon, which the defendants contend is theirs by reason of the failure to carry out the real estate contract. The trial judge sustained the contention of the Bishops and adjudicated the claim in the amount of $1,487.49, giving judgment for that amount with interest from December 5, 1918.

The appellant maintains that it was at all times ready and willing to execute and deliver to the defendants a partial satisfaction of the $15,000 mortgage so as to clear the title, which the defendants were to receive, of all incumbrances save the $1,000 mortgage, which they had agreed to assume; that it had no notice of Palmer's failure to deliver a deed to the other defendants, the Bishops; that neither it, nor its officer and agent, Lemmon, was in any way concerned with the real estate transaction between Palmer and the Bishops other than as purchasers of the mortgage; and that neither it, nor Lemmon, assumed any obligations whatsoever in favor of the Bishops in connection with the real estate deal. It is also contended that according to the preponderance of the evidence no directions were given for applying the moneys paid by the defendants, and that consequently they were bound by the application made by the creditor. A further contention is made that if the evidence shows a rescission of the real estate contract between the immediate parties to it, the plaintiff's rights cannot be affected, as it was not a party.

It is clear upon this record that the defendants, the Bishops, never obtained title to the lands purchased. It is equally clear that though a deed was tendered to them, the title sought to be conveyed was not one free and clear of all incumbrance above $1,000, from which it follows that the contract was never so far performed on the part of Palmer as to put the Bishops in default. The record further shows that they were willing and endeavoring to perform on their part for a long period prior to the abandonment of the premises in March 1919; and that the plaintiff, through its agent Lemmon, was familiar with the terms of the contract from the beginning. It knew the rights of the Bishops thereunder. It knew that the contract was executory. It knew that it had never been performed on the part of Palmer and that it was impossible for it to be performed without its releasing the $15,000 mortgage. Furthermore, we think the record clearly shows that Lemmon was at all times as much interested in the performance of the real estate contract as the imme-

diate parties to it, for he was apparently desirous of canceling part of Palmer's obligations to him or his company through the assumption or payment by the Bishops of a like amount. The evidence approaches proof of a novation, if, indeed, it does not in fact establish it. We are of the opinion on this record that the plaintiff cannot claim to stand in the position of a bona fide purchaser of the note and mortgage, but rather that it is a party to the transaction with knowledge of, and participation in, the failure of consideration upon which the rights of the defendants are grounded. After the failure of Palmer to perform for so long a period, it is not enough for this plaintiff to assert a mere willingness and readiness on its part to have released its mortgage. It took its mortgage with a knowledge of the immediate rights of the Bishops in the premises and it had constant notice that these rights had never been enjoyed. Since affirmative acts on the part of the plaintiff were required to give to the defendants the rights to which it knew they were entitled, and since it accepted the mortgage note with full knowledge of the situation, it is as chargeable with the consequences of the failure of consideration as Palmer himself. It follows that the defendants are entitled to recover from the plaintiff any surplus that might be held by it which otherwise would be applicable to the mortgage or land contract.

Even if it be assumed that the plaintiff applied a portion of the cattle proceeds to the real estate contract without any contrary direction being given by the defendants, the legal situation of the parties is, in our view of the case, in no manner affected. Hence, it is unnecessary to discuss or to weigh the conflicting testimony.

The judgment is affirmed.

CHRISTIANSON, BRONSON, and ROBINSON, JJ., concur.

GRACE, J., concurs in the result.

STATE OF NORTH DAKOTA, Respondent, v. JOSEPH THRONDSON, Appellant.

(191 N. W. 628.)

Criminal law — capacity to understand act.

1. The generally accepted test of responsibility for crime is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act.

Criminal law — defendant may waive rights.

2. A defendant in a criminal action may waive his right to the services of counsel, the procurement of witnesses or a jury trial.

Criminal law — evidence held to show mental capacity to commit crime.

3. An examination of the record discloses that at the time of the killing the defendant was mentally able to distinguish between right and wrong and understood fully the nature of his act; that his confessions were made freely and voluntarily and with mental capacity to understand their contents and the legal effect thereof.

New trial — no error in denying.

Held—evidence held to show no fraud, misrepresentation, coercion or duress in procuring confession or plea of guilty.

The record shows that no undue advantage was taken of the defendant by the officers of the law or that he was advised or coerced, or forced to enter a plea of guilty. No disposition shown on the part of any of the officers to prevent the defendant from procuring the services of an attorney or having a trial if he wished. He was also admonished by the court as to his right, and for this and other reasons stated in the opinion it is held that the court did not err in denying defendant's motion for a new trial.

Opinion filed December 22, 1922.

Criminal law, 16 C. J. § 75 p. 100 n. 12; § 737 p. 401 n. 61; § 1586 p. 775 n. 68; § 2077 p. 821 n. 23; § 2624 p. 1125 n. 16. Homicide, 30 C. J. § 550 p. 304 n. 54 Juries, 35 C. J. § 105 p. 198 n. 58. Witnesses, 40 Cyc. p. 2156 n. 17.

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

Defendant appeals from a judgment and from order denying motion for new trial notwithstanding the verdict.

Affirmed.

Jas. A. Peterson and *Edward P. Kelly*, for appellant.

Theo. B. Elton, for respondent.

Note.—On weakness of mind as affecting liability for criminal act, see note in 10 L.R.A.(N.S.) 999; 8 R. C. L. pp. 64, 175; 2 R. C. L. Supp. 532; 4 R. C. L. Supp. 518; 5 R. C. L. Supp. 442; 13 R. C. L. pp. 710–712; 14 R. C. L. pp. 599–602, 624.

McKENNA, District Judge. Elmer Dezell was shot and killed by the defendant at the former's farm residence in Grand Forks county on the 28th day of December, 1919, and immediately following the shooting the defendant attempted suicide. On the evening of the same day on which the killing of Dezell occurred the defendant signed a written confession, and signed a second written confession on the 29th day of December, 1919, both of which admit the shooting of Dezell and set forth in detail the reasons and causes leading up to the shooting and the surrounding circumstances. Both of these statements were made while in custody and before any formal proceedings were instituted against the defendant. On January 13, 1920, a criminal information was filed against the defendant in the district court of Grand Forks county charging the defendant with the crime of murder in the first degree. On the same day the defendant was arraigned, entered a plea of not guilty and was sentenced to life imprisonment in the penitentiary. On January 12, 1921, the defendant made a motion for a new trial asking that the judgment of conviction be vacated and set aside, that he be allowed to withdraw his plea of guilty and to enter in lieu thereof a plea of not guilty, and that he be granted a jury trial upon the merits. The basis of the motion was that at the time of the killing he was suffering from shell shock and that he was not responsible mentally, and that at the time of entering his plea of guilty, he was in no condition physically or mentally to understand the nature of his act or the results of his plea and that he was prevented by the officers from procuring legal advice or having an opportunity to prepare for trial.

On the 13th day of January, 1920, in the district court of Grand Forks county, a criminal information was filed against the defendant, Joseph Throndson, by the state's attorney of that county charging the defendant with the crime of murder in the first degree, alleging that he did on the 28th day of December, 1919, in said county and state kill one Elmer Dezell by shooting him with a 25–40 caliber rifle. On the same day the defendant was arraigned in said court, Judge A. T. Cole of the First Judicial District presiding, and entered a plea of guilty to the crime as charged in the information. He was thereupon sentenced to life imprisonment in the penitentiary at Bismarck, where he has since been confined.

Some time later the defendant through his attorneys made an application to the state pardon board for a pardon, which was denied. On the 12th day of January, 1921, he presented a motion to the district court of Grand Forks county before Judge Cole asking that the judgment of conviction entered in his case on the 13th day of January, 1920, be vacated and set aside, that he be allowed to withdraw his plea of guilty entered therein and to enter in lieu thereof his plea of not guilty, that the sentence of imprisonment upon such judgment be withdrawn, and that he be granted a trial before a jury upon the merits. The motion was denied, and from this order of the district court entered on the 20th day of September, 1921, denying the motion and refusing to set aside or vacate the judgment of conviction in said cause the defendant has appealed to this court.

Elmer Dezell was shot and killed at his farm home near Emerado in Grand Forks county on the 28th day of December, 1919, by the defendant, Joseph Throndson. The only persons present at the time of the shooting besides the defendant were Nellie Dezell, wife of the deceased, and Clifford Dezell, a son. The defendant shot the said Elmer Dezell with a 25–40 caliber rifle, the first shot taking effect as the said Elmer Dezell stood in the doorway of a small wash room off the kitchen of his farm home. After the first shot Elmer Dezell ran through the house endeavoring to escape through the front door. The defendant followed him and shot him at least twice more before Dezell succeeded in getting out the front door where he fell on a snow bank near the house and died within a very few minutes. The defendant then turned the rifle upon himself shooting himself through the abdomen, but the wound was not serious and he recovered in about ten days.

On the 28th day of December, the defendant, after he had shot Elmer Dezell, and inflicted the wound upon himself, was taken to the Deaconess hospital at Grand Forks where he remained until discharged on the 7th day of January, 1921. From there he was taken to the county jail where he was detained until the 13th day of January, 1921, when he entered his plea of guilty of the crime of murder in the first degree and was sentenced to the state penitentiary at Bismarck for life.

The defendant asks to have the judgment of conviction set aside and that he be permitted to withdraw his plea of guilty and to go to trial upon the merits upon the following grounds:

First. That at the time he entered his plea of guilty he was not aware of his rights and did not understand the nature of the defenses which were open to him.

Second. That at the time he entered his plea he was not in a condition mentally to fully realize the meaning and consequences of his plea of guilty.

Third. That at such time he was not in condition to fully weigh and consider his rights, his defense to the charge and his condition at the time of the homicide.

Fourth. That at such time he was not in a condition or in a position to know or to find out what could or ought to be done in his behalf. In other words, that he was not in a position to know whether he had a defense or not.

Fifth. That at the time of making his statement to the state's attorney he was suffering from loss of blood, from the effect of hypodermic injections, from the excitement of the shooting and under a severe nervous strain.

Sixth. That he was so surrounded by the officers and state's attorney that he had no opportunity to seek advice or to secure the assistance of an attorney and figuratively the officers had him bound hand and foot while in a weakened condition.

Seventh. That at the time of the killing of Elmer Dezell the defendant was laboring under pressure of fear and illusion brought about by a mind so weakened and wrecked by shell shock that he was positively unable to control himself; that he was not responsible mentally for the shooting of Elmer Dezell, and that at the time of entering his plea of guilty before the district court he was in no condition physically or mentally to appreciate that he was not responsible for the murder.

To arrive at a just conclusion as to whether the contentions of the defendant have sufficient merit to warrant this court in setting aside the judgment of conviction and in order to throw light upon the mental and physical condition of the defendant at the time of the shooting and at the time of entering his plea, it is necessary to scrutinize carefully and methodically the statements as disclosed by the record in reference to the defendant, his life history, his associations with the deceased and the deceased's family, the motive for the murder, and the actions

and conduct of the defendant immediately preceding and following the murder and up to the time of his being sentenced to the penitentiary.

On December 28, 1919, the defendant Joseph Throndson was thirty-two or thirty-three years of age, was a powerfully built man 70 inches high and weighing 165 pounds. He was born on a farm near Baldwin, Wisconsin, had a common school education, and had followed the work of farm laborer all his life. He had known Elmer Dezell and his family for a long time, and had worked as a farm hand for Elmer Dezell covering a period of seven years, with the exception of thirteen months when he was in service during the World War. He was inducted into the army on the 13th day of March, 1918, was sent to Camp Dodge, Iowa, and remained there in training until April 20, 1918, when he was sent to France reaching the firing line in the month of July the same year. He was overseas about eleven months and took part in some of the most important battles of the war, namely, St. Mihiel, Meuse, Argonne, and the Verdun Sector. He was honorably discharged from military service at Camp Dodge, Iowa, on the 2d day of May, 1919, spent a week visiting his sister at his old home near Baldwin, Wisconsin, and then returned to the Elmer Dezell farm in Grand Forks county where he remained from May 1919 in the employ of Mr. Dezell until the day of the shooting on the 28th of December of the same year. During the entire period that he worked for Dezell and up to within two weeks of the shooting it appears that there was no trouble between them, except a minor instance in one of the earlier years of the defendant's employment and that Throndson was treated almost as a member of the Dezell family.

To ascertain a motive for the shooting of Dezell by the defendant we shall look first to the statements which the defendant himself made immediately following the shooting. His first statements were made on the day of the shooting after the physicians and coroner and neighbors had arrived at the farm home, and were made orally. These statements appear in the affidavits of Mr. E. Franklyn, cashier of the Farmers Bank of Emerado; Dr. G. A. McKay, a physician of Grand Forks county; Mr. Clifford Veitch, a farmer and resident of Grand Forks county for more than twenty-two years; Mr. Charles L. Emery, for seven years engaged in the farm machinery business in the village of Emerado; and Dr. R. M. McLean, county coronor and a practising

physician in North Dakota for more than thirty years. That upon talking freely with these men for about half an hour regarding the cause of his wound and the facts leading up thereto and the cause of his shooting Dezell, that Throndson informed the affiants as follows: "That he had had some sort of verbal quarrel with the said Elmer Dezell on said day, and that said Throndson had gone to the cook-car which was located alongside the kitchen of the said Dezell farmhouse and had taken a rifle therefrom and upon meeting said Dezell coming through the kitchen door he had shot at the said Dezell, and upon said Dezell turning and running into the house said Throndson had followed said Dezell and had shot at him several times as he was passing through the house, and had also shot at the said Dezell after he had passed out of the front door of said farmhouse, that when he had found that he had killed said Dezell he attempted to kill himself by shooting himself with the same rifle with which he had shot said Dezell." That at said time Throndson appeared to be very sorry and so expressed himself, stating that he had killed his best friend. That he had failed to kill himself because the gun slipped and the bullet went too low and instead of shooting himself through the heart the bullet went through his abdomen.

His next statement as to the cause of the shooting was made in the depot at Emerado the evening of December 28, 1919, while waiting for the train to take him to Grand Forks and to the hospital. This statement is in writing and is as follows:

"I, Joe Throndson, wish to make this statement regarding death of Elmer Dezell. This morning December 28th, he and I had a little trouble at the barn and when he went to the house I thought he was going to get a gun to shoot me. I went to the shack where I knew there was a rifle and took it and followed him to the house and shot him in the house. As nearly as I can remember he ran out the door and I shot him again out in the yard. After that I went back into the house and tried to kill myself by shooting myself in the breast. In this I failed as the bullet went too low."

This statement, which is known as Exhibit A, was made at the request of the defendant himself. It was written on a typewriter by Mr. E. Franklyn in the presence of Dr. R. M. McLean and signed by the defendant in their presence. At the time this statement was made

the defendant Joseph Throndson was smoking a cigar. He had not received any hypodermic or quieting drug of any kind, and according to the affidavits was apparently perfectly rational and cool and did not show any great mental excitement.

The next statement made by the defendant was on the 29th day of December, 1919, taken at the Deaconess hospital in the city of Grand Forks about 11 o'clock in the morning in the presence of T. B. Elton, state's attorney, C. C. Stewart, sheriff, and J. W. Lowe, deputy sheriff of Grand Forks county, and Frank Kilgore, stenographer. This latter statement was made after Dr. T. Mulligan, the county physician, had told the state's attorney that the defendant was physically able to stand such an examination, and after the state's attorney had told the defendant Thorndson the purpose of the examination. The state's attorney said:

Q. Before making a statement, however, Mr. Throndson, you understand, of course, that I am here in my official capacity as state's attorney, and any statements you do make will be used, of course, by me as state's attorney in connection with such prosecution as is commenced. You understand that?

A. Yes.

Q. Any statements you make, they will be of your own free will?

A. Yes.

Q. Without any fear on your part, or any promise by me?

A. Yes.

This statement of the defendant is too lengthy to place verbatim in the record. Its outstanding features are that the defendant claims that Elmer Dezell accused him of having improper relations with Mrs. Dezell. He said in part: "It has been kind of trouble, you know, for a year or so, that is, he accused me a couple of times, two or three times before. . . . This here was jealousy more than anything else. . . . You see I wanted to get away from the place because I was afraid of my life; I have been scared; I wanted to leave for the last couple of weeks, and the simple reason I didn't get away was because I was in the hole. . . . She told him some, but not as much

as I was. . . . She was keeping the time, and she didn't like to see me pick right up and leave.

Q. Why were you scared?

A. I heard him accuse me; that he would kill me.

Q. Did he ever say that he would harm you?

A. He said that if he ever caught anybody at it he would kill them.

Q. If he ever caught anybody with his wife, is that what he meant?

A. I suppose that is what he meant.

Q. But he didn't say that directly to you, did he?

A. Well, he referred to anyone; I suppose he meant me too. And yesterday morning, or the day before yesterday morning I wanted to go then; well, he was down in the field after corn; she says if you go now I will have to tell him, and there will be an awful mix-up. She says I would have to tell him what you went for. She says then there would be an awful mix-up, and it would be worse for me. I says to her if that is the case I will stay. And then the day this happened, that was yesterday, I made up my mind I wanted to leave the place anyway, because I was getting pretty scared. I thought I would just simply go away; and she told me not to go away; she says if you go I will have to tell him why you have gone and I spoke up and says you don't have to tell him, I will tell him myself, but I am going away, and there will be no trouble. And he has been accusing her before I think about me certain times. . . . *She went away yesterday morning. She went to see one of the neighbors. He was down there in the field after corn; and so I went down there—I got over to the neighbors before she got there, and I says you better come back with me, and there won't be nothing said, and I wont say nothing, and probably everything will pass over. I went over to get her back. She wouldn't come back. Then when I came back he started to ask me all kinds of questions. He saw that I was going to leave then.*

Q. Where was he talking to you?

A. That was at the house. She was down at the neighbors then; and he knew then—he said he knew everything what was going on. I says well if you know it, I says, I can go away from the place and there wont be nothing more said and I wouldn't show up any more. . . . He told me I will go and get her, and I will tell her that you are going. And I asked him then you ain't got any intention of harming me or

her, have you? No, he says, I haven't no intention of harming you, but if I caught you right at it I might harm you. I don't know what I would do.

Q. That is, he meant if he caught you and she having sexual intercourse?

A. Yes."

He then says that Mr. Dezell went over to the neighbors and brought Mrs. Dezell home, that they went into the house and he heard them wrestling around and heard Mrs. Dezell scream (which she denies in her affidavit) and that he thought Dezell was harming her, so he went into the cook-car and got the rifle and when Dezell opened the washroom door just off the kitchen he shot him. That the rifle belonged to both of them, half and half; that he thought maybe Dezell had a gun but wasn't very sure about it; that he shot because he wanted to protect Mrs. Dezell, and that he thought her husband was harming her. That he shot three shots, maybe four; that he followed Dezell through the house shooting at him; that when he found Dezell was dead that he figured on ending his own life.

"When I was in the war in France I sent $70 to her, Mrs. Dezell, and I says if I don't come back it is yours and if I do come back I will have that to go on." That the only talk he had with Mr. Dezell about the trouble with Mrs. Dezell occurred during the two weeks immediately preceding the shooting.

Q. Did he have any reason to suspect you of improper relations with his wife?

A. *He has never seen me that I know of. He has told her that he seen me and her the day before, but that was a lie because he never.*

Q. Did Mr. Dezell say anything to you when you went up to him as he was lying on the snow bank?

A. Yes, he says to me "get a doctor," he says, "Joe I am dying, get a doctor." But he didn't live very long.

Q. Is there anything else in connection with the affair that you would like to tell about now Mr. Throndson?

A. No I can't see anything because, as far as all I know I am the

one that done it, and I done it more to kind of protect myself and her than anything else as far as I can say.

Q. Just to be more clear, with reference to your talks with Mr. Dezell, you say about two weeks ago was the first time that he spoke to you about it?

A. Yes, about ten days or so, it was when we started to haul ice.

Q. That was the first time he started speaking to you about Mrs. Dezell, as I understand you?

A. Yes, and he spoke to her too. He spoke to her first after they went to bed. *She told me about it. She said "Elmer said something funny to me last night"* she says *"he has been accusing me—he asked me if you have ever asked me any such thing."* Then when we were out hauling ice out there, he says "I hear quite a bit about you and my wife," and ever since that I have been wanting to get away.

Q. But you had no severe quarrels about it with him?

A. Why no, because I asked him before he went down to get the Mrs. I says you ain't going to harm me or her, are you, and he promised me has wasn't going to harm us. So I stuck up for her.

The next statement made by the defendant was made to Judge Cole on the 13th day of January, 1920, at the time of the filing of the information and the arraignment and the plea of guilty. In this connection Judge Cole said: "You understand Mr. Throndson that you have a right, if you want it, to engage an attorney; the court will appoint one for you and grant you a trial by a jury if you want such a trial. That is your right. You have a right to be represented by counsel and go on trial before a jury. Are you ready at this time to enter a plea or do you want time to prepare and be tried before a jury; to engage counsel or have counsel appointed for you and prepare for trial and be tried before a jury, or are you ready to enter a plea now?"

The defendant: "I am ready to plead; yes, sir."

The court then informed the defendant of the nature of the crime and the punishment that would follow, and examined the defendant as to the circumstances surrounding the crime.

In his statement before the judge Throndson repeats practically the same story as told in the statement made before the state's attorney, except that he states that he knew where the gun was, that he took the

gun out of the house himself, that he took it out the day or morning of the 28th of December while Mr. Dezell had gone to the neighbors to get Mrs. Dezell. That when Mr. Dezell and Mrs. Dezell returned that morning from the neighbors that Mr. Dezell called the defendant to come to the house from the barn, and that on the way to the house he stepped into the cook-car, then came out of the cook-car and went toward the house, that when he heard Mr. and Mrs. Dezell wrestling in the house he went back into the cook-car and got the gun and walked up on the porch and when Dezell opened the door of the wash room leading out on the porch the defendant stepped back on the ground from the porch and then shot Dezell as the latter stood in the doorway.

The next statement which the defendant made with reference to the circumstances of the shooting appears in the affidavit made by him in the district court at the time of his motion to set aside the judgment of conviction, which affidavit was dated the 6th day of January, 1921, after he had been in the penitentiary nearly a year. This affidavit throws little new light on the details of the tragedy. In it the defendant endeavors to show that he has no clear recollection of what happened, that the shooting occurred under great stress and excitement, that he was suffering from shell shock, that his statement made in the hospital to Mr. Elton was made at a time when he was under the influence of narcotics, that his mind was bewildered and that he did not understand or comprehend just what he was doing or saying, and does not remember what he said in the court room at the time of his arraignment.

In addition to these statements of the defendant himself as to the causes leading up to the shooting and as to just what happened on the morning Dezell was killed, we have the testimony of Clifford Dezell taken before Judge Cole on the 13th day of January, 1920, and the affidavit of Nellie Dezell.

Clifford states that his father was shot in the back the first time, was just going in the door when Joe shot him, that he, Clifford, heard two shots in the house; that on that day Joseph Throndson took the shells out of the house and took them to the cook-car and loaded the rifle in the cook-car, and that that was just before the shooting. That there were two shot guns in the house, that one had two or three shells in it, and that Joseph Throndson loaded the other one shortly before the shooting; that his mother and father were kind of wrestling around in

the house just before the shooting and that was why Joe shot his father.

The affidavit of Nellie Dezell, the widow of Elmer Dezell, made on the 24th day of May, 1921, states that about two weeks prior to the 28th day of December, 1919, while affiant's husband was away from home, said Throndson made improper advances to her, and that upon her refusal to submit and stating that she would go to town and inform her husband, said Throndson got a shot gun and said he would blow his brains out if she told her husband or caused him to leave the place, and that he then promised to not act improperly again. That about nine o'clock in the morning of December 28, 1919, while her husband was gone from the house, Throndson again came to the house and talked with her and asked her to stay alone while her husband was gone to St. Paul so that he, Throndson, could stay with her the first night; that she then put on her hat and coat with the intention of seeing her husband, and that Throndson said he would blow his brains out and somebody elses; that she then went out of the house saying to Throndson that she was going to the home of her parents, Mr. and Mrs. J. W. A. Kenmir, that affiant walked down the road, and upon looking back saw Throndson run out to the barn and later observed him coming down the road with the team, and that she then cut across the fields to the farm home of Mr. E. Conn, and that Thronsdon overtook her just as she was entering the farm yard; that Throusdon asked her to come back and not cause him any trouble, but she refused to go. That later her husband came to the Conn home with a team and sleigh and took her back. That when she reached the farm home she and her husband went into the house, and that upon passing through the kitchen she looked out and saw Throndson come hurriedly out of the barn toward the house; that Throndson stopped at the cook-car and got the gun, and when her husband opened the kitchen door to see where he was going that the defendant shot him and followed him through the house shooting again, and that Throndson then threatened to kill her, but she pleaded with him not to do so saying she would take the blame for the murder upon herself.

From all of these statements and affidavits it is apparent that the cause of the shooting was the relationship existing between Mrs. Dezell and Throndson. That Throndson was afraid that Mrs. Dezell would

either tell her husband or that her husband would force a confession from her and that Dezell would then visit his wrath on Throndson, and that he prepared for just such an emergency by loading the rifle and the shot gun so that whether in the house or out of it he would have a weapon with which he could kill Dezell if necessary. There was no assault on the part of Dezell, no threats of violence, no apparent immediate danger to be apprehended by Throndson, unless, perhaps, a guilty conscience made him a coward and abnormally afraid of some injury to himself or to Mrs. Dezell. Dezell was unarmed. Throndson had every opportunity to leave the place and prevent a tragedy. Either his past misconduct or an infatuation for the woman made him stay. When he was in France it was to her that he sent his money. When he wanted wages he went to her. She seems to have overpaid him. There must have been a close and friendly relationship between them if nothing more criminal. It was to save her appearing in court and testifying that he wished to avoid the publicity of a trial and entered his plea of guilty. He frankly stated that he did not wish to bring Mrs. Dezell into court? Why? Either because he wished to save her the disgrace that would follow the truth, or that he felt his story would not bring him much credit or sympathy. He had no grudge against Elmer Dezell. Immediately following the shooting he insisted on stating that he was sorry and that Elmer Dezell was his best friend. There is every indication then from the record that the shooting was not just the result of unusual excitement or anger, or the result of immediate fear of great bodily injury to himself or Mrs. Dezell, but that he deliberately planned the shooting in case Dezell should tax him with his misconduct toward Mrs. Dezell. The fear that Dezell would ascertain the facts was uppermost in his mind and he determined that if such a thing threatened he would put Dezell out of the way. Suicide following such murders is often the result. A criminal love affair, the fear of the husband ascertaining the truth, followed by the killing of the husband would be ample reason for the attempted suicide following the shooting, and is not strong evidence of a diseased mind, any more than that all murders and suicides are evidence of some mental derangement.

There is nothing in the record that shows that any undue advantage was taken of the defendant by the officers of the law or that he was ad-

vised or coaxed or forced to enter a plea of guilty. His brothers were permitted to visit him at the hospital immediately following the shooting, were allowed to talk with him freely; there was no disposition shown on the part of the state's attorney or any of the officers to prevent the defendant from securing the services of an attorney or having a trial if he wished. The court also admonished him as to his right, but the defendant freely and voluntarily waived his right which, as stated by our court in the case of State v. Layer, 48 N. D. 366, 184 N. W. 666, is a right which the defendant can forego.

We now come to the main ground of the application made by the defendant for setting aside the judgment of conviction, namely, that at the time of the commission of the crime, and at the time of the entry of his plea of guilty he was mentally incapacitated by reason of suffering from shell shock following his war experience. In this connection we cannot lay much stress or rely too strongly on his own affidavit or the affidavit of his counsel. It is very natural, perhaps, that after being in the penitentiary for a year and realizing that a lifetime in prison is a dread prospect that he should look about for some means of escaping the punishment due to his crime and should grasp at the idea of shell shock, and that he should regret not having taken advantage of such a defense under a plea of not guilty. However, the fact that by the assistance of able counsel he might have secured a conviction of murder in a lesser degree, or by the building up of a clever defense might have secured immunity from punishment, is no ground for relieving him of the burden of his crime if he knowingly, willingly, voluntarily, and with a full understanding of the nature of the crime which he had committed and the punishment which would follow entered his plea of guilty.

We must look for extrinsic proof. The only nonmedical testimony which we have to aid us is the affidavit of Ida Throndson, his sister. However, she had the opportunity of observing him for but a week covering a period of seven years. This was immediately following his discharge from the army in May, 1919, when he visited her at his old home in Baldwin, Wisconsin. She says that he appeared to be very nervous and easily excited, and further that when he was asleep she could hardly awake him that he slept so soundly. Her affidavit can not be said to prove a diseased mind, or tend strongly in that direction.

The next affidavit for the defendant is that of Dr. Julius O. Arnson of Bismarck who examined the defendant at the penitentiary on the 2d day of December, 1920. He says: "There is in the life history of his, Joe Throndson's, life nothing unusual or anything indicating any mental disturbance, with the exception that he has been below the average in intelligence. There is nothing to indicate that there was any mental derangement previous to his entering the service of the United States Government in the army." He further states that he does not see any evidence of any mental trouble at this time, but that it is reasonable to suppose that due to his war experience he might be provoked by unusual excitement or severe nervous strain of any kind. There is nothing in this affidavit to show that the defendant was suffering from shell shock or from any mental derangement either at the time of the shooting or any time thereafter, or that he has not been at all times in clear possession of his usual mental faculties.

The remaining affidavit in support of the defendant's theory is that of Dr. John Even Engstad. This affidavit is highly interesting from a theoretical, imaginative, and literary viewpoint. The doctor very graphically described what might happen, or what thoughts might enter the mind of a highly intellectual and supersensitive individual when surrounded by the horrors of war. His conclusions are all based on statements made by the defendant, not by any physical condition which he himself finds. It is to a large extent a restatement of the facts as given by Throndson himself vivified and enhanced by the picturesque imagination of the doctor, and is not at all convincing as expert testimony of an actual mental condition.

Opposed to these affidavits of Ida Throndson, Dr. Arnson, and Dr. Engstad are the affidavits of the physicians in charge of Throndson immediately following the shooting; the nurse who had charge of him in the hospital; the sheriff and his deputies; supported by the affidavits of some eight or ten respectable citizens of Grand Forks county who knew Throndson during all the years he worked for Dezell. A summing up of these affidavits is to the effect that Throndson was just the same in every respect after he returned from the army as before, that he never indicated any signs of excitability or nervousness or mental strain. That even after the shooting he was particularly cool, calm, and collected. Was even able to remember that he had made an error,

or that Mr. Franklyn had made an error, in the affidavit made by him in the depot waiting room at Emerado on the evening of December 28, 1919, which affidavit reads that he had procured the rifle from the shack. In his statement made the next day he corrects this and states that he procured the rifle from the cook-car and that Mr. Franklyn and the others must have misunderstood him.

"The generally accepted test of responsibility for crime is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act." Philbrick v. State, 105 Neb. 120, 179 N. W. 398; Osborn v. State, 143 Wis. 249, 31 L.R.A.(N.S.) 966, 126 N. W. 737; State v. Mewhinney, 43 Utah 135, L.R.A.1916D, 590, 134 Pac. 632, Ann. Cas. 1916C, 537; 16 C. J. 100.

The defendant in our opinion has failed to establish that in entering his plea of guilty he was deceived or induced to enter it either through fraud or misrepresentation or a misunderstanding of his legal rights. He has failed to establish that his plea was not free and voluntary when entered and that all the proceedings thereafter including his conviction and sentence were not thoroughly understood by him or that the sentence of conviction is unreasonable or unjust. He has failed to establish that at the time of the commission of the crime his mind was unbalanced, or that he was suffering from shell shock or any nervous disease which prevented his mind from acting openly and understandingly, or that he had not the ability to distinguish between right and wrong.

This matter, too, was before the district court. The district court had an opportunity of seeing and examining the defendant at the time that he entered his plea and was thus in a better position to realize the physical and mental condition of the defendant than this court can be from the mere reading of affidavits, and the fact that the district court has denied the petition or motion of the defendant to reopen his case must necessarily carry some weight with this court.

It follows that the order and judgment from which this appeal has been taken is hereby affirmed.

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

ROBINSON, J., concurs in result.

CHRISTIANSON and BRONSON, JJ., disqualified, did not participate, Honorable GEO. M. MCKENNA and Honorable THOMAS H. PUGH, Judges of the Third and Sixth Judicial Districts, sitting in their stead.

GRANDIN INVESTMENT COMPANY, a Corporation, Plaintiff and Appellant, v. NICHOLAS HARTUNG and T. N. Hartung, Defendants and Respondents.

(191 N. W. 783.)

Disposition of case.

For errors of law the judgment is reversed and a new trial granted.

Opinion filed November 23, 1922. Rehearing denied December 30, 1922.

Contracts, 13 C. J. § 394 p. 453 n. 69; § 395 p. 454 n. 79, 80. Trial, 38 Cyc. p. 1615 n. 21.

Appeal from the District Court of Stark County, *Berry*, J.

Reversed and new trial granted.

J. W. Sturgeon, for appellant.

A general allegation that the consideration was illegal or insufficient in law, or the like is bad, as being a mere conclusion of law. 8 C. J. 922, 1207 and cases cited.

And in many cases decided under American statutes requiring the facts constituting the cause of action or defense to be pleaded, it has been decided that evidence tending to show the illegality of the contract in suit cannot be given under a general denial or the general issue, if the contract is valid on its face, but the defense must be specially pleaded. 13 C. J. 742, 890, 891; Frankel v. Geo. M. Hillier, 16 N. D. 387.

"Where an averment that the note was based on a 'gambling transaction' by defendant in cotton futures, was held to be a mere statement of a legal conclusion." Key v. Hickman, 149 S. W. 275.

Thus a plea averring that the several causes of action, if any there were, or still are, did not accrue is bad for not giving color; and so also is a plea referring to the cause of action alleged as the "said supposed

debt, if any such there be;" but a plea merely using the term "supposed" in reference to the causes of action alleged, is good. 31 Cyc. 216 (b).

Matters in avoidance should consist of facts, not legal conclusions nor matters of evidence. 31 Cyc. 217 (c).

"It is no defense to certain notes that they were executed to save the maker from prosecution for receiving stolen goods, where there was neither allegation nor proof that at the time the notes were given any criminal prosecution was pending against him, or that he was in fact guilty of any criminal offense." Fred Rueping Leather Co. v. Watke (Wis.) 116 N. W. 174.

"So also, where a witness testified that certain language was used by another person, such person may be called and asked if he used that identical language, and he is not simply to be required of as to what he did say." 40 Cyc. 2775.

Simpson & Mackoff, for respondent.

"The evidence is sufficient to establish that the contract was given to compound a crime; in other words, that the consideration for the agreement and promise of the defendant was that C. D. Miller should not be prosecuted for embezzlement of plaintiff's money. This contract is against public policy, and is illegal and void." McCormick Harvesting Mach. Co. v. Miller (Neb.) 74 N. W. 1061; Rosenbaum Bros. v. Levitt, 80 N. W. 393.

"An agreement or understanding not to prosecute need not be the sole consideration for the note, and it was not incumbent upon defendants to show that plaintiff's agent intended to enter into such a contract. It was sufficient if, in the language of the statute, the note was taken upon an agreement or understanding, express or implied, to compound or conceal the offense or not to prosecute the same."

"Although the contract may have been based in part upon other valuable considerations, still, if there was such an agreement or understanding as the law forbids, combined and co-operating with that consideration and operating as a part of the inducement for the giving of the note, then the instrument is illegal and cannot be enforced." Baird v. Bochner (Iowa) 42 N. W. 454; Peed v. McKee, 42 Iowa, 689; Henry v. State Bank, (Iowa), 107 N. W. 1034.

"In order to avoid the payment of a note executed under threats to

prosecute a son for felony, *where no indictment has been returned or no prosecution is pending,* it is not incumbent upon the maker of the note to show that a felony had in fact been committed." Pendleton v. Greever (Okla.) 17 A.L.R. 317.

"Where a note is procured from a father under threats to prosecute his son for a felony, and a promise by the debtor that the son would not be prosecuted if the father would execute the note with another as surety, the defense of the illegality of the consideration is equally available to the surety."

"It is the practice, which generally prevails, to ask the impeaching witness the direct question in leading form, whether the other witness used the language attributed to him." Jones, Ev. 1078, note 16.

"It is not necessary, in laying the foundation, to give the exact language of the alleged statement, the substance is sufficient." Jones, Ev. 1078, note 12.

This court had held that threats of prosecution is no defense to notes given as in this case. Threats of prosecution is no defense unless the crime is confessed or prosecution started before the giving of the notes. 26 L.R.A. 48 and note; 59 N. W. 564; 47 N. W. 946, 31 N. D. 240 and cases cited.

"It is no defense to certain notes that they were executed to save the maker from prosecution for receiving stolen goods, where there was neither allegation nor proof that at the time the notes were given any criminal prosecution was pending against him, or that he was in fact guilty of any criminal offense." Fred Rueping Leather Co. v. Watke (Wis.) 116 N. W. 174.

Robinson, J. The plaintiff appeals from a judgment of dismissal. The suit is on two promissory notes made by the defendants to the plaintiff on June 4, 1918 for the sum of $3,500. The defense is that the notes were given to compound a felony. The defendants are brothers. They had been doing business at Dickinson as partners under the firm name of Hartung Real Estate & Loan Company. T. N. Hartung was the sheriff of Stark county. Nicholas Hartung had sold the plaintiff the note and mortgage for $3,500 cash. It being conceded that the notes and mortgage were forged, Nicholas Hartung was requested to refund the money or to give other security. He had a good

growing crop and was considered responsible. Without any question or unpleasantness he offered to give notes with the signature of his brother, who was responsible. The offer was accepted and the notes in suit were made to the plaintiff.

The appellant assigns errors on the rejection of evidence, the instructions of the court and the insufficiency of the answer.

(1) The answer does not state a defense because it does not show the commission of a crime or an agreement to compound a crime. The answer is, in effect, that if the notes were given at all, they were given to compound a felony and upon the agreement or understanding to conceal the offense of forgery, alleged by the plaintiff to have been committed by Nicholas Hartung, which forgery was alleged to be of a note and mortgage for the sum of $3,500. The answer neither shows the commission of a crime nor an agreement to compound a crime. It does not show any defense.

(2) Error is assigned on the charge of the judge. He repeatedly charged that an agreement to compound the crime might be either express or implied from the facts and circumstances. There was cogent, forcible and preponderating evidence that not a word was said about a crime or the compounding of a crime. Yet the court elaborated on an implied agreement which might be inferred from the mere giving of the promissory notes in question without a word being said concerning any crime. Clearly the charge was erroneous and the judgment must be reversed and a new trial granted.

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

BRONSON, J., concurs in result.

CHRISTIANSON, J. (concurring specially). In this state the legislature has spoken as follows as regards the compounding of crimes and the compounding of prosecution:—

"*Compounding crimes.* Every person who, having knowledge of the actual commission of a crime or violation of statute, takes any money or property of another or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, express or implied, to compound or conceal such crime or violation of statute,

or to abstain from any prosecution therefor, or to withhold any evidence thereof, is punishable, etc." Comp. Laws, 1913, § 9401.

"*Compounding prosecution.* Every person who takes any money or property of another or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, express or implied, to compound, discontinue or delay any prosecution then pending for any crime or violation of statute, or to withhold any evidence in aid thereof, is guilty of a misdemeanor." Comp. Laws, 1913, § 9402.

In this case there is no contention that a prosecution had been commenced. In other words, there is no contention that a prosecution was compounded; but the contention is that a felony was compounded and that the notes in suit are void because they were given upon an agreement to compound a felony. The statute relating to the compounding of crimes by its express terms applies only to a person "who having knowledge of the *actual commission* of crime or violation of statute, takes any money or property of another, or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, express or implied, to compound, discontinue, or delay any prosecution then pending for any crime or violation of statute or to withhold any evidence in aid thereof." Manifestly, a transaction is not within the inhibition of this statute unless it is shown that a crime has actually been committed. It will be noted that the statute draws a clear distinction between the compounding of a crime and the compounding of a prosecution. The statute defining the compounding of crimes makes knowledge of the *actual commission* of crime an essential ingredient of the offense defined. This is not true, however, of the statute relating to compounding a prosecution. That statute is violated by any person who commits any of the proscribed acts with respect to a pending criminal prosecution, without regard to whether a crime has or has not, in fact, been committed. The reason for the distinction drawn between the two classes of cases is generally recognized in civil as well as in criminal cases. Corpus Juris (13 C. J. pp. 453–454) in dealing with this subject says:

"To render an agreement illegal as an agreement to compound a crime, it is essential that there shall be an agreement not to prosecute, although the agreement may be either express or implied. The law does not prevent one whose property has been stolen or whose rights

have been interfered with through the commission of a crime to compromise with the wrongdoer, if it is not agreed either expressly or impliedly that the prosecution for the offense shall be suppressed or stayed. Illustrations of this rule are agreements by which security is given for the value of property stolen or embezzled. Even a promise not to prosecute is not illegal, where it is made, not for the sake of gain but from motives of kindness and compassion or on account of relationship. And mere threats to prosecute, while they may amount to duress or undue influence, so as to render a promise voidable, will not avoid an agreement made by a defaulter for the purpose of making reparation to the person injured by his misdoing, if there is no agreement not to prosecute.

"In this connection a distinction is made between a criminal prosecution actually pending and a charge or suspicion of crime where no criminal proceedings have yet been commenced. If a criminal prosecution is in fact pending at the time, either by the finding of an indictment or otherwise, then the public interest in the prosecution of the actual pending charge is of such a nature as to avoid any security for a debt given on an agreement for the stifling of the pending prosecution, even though the debt thus secured was due. But where no criminal proceedings are pending, the actual commission of the crime alleged to have been compounded is one of the facts at issue in the case, and necessary to be alleged and satisfactorily proved in order to make out the defense of illegality. The reason is that if no criminal charge is actually pending for trial or prosecution, the public interest is, not that there should be a charge in any event, but only in case a crime has been actually committed; and proof, therefore, that the crime has been committed lies at the basis of the charge of illegality. This distinction, however, is not observed in all of the cases, and the broad general rule has been stated that a contract cannot be void as compounding a felony, where no felony has in fact been committed." 13 C. J. pp. 453, 454.

In this case the answer did not allege nor did the proof show that any crime had been committed. The answer merely alleged, and the evidence adduced merely tended to show, that the plaintiff claimed that a crime had been committed. Hence, the verdict returned in this case has no support either in the pleadings or in the evidence.

J. R. DANIELS, Respondent, v. JOHN BARTON PAYNE, Agent of the United States Government, Appellant.

(191 N. W. 776.)

Damages — evidence of injury to spine, etc., held to sustain verdict for $10,000.

Upon a second trial of an action for personal injuries the plaintiff recovered $10,000 damages. A motion was made in the trial court for judgment non obstante, or, in the alternative, for a new trial, which motion was denied. The evidence is examined, and it is held that it is not insufficient, as a matter of law, to sustain the verdict.

Opinion filed December 23, 1922.

Damages, 17 C. J. § 417 p. 1098 n. 8.

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

Judgment affirmed.

Young, Conmy & Young, for appellant.

In considering this motion we particularly ask the court to read decisions in Waterman v. Soo, 26 N. D. 540; Carpenter v. Dickey, 26 N. D. 176, and the note found in L.R.A.1915F, p. 30; Heath v. Taxicab Co. (Wash.) 131 Pac. 843; Yarborough v. Swift & Co. 44 So. 121; Illinois Cent. R. Co. v. Downs, 122 Ill. App. 545; James v. Hauden Bros. (Neb.) 150 N. W. 1013; St. Louis Ry. v. Brabizer (Ark.) 112 S. W. 222.

"There is relatively an obligation resting upon employees to yield obedience to all proper rules and orders; and if an employee sustain an injury by reason of a violation of the employer's regulations, orders, or commands, he will be barred of all right of recovery from the employer on the score of the latter's negligence." 18 R. C. L. 659.

An employee riding on a rear end platform, contrary to rules of the railroad, held prevented from recovering from injury. Atchison, T. & S. F. R. Co. v. Reesman, 60 Fed. 370.

Yardmaster going between cars where the coupling was known to be

Note.—On excessiveness of verdicts in actions for personal injuries other than death, see note in L.R.A.1915F, 30; 8 R. C. L. 674; 2 R. C. L. Supp. 638; 5 R. C. L. Supp. 480.

defective prevented from recovery because of the rule. St. Louis M. & S. R. Co. v. Rice (Ark.) 11 S. W. 699.

Where rules of the company required one riding on a hand car rounding a curve to flag the curve, a section foreman failing to comply with this rule held guilty of contributory negligence, barring recovery. Louisville R. R. Co. v. Markee (Ala.) 15 So. 511.

An engineer running train in violation of rules held guilty of contributory negligence. Eastern Tenn. V. & G. R. R. Co. v. Kane (Ga.) 18 S. E. 19.

A switchman or brakeman entering between cars when in motion, contrary to rules of company, held guilty of negligence precluding recovery. Ford v. C. R. I. & P. R. R. Co. (Iowa) 59 N. W. 5; Grand v. Michigan C. R. Co. (Mich.) 47 N. W. 837.

Railroad providing that brakeman should not leave brakes while train is in motion and that rear brakeman must not leave last car held reasonable, and plaintiff precluded from recovery because of violation. Gordy v. N. Y. P. & N. R. R. Co. (Md.) 23 Atl. 607.

Fireman's failure to call attention to engineer to signal where so required by the rules held contributory negligence, barring recovery. Elmgren v. C. M. & St. P. R. R. Co. (Minn.) 112 N. W. 1067.

Car inspector's failure to put out blue flag in conformance with rule of company, bars recovery. N. Y. C. & St. L. R. R. Co. v. Ropp (Ohio) 81 N. E. 748.

The United States Supreme and the Federal Court absolutely bar a recovery on the theory that the violation of the rule is the proximate cause of the injury, or that the servant in violating the rule assumed the risk of injury. These decisions are controlling and are being followed by all the state courts in their later decisions on the subject. G. N. R. Co. v. Wiles, 240 U. S. 444.

Held that a railway engineer violating the rules of the company cannot recover, under the Federal Employer's Liability Act. Rask v. Atchison, T. & S. F. R. R. Co. (Kan.) 173 Pac. 1066.

Held that where employee of the company violated the blue flag rule he cannot recover, under the Federal Employers' Liability Act. Yoakum v. Lusk (Mo.) 223 S. W. 53. Dahlen v. Hines (Wis.) 267 Fed. 926; (S. C.) 105 S. E. 747, reads as follows:

"A yard conductor though injured as a result of the railroad's viola-

tion of the Federal Boiler Inspection Act (U. S. Comp. Stat., §§ 8630–8639) as amended by Act March 4, 1915 (U. S. Comp. Stat., §§ 8639a–8639d), in furnishing a defective engine which he attempted to operate in wilful violation of a rule forbidding his operation of engines, is not entitled to recover; his conduct in violating the rule being available as defense, whether it be called negligence or assumption of risk, referred to in Employers' Liability Act, §§ 3, 4 (U. S. Comp. Stat. §§ 8659–8660)." Froelich v. N. P. R. R. Co. 42 N. D. 550; Wingen v. Soo, 42 N. D. 517.

Jacobson & Murray and *M. S. Odle,* for respondent.

"It is apparent that trial court here, under this provision, no longer have power to set aside verdicts, because simply excessive, but can only do so when it is also found that the excess award is due to passion or prejudice." Waterman v. Soo Railway Co. 26 N. D. 540; York v. General Utility Corp. (N. D.) 176 N. W. 352.

"Neither is it possible to lay down rules according to which injustices due to verdicts of juries on questions of fact can be obviated in all cases. Verdicts which by subsequent demonstration, may be found to be unjust may nevertheless be of unquestionable legal validity. This may work to the disadvantage of either party for wrongs are perhaps as likely to result from the denial by juries of substantial damages for real injuries, as from awards for injuries which prove to be less serious than anticipated."

"The witnesses for the plaintiff testify that there is a lesion of the spinal cord, or a condition of traumatic neurosis. Those for the defendant say that, in their opinion, such a condition does not exist. For this court to say, then, that the plaintiff has not sustained the burden of proof as to the permanency of her injuries, would involve the question of usurpation of the functions of the jury in weighing the testimony upon a disputed fact relating to an existing condition." Larson v. Russel (N. D.) 176 N. W. 998.

"His lower rib was fractured, and he was badly injured and disabled. He suffered much pain, some expense in doctoring, and the impairment of his working capacity, and so the jury assessed his damages, at $4,000; and though the damage appeared rather excessive, that is not sufficient cause for disturbing the verdict. It is quite probable that the plaintiff would have settled for half the sum if he could have obtained it without

incurring the expense of an action and an appeal to this court. Where a party has to recover his damages at the end of a lawsuit, the expense is always a matter of some consideration." Lilly v. Elm Point Min. Co. (N. D.) 178 N. W. 128; Ash v. Washburn Lignite Coal Co. 186 N. W. 577; Rathbone v. Detroit United R. Co. (Mich.) 169 N. W. 884, 164 N. W. 143; Root v. Cudahy Packing Co. (Kan.) 147 Pac. 71; Wessler v. Great Northern R. Co. (Wash.) 155 Pac. 1063.

"Where, in an action for injuries, the evidence was such that the jury might well have found that plaintiff's injuries were permanent, and that, though he was forty-five years of age, and had previously earned $3.50 a day, he would not thereafter be able to earn money, a verdict in his favor of $20,000 would not be set aside on appeal as excessive." Bourke v. Butte Elev. R. Power Co. (Mont.) 83 Pac. 470.

"What constitutes negligent disobedience. Rules and orders are not held to forfeit the right of a servant where, otherwise, under the law, he would be entitled to recover, unless there has been a plain and manifestly negligent violation of the rule or order, according to its plain and obvious meaning, or unless such violation has been itself a contributory cause to the injury.

"Excuses for disobedience. The violation by a servant of a rule or order promulgated by the master for the conduct of his business, is not negligence per se, and his disobedience will be excused where the rule or order is unreasonable; where obedience is not practicable." 26 Cyc. 1269.

BIRDZELL, Ch. J. This is an appeal from a judgment in favor of the plaintiff for $10,000 and costs, in an action for personal injuries. The judgment was entered pursuant to a special verdict at a second trial of the action. At the first trial, the plaintiff had judgment for $4,559.50, and an appeal was taken to this court, where the judgment was reversed and a new trial granted (Daniels v. Payne, 48 N. D. 60, 182 N. W. 1010).

It is unnecessary to again state the facts in detail, as reference may be had for this purpose to the decision on the former appeal. The principal contention upon this appeal is that the verdict is excessive. This question was presented to the trial court by a motion for judgment non obstante, or, in the alternative, for a new trial, which motion was

denied. This court, when the former judgment was before it, in commenting on the prejudicial effect of certain improper remarks of counsel to the jury, called attention to the probable effect of such statements by pointing out the unsatisfactory character of the evidence going to establish permanent injury and the size of the verdict, but we specifically stated that the damages awarded were not necessarily "so large as to indicate passion and prejudice if awarded under the evidence at the end of an assuredly fair trial."

In support of the argument that the verdict is excessive, the appellant urges that the evidence as to the plaintiff's injuries is no stronger now then formerly. It is pointed out that the only treatment received by the plaintiff, aside from that given in the hospital in Brainerd, Minnesota, by Dr. DeRauf, in April, 1919, was eight treatments from an osteopathic doctor named Allen; that while the plaintiff had been examined by another competent physician, Dr. LaRose, the latter was not called to testify; and that Dr. DeRauf testified that the plaintiff was not, in his opinion, permanently injured. On the question of his injuries, the plaintiff testified in substance as follows: That he was forty-seven years of age; that he was knocked unconscious when he was struck by the defendant's speeder, and when he regained consciousness he felt severe pain in his back, hip and leg; that he could not work; that he had received a long gash in his chin, which was sewed up; that his head was badly bruised; that there are nights that he cannot sleep on account of his head; that two of his front teeth were knocked out and two broken off, which damage had been repaired by a dentist; that he had suffered lots of pain; that he still suffers pain in his back and is unable to work at hard labor, and still has pain in his head and dizziness; that he suffers from pain and nervousness to the extent that his sleep is disturbed; that he was strong and in good health before he was injured and never bothered with nervousness; that his kidneys give him trouble; that his knee is still somewhat stiff; and that since his injury he has not been able to do a man's work, or to earn pay accordingly. Dr. Allen testified that the plaintiff first consulted him on June 16th, 1919; that the lower part of the spine, in the lumbar region, showed signs of strain and tenderness; that he complained of a great deal of pain in the right knee and in the back; that he was weak; that the spine was badly twisted, the muscles somewhat swollen, and strained and sore; that

unless the condition found was remedied "particularly the spine straightened, or something done, there would be some permanent injury;" that he did not notice a great deal of improvement in plaintiff's condition while he was being treated; that he seemed to have less pain and not to suffer so much towards the last; that he treated him about a month, but did not discharge him, although the plaintiff quit coming. Dr. DeRauf, upon this trial, testified concerning the treatment in the hospital, and also concerning an examination given him on the occasion of the previous trial, which was a year prior to the present trial. He said that his general appearance was good; that the patient complained of tenderness in that region of his back that had been injured a year before; that his knee was possibly very slightly swollen; that he wore an elastic band over the knee, but there was no permanent injury that he could find; that he could find no injury that would be the cause of pain; that his reflexes were normal, indicating absence of injury to the spinal cord.

In the light of this evidence, considered, in view of the fact that approximately two years and a half had elapsed between the injury and the date of this trial, and the further fact that the trial court has held that the verdict is not excessive, can this court say that this verdict is so excessive as to indicate passion or prejudice, or that there is no substantial evidence to support it? It is elementary that in actions for personal injuries there is no precise rule for the measurement of damages, and that of necessity their assessment is left largely to the good sense of the jury. 13 Cyc. 136. And that the jury is required to take into consideration, among other things, the character of the injury, the degree of physical impairment resulting, the pain suffered, and all damages which the evidence shows had resulted, or will result, from the injury. 13 Cyc. 137; 8 R. C. 544. The operation of this rule, says Corpus Juris, "is not affected by the fact that, in the opinion of the reviewing court, the amount awarded by the jury is larger or smaller than it should have been, where there was evidence to sustain the verdict, and nothing to induce the belief that the jury was actuated by prejudice, partiality, or corruption." 4 C. J. 870. The previous verdict, and the lapse of time between the injury and the second verdict, are matters that must be taken into consideration by an appellate tribunal in determining whether or not a particular verdict should be set aside on the

ground of its excessiveness. 4 C. J. 867; 17 C. J. 1090; Missouri P. R. Co. v. Johnson, 59 Kan. 776, 53 Pac. 129; Wheeling & L. E. R. Co. v. Suhrwiar, 12 Ohio C. D. 809. We are of the opinion that the evidence contained in this record, considered in the light of the legal principles stated above, does not warrant the setting aside of the verdict by this court.

We are of the opinion that there is no merit in the contention that the plaintiff was walking upon the railroad track, in violation of the rules of the company. In view of what was said on the former appeal we deem it unnecessary to discuss the remaining contentions with respect to negligence, contributory negligence, and the special verdict. The judgment appealed from is affirmed.

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

ROBINSON, J., dissents.

STATE OF NORTH DAKOTA, Respondent, v. HIRAM J. STEPP, Appellant.

(191 N. W. 482.)

Criminal law — ruling on new trial not disturbed unless discretion abused.

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

Criminal law — denial of motion for new trial for newly discovered evidence held not abusive of discretion.

2. In this case it is *held* that no abuse of discretion has been shown.

Opinion filed November 25, 1922. Rehearing denied December 28, 1922.

Criminal Law, 16 C. J. § 2708 p. 1182 n. 88; 17 C. J. § 3589 p. 252 n. 17.

Appeal from the District Court of Ramsey County, *Buttz*, J.

Note.—On discretion of trial court as to granting or refusal of motion for new trial on the ground of newly discovered evidence, see 20 R. C. L. 290; 3 R. C. L. Supp. 1051; 4 R. C. L. Supp. 1351; 5 R. C. L. Supp. 1096.

Defendant appeals from an order denying a new trial.

Per Curiam opinion.

J. F. T. O'Connor and *C. F. Peterson,* for appellant.

G. Grimson, State's Attorney of Cavalier county, and *Fred J. Traynor,* Special Assistant State's Attorney, for respondent.

PER CURIAM. The defendant was convicted of the crime of rape in the first degree in the district court of Ramsey county, on a change of venue from the district court of Cavalier county, and sentenced to two and one-half years' imprisonment in the state penitentiary. After sentence had been imposed he moved for a new trial. The motion was denied and defendant appealed from the judgment and from the order denying a new trial. The order denying the motion for a new trial was set aside and the cause remanded with directions that the trial court hear such motion anew, and, by application of the legal principles stated in the opinion to the facts in the case as presented on such motion, determine whether a new trial should or should not be had. State v. Stepp, 48 N. D. 566, 185 N. W. 812. In conformity with that decision the motion for a new trial was reargued before the district court and after due consideration the motion was denied. On the former appeal, this court considered and determined adversely to the defendant all questions there presented with the single exception of whether the trial court erred in denying defendant's motion for a new trial on the ground of newly discovered evidence. This was based upon certain alleged newly discovered evidence relating to the credibility of one Mrs. Manning and the truthfulness of the story which she had told upon the trial. On the former appeal this court was unable to review the ruling of the trial court on this question for the reason that the record did not disclose that the trial court had exercised the judgment which the law requires it to exercise when a motion for a new trial is asked on such ground. In other words, as was said in the former opinion: "The language utilized by the trial judge in the record transmitted to us on this appeal is such that we have some difficulty in understanding exactly what conclusions he did reach so far as the facts are concerned. And it is his judgment, his conclusions as to what the facts are, which in the first instance largely, if not wholly, determine whether a new trial shall or shall not be had. The discretionary power with

which trial courts are vested in ruling on motions for a new trial on the ground of newly discovered evidence is primarily applicable to a determination of the facts. The facts being determined, the applicable legal principles readily determine whether a new trial should or should not be had."

In considering the rules applicable in the district court to a determination of the motion this court said: "The rules governing the consideration of motions for a new trial on the ground of newly discovered evidence have been formulated to aid in the administration of justice, and to prevent a miscarriage of justice. Hence, where it is shown to the satisfaction of the trial court that since the trial at which he was convicted, a defendant has discovered certain new and material evidence, which he could not with reasonable diligence have discovered and produced at the trial; and the newly discovered evidence is of such probative force and character that, if considered with all the evidence adduced at the trial, it is likely to raise in the minds of reasonable men a reasonable doubt as to the guilt of the defendant, that is that such newly discovered evidence is likely to produce a different result upon another trial of the action—then it is the duty of the trial court, however unpleasant that duty may be, to grant a new trial. . . ."

"In the certificate of probable cause certain language is used, which seems to imply that the trial judge believed that the conviction of the defendant was due, largely if not wholly, to the testimony of the witness Mrs. Manning. He was not justified in denying the motion for a new trial here merely because he was of the opinion that there was substantial evidence tending to support the verdict. If he was of the opinion that the proposed evidence was newly discovered, and could not with reasonable diligence have been discovered and produced by the defendant upon the trial of the action; and if he further was of the opinion that the newly discovered evidence probably would, and ought to, bring about a different result upon another trial—in other words, if the trial judge was of the belief that the new evidence was of such character that, considered in connection with the evidence adduced upon the trial, it would be likely to create in the minds of reasonable men a reasonable doubt as to defendant's guilt—then he should have granted a new trial. *Or to state the concrete proposition as it appears in this case, it is our opinion that if the trial court was of the belief that the defendant would*

not have been convicted except for the testimony given by Mrs. Manning, then he should have granted the motion for a new trial."

The record before us on this appeal shows that after the case had been remanded, the motion for a new trial was fully argued before the trial court. It is also apparent that the trial court gave the matter careful consideration. He prepared and filed a memorandum decision, from which it appears that he exercised the judgment which the law requires that he exercise when a motion for a new trial is made on the ground of newly discovered evidence. The trial judge reached the conclusion that the motion for a new trial should be denied, and he stated that in his opinion defendant had had a fair trial and that it is not likely that a retrial would result in a different verdict.

In our opinion the determination of the trial court must be sustained. Upon the record here we cannot say that that determination is erroneous.

Affirmed.

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

GRACE, J., dissenting. This is a criminal action in which the defendant, by an information, was charged with the crime of statutory rape. On this charge he was tried in the district court of Cavalier county, and on June 21st, 1919, by the verdict of a jury was found guilty and was sentenced to a term of two years in the state penitentiary. On June 25th, 1919, he appealed from the judgment of conviction. He subsequently made a motion for a new trial, which was denied on January 9th, 1920. On April 1st, 1920, an appeal was perfected to this court from this order. In that appeal the state contended that the trial court had no jurisdiction to hear the motion for a new trial on the ground that the defendant having previously appealed from the judgment of conviction, the court had no jurisdiction to hear the motion for a new trial.

The court, however, following the decision of McCann v. Gilmore, 42 N. D. 119, 172 N. W. 236, held that the appeal from a judgment and a motion for a new trial are independent remedies. See State v. Stepp, 45 N. D. 516, 178 N. W. 951. This court in the decision in that appeal in an opinion prepared by Mr. Justice Bronson, and con-

curred in by the other members of the court, held that the defendant was entitled to a new trial, by reason of errors in the record, with reference to the reception at the trial of certain prejudicial evidence, and on the further ground of certain prejudicial misconduct on the part of the special counsel for the state.

The case having been remanded to Cavalier county, where the crime was alleged to have occurred, for a new trial, the defendant thereupon made a motion for a change of venue, which was granted, and the case sent to the district court of Ramsey county for trial. There the case was again tried, and again the defendant was found guilty by a verdict of the jury. By the district court of that county, he was sentenced to the penitentiary for a period of two and one-half years. After sentence had been imposed, he appealed from the judgment of conviction and from the order denying a new trial.

On the appeal, several errors were assigned. The principal ones were:

1. That the court erred in appointing and permitting Fred J. Traynor to act as assistant attorney in the prosecution of the case, over the objection of the defendant.

2. That the conviction should be set aside for the reason that the defendant did not enter any plea to the information before the commencement of the trial, and was not afforded an opportunity to do so.

3. That the trial court erred in denying defendant's motion for a new trial on the ground of newly discovered evidence.

The first two of these were decided adversely to defendant. As to the third, the majority of the court were in doubt whether the trial court abused its discretion in denying defendant's motion for a new trial. In an opinion written by Mr. Justice Christianson, the majority concurring, it was held that the order denying a motion for a new trial should be set aside and the cause remanded with directions that the trial court hear such motion anew, and, by application of the principles announced in the opinion, again determine whether a new trial should or should not be had, while two of the judges held that the case should be remanded for a new trial. The case was remanded and the motion for a new trial considered anew by the trial judge, who again made an order denying it. The defendant appealed from that order. The matter has been orally argued and submitted to this court.

The only question presented is whether the court erred in denying

the motion, that is, did the court abuse its discretion in making the order, in view of the character of the newly discovered evidence offered in support of the motion. It is our opinion it did. The newly discovered evidence is of such a character as to challenge the truthfulness of certain evidence and statements of witness, Mrs. Manning, which were made at the last trial. She was the state's most important witness and her evidence is very material and of great strength, if true. At the trial her reputation for truth and veracity was to some extent challenged by the testimony of certain of defendant's witnesses, and if there were no newly discovered evidence affecting that testimony in this respect, the verdict of the jury against the defendant, we think, would have warranted this court in affirming the order of the trial court in denying a new trial, it being well understood, as a matter of law, that the jury is to judge the weight of the testimony and the credibility of the witness. There is newly discovered evidence, however, which if assumed to be true, is of such a character as to give rise to grave doubt as to whether certain very material testimony given by Mrs. Manning was in fact true.

In order that a clear comprehension of her testimony in this important respect may be had and the vital effect of it understood, it will be necessary briefly to refer to it. She was not a witness for the state at the first trial; she was introduced as a witness for the state at the second trial only. The information charges the defendant with committing statutory rape upon one, Florence Day, on February 26th, 1917. Mrs. Manning in substance testified, that she came to the home of the complaining witness at about the time that the crime was committed with which defendant is charged. She claimed that she knocked at the door but that there was no response; that she then entered the house, opened the kitchen door, and saw defendant and the complaining witness in a compromising position on the floor. It is not difficult to understand that her testimony is exceedingly important. If she saw what she claimed to have seen, such evidence was direct and not circumstantial, hence, its convincing character, if true. It is very frequently an arduous task to successfully challenge the veracity of a witness who has given material and important testimony, however, in an action or proceeding in court where it is attempted, there are certain adopted methods which are intended to bring about this result. It is not necessary to mention

all of these; it is sufficient to say that one of the principal ones is to show that the witness made an important statement or admission at a different time and place, with reference to a material issue in the case, that was different to that made under oath by the same witness at the time the testimony was given in court.

In considering the question now presented, that is, of newly discovered evidence, which it is claimed shows that important evidence of Mrs. Manning was not true, the place where she claimed to have seen the act committed becomes material. She in effect testified she saw the act committed in the kitchen. If it were shown that subsequent to the trial she made a statement in substance, that she saw the act committed in the dining room, it would be an important circumstance tending to show that her statement to the effect that the act occurred in the kitchen was not true. If she saw the act committed in the kitchen as she claimed she did, or which amounts to practically the same thing if she saw the parties on the floor in a compromising position, it would seem that she could not at another time truthfully describe it as having been committed at any other place; having testified to what she saw in the kitchen, then at a time subsequent to the trial having described the same occurrence as having taken place at a different location, the discrepancy is material and of such a nature as might give rise to grave doubt as to whether her testimony given at the trial was true.

Mrs. George K. Anderson made an affidavit in support of the motion for a new trial. Without setting it out at length, it is sufficient to say that in substance it states that she was one of the witnesses at the trial; that sometime after the trial and while on a train she was approached by Mrs. Manning, who was also a witness at the same trial; that the latter left her seat in the car and came over to the seat where the affiant was, and asked if she was the lady that was at the hearing of the Stepp and Day trial. Affiant said that she was; that Mrs. Manning said that she went to the Day home in Sarles village and when she got there, rapped several times at the front door and got no response; that she then opened it and went in at the door that leads to the kitchen and thought she would bounce in and scare the children as she often did when she went to the Day home; that when she got to the kitchen there was no one there, so she went to the dining room door and saw Hiram Stepp and Florence Day on the floor in the dining room; that affiant knowing that Mrs.

Manning had testified at the trial that she saw Florence Day and Hiram Stepp in the kitchen, and so that there would be no misunderstanding asked Mrs. Manning again if this act happened in the dining room, and Mrs. Manning said yes; that the conversation with Mrs. Manning was entirely at her invitation and request. The place of the commission of the crime is immaterial here except the discrepancy above referred to has a manifest tendency to show that Mrs. Manning did not tell the truth, where she testified as above stated. If the defendant actually committed the act in either the kitchen or the dining room, he would be guilty. That, however, is not the question with which we are dealing. Here we are dealing with the question of whether or not there is newly discovered evidence, which is sufficient to give rise to considerable doubt as to the truth and veracity of certain important and material evidence given by Mrs. Manning in the respect mentioned. There can be no doubt that Mrs. Manning was the most important witness. The trial court in its certificate of probable cause stated the following: "If her testimony was believed by the jury, this was the strongest testimony the state had, and one of the jurymen so expressed himself to me."

To the same effect is the affidavit of Mr. O'Connor, one of the attorneys for the defendant. Then there is another affidavit which states that on a certain occasion mentioned in the affidavit, that Mrs. Manning said to the affiant when the affiant's husband was standing not far distant, the following: "I don't believe Hiram Stepp is guilty, do you?" All of these various statements relative to statements made by Mrs. Manning are sufficient, we think, to give rise to serious doubt as to the truth of her testimony.

Notwithstanding the fact that the trial court has twice denied defendant's motion for a new trial, after a thorough consideration of the record on this appeal for the purpose of determining whether the trial court failed to exercise a legal discretion in making the order here appealed from, denying defendant's motion for a new trial, we are agreed that there was an abuse of such discretion, and for this reason the case should be remanded for another trial.

ROBINSON, J. (dissenting). In this case and in every other case where the judges are divided and stand three against two, there is a possibility that the majority may be right, and also that it may be wrong. At very most the chances are not more than three to two in favor of

the majority opinion. But in this case, one thing is certain: It is really a shame and a reproach to the administration of justice to send anyone to state's prison for two years where two justices of the supreme court do certify that he has not had a fair trial.

A. F. McLANE, Respondent, v. A. P. SCOFIELD, Sheriff of Ward County, North Dakota, Appellant.

(191 N. W. 842.)

Counties — taxpayer's suit will not lie against sheriff to restrain the employment of special deputies; complaint to enjoin sheriff from appointing and continuing deputies and other officers from paying funds to such deputies held insufficient for such relief as against the other officers.

In an action by a resident and taxpayer to enjoin the sheriff from appointing and continuing in employment special deputies, and other county officials from paying county funds to such special deputies so appointed, it is *held:*

(a) That, as against the sheriff, plaintiff, upon the allegations of the complaint, is in the position of a private individual sustaining no threatened loss and having no right to maintain the action.

(b) That, as against the other defendants, the complaint does not allege, nor the record show, facts sufficient to warrant any injunctive relief.

Opinion filed December 28, 1922.

Counties, 15 C. J. § 354 p. 643 n. 7; § 358 p. 645 n. 35.

Action in District Court, Ward County, *Lowe,* J., to enjoin the sheriff and other county officials concerning the appointment and pay of special deputies.

Defendants have appealed from an order overruling a demurrer and an order refusing to vacate a temporary injunction.

Reversed and proceedings dismissed.

Fish, Murphy & Nash, for appellants.

Funke, Campbell & Eide, for respondent.

Statement.

BRONSON, J. This is a proceeding to enjoin the sheriff and other county officers from appointing or paying certain special deputies.

The complaint alleges that between July 1st and 25th, 1922, the G. N. Ry. Company had appointed and employed certain peace officers, so designated by it under the statute, in and about its property at Minot, North Dakota; that the sheriff, without any emergency existing therefor, appointed about twelve special deputies to serve as such until removed; that such deputies so appointed were then and are now in the employ of the railway company, receiving compensation from the company as peace officers; that such persons are in the employ of Ward county as special deputies and are demanding and receiving pay from Ward county as compensation for their services; that the county commissioners, county auditor, and county treasurer are about to expend and use the funds of Ward county in payment of the compensation of such special deputies and will do so unless restrained and enjoined by the court.

With the complaint there are two affidavits: One, by the plaintiff, to the effect that the sheriff had appointed some twelve special deputies who were in the employ of the railway company; that these special deputies were receiving $6 per day and meals; that the railroad company was paying one half thereof and furnishing the meals and that Ward county, pursuant to the understanding, would pay the remaining one half, or $3 per day. Another, by one Barnum, to the effect that on July 12th, 1922, he and two others were appointed by a deputy sheriff as special deputies to work for the G. N. Ry. Company and to watch its property; that the understanding was that they should receive $6 per day and meals, of which the county would pay one half and the railway company one half; that he was instructed to report to, and work under the direction of, a person in the employ of the railroad known as chief of railroad police; that a large number of special deputies were appointed and were working under the direction of such chief; that affiant worked under the direction of Lano for a day and a half and was paid for such time by the railroad company $4.50 and was furnished his meals.

Upon such complaint and affidavits, the trial court, on July 25th, 1922, issued a temporary order, restraining the defendants from appointing and qualifying such peace officers and special deputies and railroad police in the employ and pay of the railway company as peace officers and restraining them from continuing the appointment and

employment of such special deputies. On July 27th, 1922, the defendants interposed a demurrer to the effect that the complaint does not state a cause of action and that the plaintiff has no interest other than that which could be claimed by the public at large; also, defendants moved to vacate the temporary restraining order upon the grounds that the court was without jurisdiction to issue the same and that it is an interference with the sheriff in the performance of his executive duty; and, further, that it does not appear that plaintiff has any interest other than that of the public at large. On August 5th, 1922, the trial court overruled the demurrer, with leave to the defendants to answer within thirty days, and quashed the motion. The court also continued the injunctional order. On September 29th, 1922, the defendants appealed from the order overruling the demurrer, and from the order continuing the restraining order and refusing to vacate the same.

Opinion

The basis of plaintiff's right to maintain this action is that he is a resident and a taxpayer of the county. As such he seeks the exercise of the judicial sovereign power to restrain an executive officer from making or continuing a discretionary appointment, and, further, to enjoin other county officers from paying out county funds to special deputies appointed by the sheriff.

So far as the action concerns the sheriff, the plaintiff seeks to enjoin the commission of an alleged public wrong, namely the illegal exercise of a discretionary power of the sheriff. As against the sheriff he seeks relief like unto prohibition; a judicial decree to prohibit the sheriff from making appointments, founded upon the idea that the sheriff is without legal authority so to do. Whether the acts of the sheriff may occasion any loss to plaintiff as a taxpayer is a question both remote and contingent. It is a question that depends upon many considerations. Considerations that involve perchance, the probability of presentation of any bills to the county; the probability of their allowance or disallowance and the legal liability of the county in case of allowance. The complaint alleges no necessity for plaintiff's championing the interests of the state in order to prevent the sheriff from exercising his discretionary power to appoint special deputies. In this regard

his position is that of a private individual who has sustained no injury and has shown no special or peculiar interest in the subject-matter alleged.

So far as the other defendants are concerned, the complaint neither alleges nor shows that a single bill of any kind has been presented to the county or its officers for audit or payment, by reason of the sheriff's acts. There is no specific showing or specific allegation that such defendants are about to act illegally or contrary to law to the injury of the plaintiff as a taxpayer. Even the affidavit made and submitted by the person who was employed as a special deputy does not show that he made any demand, presented any bill, or received any pay, from the county. The complaint is insufficient to warrant relief to the plaintiff under general principles which apply when a taxpayer is seeking injunctional relief.

Even though it be conceded, for purposes of argument, that the county should not pay such special deputies a per diem and mileage (§ 3524 Comp. Laws 1913) when such special appointees of the sheriff are also peace officers already appointed by a corporation who is obliged under the law, and who has agreed to pay their fees and expenses (§§ 4810, 4811, 10,586, 10,590, Comp. Laws 1913), it does not follow that this affords any ground for injunctional relief to a mere taxpayer in a private suit upon general allegations of probabilities. It will not be presumed in advance that the disbursing officials of the county will disburse county funds illegally. The proceeding should be, and is, dismissed.

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

GRACE, J. (dissenting). This is an appeal from an order sustaining a demurrer to the complaint. The proceeding is one to enjoin the defendant as sheriff of Ward county, and R. W. Kennard, auditor, and Alfred Mostad, as treasurer of Ward county.

The complaint in substance alleges, that between July 1st and 25th, 1922, the Great Northern Railway Company appointed and employed certain peace officers in and about its property at Minot, North Dakota, who were designated by it, under the provisions of a statute, hereinafter referred to. The complaint further, in substance, shows that

twelve of these appointees were by the defendant sheriff, appointed as special deputies until removed; that such persons are receiving compensation from the railway company as peace officers and are demanding and receiving from Ward county, compensation for their services as special deputies; that the county commissioners, county auditor, and county treasurer are about to expend and use the funds of Ward county in payment of the compensation of such special deputies and will do so unless enjoined by the court. The appointment by the sheriff of the deputies must presumably have been under the authority of § 3524, Comp. Laws, 1913. The affidavits accompanying the complaint show that these persons were receiving $6 per day and meals, the railway company paying one half thereof and furnishing meals and Ward county to pay the remaining one half or $3 per day.

The complaint, after alleging the official positions of the defendants and the corporate existence of the Great Northern Railway Co., further states:

(4) "That heretofore and at sundry times between the 1st day of July 1922 and the 25th day of July 1922, the said railway having then and theretofore employed sundry and sufficient police officers, the defendant, A. P. Scofield, as sheriff of Ward county, without right or cause therefor, no emergency arising or existing therefor, then and there and at all times falsely and fraudulently claiming and pretending that there was a case of an emergency has appointed and qualified and caused to be appointed and qualified sundry special deputies under and pursuant to the authority to him granted by the statutes of this state in case of emergency, and which said special deputies, not less than twelve in number, are and will continue to act and serve as such special deputies until removed by the said defendant, A. P. Scofield, sheriff, or otherwise, and are and will continue in the employment of the county of Ward in the state of North Dakota as such special deputies, demanding and receiving from said county of Ward, compensation for their services as provided by law; and which said compensation the defendants herein threaten to and are about to pay the said special deputies; and will pay or cause to be paid to them, if not enjoined and restrained by this court and that the said defendant sheriff threatens to and is about to continue the appointment and employment of said special deputies as such.

(5) "That prior and at the time of such appointment of said persons

by the said sheriff as special deputies, as aforesaid, and during the time of their employment and service as such special deputies, the said persons so appointed and qualified by the said defendant sheriff were and they still continue so to be, in the employ of the said Great Northern Railway Company, and are receiving compensation and pay from said railway company as peace officers of all of which said defendant sheriff at all times had full notice and knowledge and which he, the said sheriff, well knows.

(6) "That no case of emergency has arisen or exists warranting the appointment of such special deputies by the defendant sheriff as aforesaid, and as such sheriff well knows; that plaintiff is informed and verily believes and therefore states the fact to be many of said special deputies so appointed by said sheriff are not residents of the state of North Dakota and are not residents of the county of Ward in said state of North Dakota.

(7) "That the defendants, the said county commissioners and said auditor and treasurer as such officers, in their respective capacities threaten to and are about to expend and use the funds and money of said Ward county in payment of the compensation of said special deputies aforesaid; and to issue and to cause to be issued and delivered warrants drawn upon the funds of said Ward county in payment therefor and to pay the same out of the said funds of said county; and that the said defendants will so do if not restrained and enjoined by this court, to the manifest injury and damage of this plaintiff and other residents and taxpayers of said Ward county, North Dakota.

(8) "That under the laws of the state of North Dakota the railroad company is required to employ such peace officers at its own expense and to pay the said peace officers and that the appointment and employment of such peace officers as special deputies by the said sheriff and the payment of said peace officers and their compensation in part or in full out of the funds and moneys raised by Ward county from the taxpayers of said county by means of the process of taxation is and constitutes an unwarranted, unauthorized, and fraudulent diversion and expenditure of the tax moneys of said county, and an unlawful and excessive burden upon the said taxpayers of said county and a fraud upon the rights of said taxpayers and upon the public, and that the appointment of such special deputies by the said sheriff without necessity

therefor and when no case of emergency exists requiring such appointment is and will be a fraud upon the rights of the said taxpayers and the public, and an unwarranted and unlawful diversion and use of the tax moneys of the said county; and that this plaintiff is without any speedy and adequate remedy at law in the premises.

"Wherefore, plaintiff prays judgment as follows: That the defendants herein be enjoined and restrained by this court from appointing and qualifying such peace officers; and railway police in the employ and pay of said Great Northern Railway Company as peace officers appointed by said railway company under the statute of this state or others unnecessarily and be enjoined and restrained from continuing the appointment and employ of any of such special deputies and be enjoined and restrained from allowing or paying the said special deputies money and funds of the county of Ward, in the State of North Dakota as compensation for their services, or otherwise, and from in any manner approving or allowing the accounts and claims of such special deputies, issuing warrants therefor drawn upon the moneys and funds of Ward county, North Dakota and paying the warrants, and for such other and further relief as to the court may seem just and equitable in the premises."

Section 173 of our state Constitution provides for the election of a sheriff in each county of the state. It also provides that the legislative assembly shall prescribe the duties of all county officers, and the sheriff is one of such. Agreeably to this section, the legislative assembly by § 3524, prescribes the duties of the sheriff with reference to the appointment and qualification of special deputies. This section provides, so far as material here:

"In case of any emergency the sheriff shall have the authority to appoint and qualify special deputies in such numbers as in his judgment the conditions may require, and each of such special deputies shall receive as compensation for his services the sum of $3 per day and the same mileage as allowed to regular deputies, to be paid by the county. The sheriff shall have the sole power of appointing and removing them at pleasure."

It will be noticed from this language that before the sheriff can appoint special deputies, an emergency must exist. It is alleged in the complaint that no emergency existed, warranting the appointment

of special deputies and in substance it is further alleged that the sheriff well knew this. It is a conceded principle of law, of pleading, that the demurrer admits all of the allegations of the pleading to which it is interposed which are well pleaded. In this case, therefore, the demurrer admits all of the allegations of the complaint. The defendant sheriff, admits thereby, that no emergency existed. In view of this admission, he was not authorized to appoint any deputies under the provisions of § 3524. There is no other authority of which we are cognizant, which authorizes him to appoint special deputies. The law provides by this section for the appointment of special deputies upon a particular ground. There are, of course, other provisions of law providing for the appointment of regular or general deputies, but a discussion in respect to them, is unnecessary here. If we are correct in what we have said, the sheriff had no authority, there being no emergency, to appoint special deputies. If he had no authority to appoint them, they were not and are not entitled to be paid by Ward county and the plaintiff or any other taxpayer of the county could bring an action to restrain such payment, and such is the nature of this action.

There is another feature of this case, which may be briefly discussed. It relates to the alleged right of railway companies, doing business in this state, to appoint and, at their own expense, to employ persons as peace officers on their property. In this respect § 10.586, so far as necessary to consider here, provides:

"Every railway or railroad company doing business within this state is hereby authorized to appoint and at its own expense to employ, such persons as peace officers at its stations or other places along the line of its road within this state, as may be by it deemed necessary, for the protection of its property or the preservation of order on its premises, or in or about its care, depots, grounds, yards, buildings, or other structures, or any of the same under its control or in its possession."

By this section the legislature undertook to delegate part of the sovereign authority of the state of North Dakota to the railway companies, doing business in this state, in that it authorized such railway companies to appoint and employ peace officers in the manner set forth in the section. In other words, it attempts to confer a power upon them, the power of appointing peace officers, which means, in such cases, the appointment of an officer, who, when on their property, has powers as

broad as those possessed by a sheriff. The power of appointing to office has been held to be an executive function. State ex rel. Standish v. Boucher, 3 N. D. 389, 21 L.R.A. 539, 56 N. W. 142. It seems quite clear that the legislature has thus attempted to delegate to the railroad companies, of this state, a part of the sovereign executive power of the state, and we think this was invalid.

Under this section, the railway companies could make not only a dozen but all of their employees, peace officers on their property. In other words, they could create a great army of such peace officers. The appellant has requested that judicial notice be taken that a strike was in progress on most of the railways of the United States, at the time of the commencement of this action and upon the Great Northern Railway. Let it be assumed that the employees of the Great Northern Railway were on a strike. A strike is not unlawful if it is peaceful. In other words, if there is an absence of violence or violent destruction of property, property rights or personal rights, we think it is well recognized in such case that the employees of a railroad or those of other industrial enterprises have a right en masse to strike in order to better their condition, increase their wages, decrease the dangers of their employment, in general to better the situation under which they labor. We know of no law of this state which prevents a peaceful strike, for these or other legitimate causes. Neither is there any national law of which we have knowledge which prevents a strike of the character we have mentioned. Whenever laws are enacted which prevent employees of railways or other large masses of employees, employed in other industries, from holding a peaceful strike, for the purpose of bettering their condition, and such laws become effective and are thoroughly enforced, the difference between the situation of such employee, then, and that of the enslavement of the negro in earlier days, will be a distinction without a material difference.

Then again, a large number of so-called peace officers, appointed by a railway company under the provisions of said law, may become the very source of violence. In many industries, when the employees call a general strike, most of their number observe the strike and refrain or refuse to do further work pending the settlement of it. In such case, the company which is operating the industry endeavors to supply the places of their striking employees with others. At such times they must

often accept the services of those who are unskilled in the employments vacated and at times they are not too choice as to the kinds of persons they thus employ. Many of them undoubtedly are persons of good name and reputation and law abiding, while others may be employed whose reputation for peace and good order is not of the very best. Then again, there are those who are known as the professional strike breaker and there are various persons of other elements of character who for various cause and reasons, drift in to fill the places of the strikers. In such case, if these are made peace officers so that they may become reservoirs of authority, and in demeanor, perhaps, overbearing or oppressive to peaceful strikers, instead of being a means of securing the public peace, they may become a source and means of exciting violence.

The sovereign power of the state of North Dakota is ample to protect the lives, personal rights, property and property rights, or any other right of any persons within the state, including railway corporations, against destruction or impairment by violence and it will do so whenever the occasion arises. Unlawful force or violence, whether it occurs in relation to a strike by the acts of either side, or elsewhere, is reprehensible. It deserves the severest condemnation of all right thinking people. The sovereign power of the state will not and ought not countenance the violent destruction of personal or property rights, by either employers or striking employees.

Again adverting to § 10,586, we think we are justified in saying of it, that it is special legislation of a pronounced and very dangerous type and, we think, it is contrary to the provisions of our constitution in that respect and is invalid. We think the court properly overruled the demurrer. Its order in that respect should be sustained. The case should be remanded and appellant given reasonable time to interpose an answer.

WHITE EARTH CREAMERY COMPANY, a Corporation, Dissolved, by Mary E. Zirbes, J. Altenthaler, J. W. Bolyard and Andrew Aardahl, Trustees, Respondents, v. K. E. EDWARDSON and Forrest Rice, as Sheriff of Mountrail County, North Dakota, Appellants.

(191 N. W. 622)

Attorney and client — attorney cannot subject adverse interest in client's property for own advantage; attorney purchasing assignment of client's mortgage became trustee subject only to lien for such fees or services due him.

Where an attorney at law has acted as an attorney for, and an officer of, a creamery association in collecting notes which should be, and were, applied as collected upon a mortgage given by such creamery, and where, while so acting, he purchased and received an assignment of such mortgage and thereafter foreclosed such mortgage for his own benefit, it is *held:*

(a) That, in keeping with the good faith required of the relationship, he could not purchase an adverse interest in his client's property for his advantage prejudicial to his client's interest.

(b) That by purchasing such mortgage he became a trustee for his client subject only to a lien for such fees or services as might be due him.

Opinion filed December 29, 1922.

Attorney and Client, 6 C. J. § 208, p. 682, n. 89, 91; Trusts, 39 Cyc. p. 185, n. 71.

Action in District Court, Mountrail County, *Lowe,* J., to enjoin the issuance of a sheriff's deed.

Defendant appealed from the judgment.

Case remanded.

Nestos & Herigstad, for appellants.

McGee & Goss, for respondents.

Statement.

BRONSON, J. This is an action to enjoin the issuance of a sheriff's deed and to invalidate the foreclosure of a real estate mortgage. The facts are: The plaintiff corporation was established as a co-operative

Note.—On right of attorney to purchase adverse interest in subject matter of employment, see 2 R. C. L. 970, et seq. 1 R. C. L. Supp. 669; 4 R. C. L. Supp. 130; 5 R. C. L. Supp. 119.

creamery at White Earth in 1911. It bought two lots in White Earth, North Dakota, and erected thereon a creamery building. It gave certain notes to one Marlott and a mortgage upon the creamery to secure the same. The shareholders in the creamery, to evidence their payments, paid cash and gave notes for their subscriptions. Defendant Edwardson was an attorney at law practising at White Earth. He was a shareholder and acted as secretary of the creamery until June, 1914. Defendant, as secretary, collected moneys for these notes and made payments to Marlott upon the mortgage from time to time. After he ceased to be secretary he received and had these notes for collection and made collections thereupon from time to time. An assignment of the Marlott mortgage, dated Jan. 3d, 1917, was made to Edwardson. Defendant testified that he paid $850 for this assignment. He continued making collections upon the notes until the amount of the mortgage remaining unpaid amounted to $225. In April, 1919, defendant foreclosed this mortgage by advertisement. He became the purchaser at the sale for the sum of $225. A sheriff's certificate was issued to him. Defendant charged the creamery company collection fees upon the notes collected by him. There is some evidence, rather indefinite, to the effect that the creamery had given a second mortgage for $1,188 to defendant and two other parties, which amount defendant advanced or paid; that he has been paid about $675 thereon; but he testified that the assignment of the Marlott mortgage was not taken to secure or enforce payment of this mortgage. The complaint, in the first cause of action, seeks to set aside the foreclosure and to enjoin the issuance of a sheriff's deed, upon the ground that the shareholders had no knowledge of the sale until after its completion; that the property is worth over $4,000, and that the defendant received the mortgage and exercised the power of sale in bad faith and in fraud of the shareholders of the creamery. For a second cause of action, it alleges that, as secretary and treasurer of the company, the defendant received moneys for which he had made no accounting and for which an accounting is demanded. Defendant, in his answer, alleges that the property is worth not more than $2,000; that he received the assignment of the mortgage for a valuable consideration and that he did not receive moneys sufficient to pay up the mortgaged indebtedness to Marlott. The charter of the creamery corporation was canceled by the secretary of state in January, 1918. This action

is maintained by some of the directors as trustees for the creamery. The trial court found that, prior to the assignment of the mortgage to defendant, the same had been fully paid, of which defendant had knowledge; that defendant, at the time of the foreclosure, had in his possession $326.80 belonging to the creamery, upon which he was entitled to an offset of $225, the amount then due upon the mortgage, leaving a balance owing the creamery company of $101.80. Judgment, accordingly, was entered determining the foreclosure sale to be void and awarding to plaintiff a judgment of $101.80 against defendant Edwardson. Defendant has appealed from the judgment and has demanded a trial de novo.

Opinion.

The record is both brief and indefinite. Practically the only competent testimony is that given by the defendant Edwardson under cross-examination. Upon the record it is difficult, if not impossible, to ascertain the amount due on the mortgage, at the time of assignment or of foreclosure. Defendant admits that there was only $225 due on the mortgage at the time of the foreclosure. From the statements that he rendered it appears that he charged collection fees to the creamery company upon the notes amounting to over $300. From his testimony he claims that these notes were turned over to him by the creamery, through the bank, for collection purposes; that he collected such notes for the creamery. In the entire transaction, from the testimony of defendant Edwardson himself, these outstanding facts appear: Defendant Edwardson assumed to act, and did act, as an officer or attorney for the creamery in collecting the notes before and after the assignment. During this time, and while this relation continued, he purchased this mortgage from Marlott, upon which the collections, made or to be made by him upon the notes, were to be applied for the reduction and satisfaction of such mortgage. His position required the exercise of the utmost good faith. 2 R. C. L. 966. The property mortgaged was the property of his employer or client. He, as a shareholder, had an interest therein. In keeping with the good faith required of this relationship defendant could not purchase an adverse interest, the mortgage upon his client's property, for his advantage prejudicial to his client's interests. By purchasing such assignment of the mortgage he became a

trustee for his client, the creamery, subject only to a lien for such fees as might be due to him. See 6 C. J. 682; 2 R. C. L. 967, 968, 970; Gates v. Kelley, 15 N. D. 639, 110 N. W. 770; Patterson Land Co. v. Lynn, 27 N. D. 391, 147 N. W. 256.

Properly, the trial court determined the foreclosure to be illegal and void. However, upon the evidence in its present shape we are of the opinion that a judgment for money against the defendant, as if upon an accounting had should not be sustained. It is our opinion that equitably the judgment should decree a satisfaction and cancelation of the mortgage, contingent upon the payment of such fees and moneys, if any, as the defendant may establish to be due him upon a full accounting, with the further right of the trial court to render specific judgment for money due the plaintiff, if any, upon such accounting. The case, accordingly, is remanded for further proceedings consonant with this opinion and without costs to either party.

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

JAMES C. DAVIS, Agent of the President under the Transportation Act of 1920, Appellant, v. COUNTY OF PIERCE, a Municipal Corporation, and E. A. Reveling as County Treasurer of Pierce County, Respondents.

(191 N. W. 618.)

Schools and school districts — laws limiting legal limit for the assessment of taxes held not applicable to county tuition fund for support of public schools.

Chapter 214 of the Session Laws of 1919, as amended by chapter 61 of the Laws of the Special Session of 1919, is construed and held to have no application as a tax limitation statute to taxes levied under § 1224 of Comp. Laws 1913, as amended by chapter 216 of the Laws of 1919 and chapter 66 of the Laws of the Special Session of 1919, for the county tuition fund for the support of the public schools.

Opinion filed December 29, 1922.

Schools and School Districts, 35 Cyc. p. 1003, n. 15.

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

Affirmed.

Murphy & Toner, for appellant.

The general proposition here has already been settled in favor of the plaintiff under what we claim to be identical conditions and identical statute. Laws 1915, chap. 254; Ry. Co. v. Duncan (N. D.) 176 N. W. 992.

The contemporary and subsequent action of the legislature in reference to the subject-matter has been accepted as controlling evidence of the intention of a particular act. Sutherland, Stat. Constr. § 476; Bigelow v. Forrest, 9 Wall. 339, 19 L. ed. 696.

That the legislature has the authority by proper enactment to refund, rebate, wipe out or invalidate taxes already levied, is clear. Demorville v. County (Tenn.) 10 S. W. 353; Henry v. Alford, 168 U. S. 651; Auditor Gen. v. O'Connor (Mich.) 47 N. W. 443; Files v. Ry. Co. (Ark.) 3 S. W. 817.

"Where the later or revising statute clearly covers the whole subject-matter of antecedent acts, and it plainly appears to have been the intention of the legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by necessary implication." Sutherland, Stat. Constr. subd. 3, § 247.

"A law authorizing counties to issue bonds to the amount of two per cent of the assessed valuation for various purposes, including the construction and repair of roads and bridge was held to be repealed as to the latter purpose by an act prohibiting the issue of such bonds to an amount in excess of one per cent." Murphy v. Comrs. 75 N. W. 951.

"A law authorizing counties to levy a tax for the support of the poor was held to be repealed by a subsequent law authorizing counties to levy not exceeding three mills on the dollar for county purposes the support of the poor being a county purpose." Oregon Short Line v. Standvig (Or.) 37 Pac. 687.

There is a presumption where acts passed at the same session of the legislature are alleged to conflict, especially where neither has a repealing clause that they were both intended to stand, and will be harmonized if possible; but if they relate to the same subject and are clearly repug-

nant to each other as they are no such presumption can prevail. White v. Meadville, 177 Pa. 643, 34 L.R.A. 567.

If there is irreconcilable conflict the latter in position prevails. Ex parte Thomas, 21 So. 369; Hand v. Stapleton, 33 So. 689; Van Horn v. State, 64 N. W. 365; Omaha, etc. v. Krogsoow, 66 N. W. 658.

"A statute authorizing the sheriff to bind the county for the support of prisoners was held to be repealed by a law which provided that no county officer, except the board of county commissioners, should contract for the payment or expenditure of any county moneys for any purpose whatever." State v. County Comrs. 37 Pac. 486; Starbird v. Brown, 84 Me. 238; Pool v. Brown (Mo.) 11 S. E. 743; Pleasant Hill v. Dasher (Mo.) 25 S. W. 566; State v. Butcher (Tenn.) 28 S. W. 296; Felts v. R. Co. (Pa.) 33 Atl. 97.

Harold B. Nelson (*C. C. Converse,* on oral argument), for respondent.

"The repeal of statutes by implication is not favored, and where there are two laws upon the same subject they must be so construed as to maintain both, if it can be done without destroying the evident intent and meaning of the later act." Traber v. Railroad Commission (Cal.) 191 Pac. 366.

"Where two statutes dealing with the same subject-matter are in conflict, so that both cannot be operative, the later act will be regarded as a substitute for the former and will operate as a repeal, although without the repealing clause." State ex rel. v. Public Serv. Commission (Mo.) 204 S. W. 395.

"Though repeals by implication are not favored, when two conflicting statutes prescribe different and inconsistent rules of action about the same thing, the later must prevail." Hurt v. Yazoo etc. Co. (Tenn.) 205 S. W. 437.

"Two acts that are passed at the same session of the legislature are not to be construed as inconsistent, if it is possible to construe them otherwise; but where it is impossible to give effect to both acts the latest in point of time will prevail." People v. Illinois C. R. Co. (Ill.) 129 N. E. 66; Buttorff v. City (Pa.) 110 Atl. 728; State v. Wetz (N. D.) 168 N. W. 825.

"A special act and the general act relating to the same subject being necessarily inconsistent, the special act is usually regarded as an excep-

tion to the former and prevails, though it was enacted before the general act, unless the provisions of the general act necessarily exclude such a construction." Kornegay v. City, 180 N. C. 441, 105 S. E. 187.

"It is a ruling of statutory interpretation that a general act is not to be construed as repealing a particular one." Kreutner v. State (Ala.) 80 So. 125; Koehn v. Public Serv. Commission, 176 N. Y. Supp. 147; Vertress v. State Bd. (Tenn.) 214 S. W. 737; People v. Chicago, etc. R. Co. (Ill.) 129 N. E. 168; Holle v. Drudge (Ind.) 129 N. E. 229; Van Hess v. Board etc. (Ind.) 129 N. E. 305; State v. Prairie etc. County (Okla.) 167 Pac. 756; Solomon v. Denver, 12 Colo. App. 179, 55 Pac. 199; Oneida County v. Evans, 25 Idaho, 456, 138 Pac. 337; Calpin v. Chicago, 249 Ill. 554, 94 N. E. 961; Princeton Coal Min. Co. v. Lawrence, 176 Ind. 469, 95 N. E. 423; Cleveland etc. Ry. Co. v. Blend (Ind.) 105 N. E. 483; Com. v. Huntely, 156 Mass. 236, 30 N. E. 1127, 15 L.R.A. 869; Paul v. Carter, 153 N. C. 25, 68 S. E. 905, 36 L.R.A.(N.S.) 1209; Follensby v. Wilbur, 14 Wash. 242, 44 Pac. 262.

Manifestly the right of taxation exists in the legislature and can, by it, be delegated as in its wisdom seems proper. 37 Cyc. 966.

The auditor is merely charging a sum, already fixed and ascertained, against the property, the value of which has already been determined, in the manner provided by law, and in which the taxpayer has had full opportunity to be heard. Gray v. Peoria Board of School Inspectors, 82 N. E. 95.

BIRDZELL, Ch. J. This is an appeal from a judgment in favor of the defendant in an action to recover certain taxes paid under protest. The facts were stipulated and, so far as material, are as follows: The plaintiff at the time of the beginning of the action was the agent of the President in charge of railroads while under Federal control. While under such control taxes were assessed and levied against the property of the Great Northern Railway Company in the county of Pierce in the year 1919 amounting to $51,858.78, which taxes were regularly paid the 29th of February 1920, by the United States Railroad Administration. $931.97 of this amount was paid under protest and a notice served upon the county treasurer at the time to the effect that this amount represented excess taxes assessed and levied for the county tui-

tion fund for the support of the public schools. It was claimed that the tax was 30 mills in excess of the legal limit of levy for the year 1919 as fixed by certain legislative enactments hereinafter referred to. The tax objected to was levied at the rate of 1 mill on the dollar of the assessed valuation.

A brief statement of the legislation authorizing and limiting the mill tax for the tuition fund may conduce to a more ready understanding of the legal question presented upon this appeal. Section 1224 of the Compiled Laws for 1913 requires the county auditor to extend a tax of 2 mills on the dollar on taxable property in the county to be apportioned among the school districts. In 1915 the legislature passed an act (chapter 254 of the Session Laws for 1915) limiting levies, which this court held, in Great Northern R. Co. v. Duncan, 42 N. D. 346, 176 N. W. 992, to be applicable to the county tuition levy so as to limit the amount that could be raised under § 1224, Compiled Laws of 1913 to the percentage of increase authorized by that chapter, which might be less than the 2 mills permitted by § 1224. In 1919, in the regular session of the legislature, two acts were passed, bearing upon the tax in question. They were both approved on the same day, March 6, 1919. One of them, chapter 214, Session Laws of 1919, reads in part:

"Sec. 1. For the year 1919 and 1920, the total annual amount of the taxes levied for any purpose, except special levies for local improvements and for the maintenance of sinking funds in any county or political subdivision thereof shall not exceed by more than 10 per cent the amount that would be produced by the levy of the maximum rate provided by law upon the assessed valuation of 1919; provided, that for road or school purposes the amount levied may be twenty per cent for 1919 and forty per cent for 1920, respectively, upon the basis of the assessed valuation of 1918."

"Sec. 3. In any case wherein any duty or power is imposed or conferred by law upon any official in any county or political subdivision thereof and such duty or power is contingent upon the assessed valuation of the taxable property in such county or political subdivision, prior to July first, 1921, such duty or power shall rest upon and be conditioned by the assessed valuation of 1918, except as provided in section one hereof."

This act was passed with an emergency clause, declaring it to be in

effect from the date of its approval. The other act is chapter 216 of the Session Laws of 1919. It amends § 1224 of the Compiled Laws of 1913 by reducing the mill tax for the tuition fund form 2 mills to 1 mill on the dollar of taxable property. This act was approved on the same day as chapter 214, but contained no emergency clause.

At the special session of the legislature, held November 25, 1919 to December 11, 1919, another act was passed, amending chapter 214 of Session Laws of 1919. The amendatory act did not differ in form or principle from the act amended; it merely extended the limitations to cities, towns, and villages, and made them apply to the taxes of the then current year of 1919. Special Session Laws 1919, chap. 61. This act carried an emergency clause, putting it into effect from the date of its approval.

On the day following the approval of this act another act was approved further amending § 1224 of the Compiled Laws of 1913, as previously amended by chapter 216 of the Session Laws for 1919, by reducing the mill tax for the tuition fund from 1 mill to ½ mill on the dollar. This act contained no emergency clause.

The plaintiff and appellant contends that the limitation contained in chapter 214 of the Session Laws of 1919, as amended by chapter 61 of the laws of the Special Session of 1919, is applicable to the levy for the county tuition fund authorized by chapter 216 of the Laws of 1919. The latter law fixes the levy at 1 mill on the dollar of valuation, and the specific contention is that chapter 214 has the effect of limiting or reducing this tax to the point where it cannot exceed by more than 20 per cent in 1919 the maximum determined according to the assessed valuation of 1918.

The principal arguments in support of this contention, as we understand them, are two in number. First, that chapter 214 of the laws of 1919, being devoted exclusively to the subject of limiting levies, is general and negative in its terms, and consequently is applicable to all levies of whatsoever kind or character; and that the intention to make it broad enough to apply to every levy is further substantiated by the amendatory act of the special session, extending it to cities and villages, and specifically requiring its limits to be observed in extending the taxes for the then current year and at a time when the tax lists had probably been partially made up. Second, that § 3 of the act, hereinbefore

quoted, is directed specifically to the officer whose duty it is to extend the mill tax, and that consequently, by the express language of § 3, the tax cannot be imposed for a greater amount than permitted by § 1.

We are of the opinion that neither of these arguments is tenable, and further, that the limitation upon the levy for the tuition fund during 1919 was only that expressed in chapter 216 of the Session Laws, wherein the tax was reduced from 2 mills, originally provided in § 1224, to 1 mill.

The reasons for our conclusion may be briefly stated. Section 1 of chapter 214 of the Session Laws of 1919 (and likewise the amendatory act, § 1, chapter 61 of the Laws of the Special Session) contains no enumeration of tax levying officers which would include the county auditor who extends the mill tax, as was the case with § 1 of the original act of this character passed in 1915, chapter 254, Session Laws of 1915, and which was construed by this court in Great Northern R. Co. v. Duncan, supra. This act simply places a limitation on the total amount of taxes levied "for any purpose" during the years 1919 and 1920, and, as we construe it, it can have no application to a tax levied by the legislature itself at a certain rate in mills, in the absence of a clear expression to that effect. The only way this limitation can be made effective is to consider the school district or other taxing district as the unit for the purpose of applying the statute. That is, the limitation does not apply to the aggregate of school taxes in a county, but applies to the aggregate of such taxes in a district. To attempt to apply it to the aggregate of school taxes in a county would, of course, result in the absurdity of making the authority of a particular school board to levy taxes contingent upon what is done by all the other boards. Hence, considering the statute as limiting the taxes that might be levied in a particular district taken as a unit and applying the appellant's construction of § 1 as applicable to the mill levy, it will be seen that it would be incumbent upon the auditor to compute for each district the school taxes levied locally and add thereto the mill tax, for obviously both levies are for school purposes. If the aggregate should exceed the limitation in § 1, it would then be his duty, under appellant's contention, to reduce the aggregate. In making the reduction, there is no legislative guide for the auditor to follow in determining whether or not he should reduce the tax levied locally or the mill tax, or whether he should

reduce both pro rata. Obviously, no reduction of either one is authorized, except where the "total annual amount" levied for school purposes should exceed the maximum, and it might be that on account of a low levy by a local school board the aggregate of the school tax in the district, including the full mill levy permitted, would be within the limitation prescribed.

The gist of the whole matter is that the limitation of § 1 has regard for the *purpose*—in fact that term "school purposes" is used—and it has no application by its terms to a stated tax, which ordinarily affords but a fractional part of the taxes levied for the general purpose of maintaining schools. Hence, to construe this section as applicable to this one tax would limit or reduce taxes levied for school purposes in some instances even though the aggregate amount levied against the property in a particular district would be less than the basic levy of 1918. This contravenes the obvious intention expressed in chapter 214. It also subverts the evident policy of § 1224 as amended—a policy of long standing—of levying a *uniform* tax for the support of the public schools, to be *apportioned* among them as a tuition fund.

We do not regard § 3 as being addressed specifically to the county auditor in such a way as to limit his power to extend the mill tax, for the reason that it is apparent that his duty or power is neither contingent upon nor conditioned by the assessed valuation. He is required to spread the tax on all taxable property in the county regardless of the aggregate assessed valuation. This power cannot be said to be contingent upon assessed valuation when it must be exercised towards the entire property regardless of amount. This language would seem to apply to a tax that is authorized only when the assessed valuation reaches a certain amount. See § 1867, Compiled Laws of 1913.

Moreover, we are of the opinion that the legislature, by the passage of two acts, each successively cutting in half the mill tax (chapter 216, Session Laws of 1919 and chapter 66 of the Special Session Laws of 1919), which entered into their concurrent consideration of the tax limiting question, showed, unmistakably, an intention to continue the policy of extending the mill tax at the rate prescribed, rather than subject it to such contingencies as would result from the attempted application of the levy limitations prescribed by chapter 214 and its amend-

ment. It follows from what has been said that the judgment is right. It is affirmed.

ROBINSON, GRACE, BRONSON, and CHRISTIANSON, JJ., concur.

L. W. RADKE, Appellant, v. E. P. PADGETT, Respondent, The Chicago, Milwaukee and St. Paul Railway Company, a Corporation, Garnishee Defendant.

(192 N. W. 97.)

Exemptions — exemptions of wage earner in garnishment suit ancillary to action to enforce collection for provisions has no application.

1. The exemption which may be claimed by a wage earner in a garnishment suit ancillary to an action to enforce the collection of a bill for groceries and provisions is fixed by chapter 72, Laws 1921, and § 7782, Comp. Laws 1913 has no application.

Garnishment — amount of weekly exemption should be paid to wage earner by employer under garnishment retaining balance to abide of suit.

2. In such garnishment suit there is exempt from garnishment to the head of a family who is a resident of this state wages or salary in the sum of $15 per week, and every employer should "pay to such person such exempt wages or salary not exceeding the sum of $15 per week of each week's wages earned by him, when due, upon such wage earner making and delivering to such employer his affidavit that he is such head of a family and residing with the same in this state," notwithstanding the service of the papers in the garnishment action; the balance, if any, of the weekly wage owing by the employer to such wage earner should be held by the employer to abide the event of the garnishment suit. Laws 1921, chap. 72.

Opinion filed December 29, 1922.

Exemptions, 25 C. J. § 102, p. 63, n. 72; § 112, p. 70, n. 92.

Appeal from the District Court of Slope County, *Pugh*, J.

Plaintiff appeals from an order directing that the defendant in a

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Note.—As to statutes containing limitation of amount of wages which may be held exempt, see 11 R. C. L. 524.

On amount of exemptions as dependent on debtor being head of family, see 11 R. C. L. 502, et seq.

garnishment suit be allowed to set up as a defense that certain moneys due him for wages are exempt under § 7782, Comp. Laws, 1913.

Reversed.

Theodore Swensseid, for appellant.

Thomas T. Hiner, for respondent.

CHRISTIANSON, J. This action was commenced before a justice of the peace to enforce collection of a bill for groceries and other provisions sold and delivered by him to the defendant. Ancillary to the main action, a garnishment action was instituted by the plaintiff against the Chicago, Milwaukee & St. Paul Railway Company as garnishee. The defendant interposed no answer in the main action but interposed an answer in the garnishment action claiming that the sum due him from the garnishee, to wit, $401.60 was exempt under the laws of this state. The justice of the peace sustained the contention of the defendant in the garnishment action and entered a judgment dismissing such action. He also ordered a dismissal of the main action on certain grounds which it is not necessary to consider here. The plaintiff appealed to the district court on questions of law and the district court ruled that the justice of the peace had erred in dismissing the main action and directed judgment to be entered in favor of the plaintiff for the amount demanded in the complaint. The district court further ruled that the justice of the peace had erred in dismissing the garnishment action. As regards the garnishment action, however, the district court further ruled that § 7782, Comp. Laws, 1913, was applicable and ordered that the garnishment action be placed upon the calendar for trial in the district court and defendant afforded an opportunity to introduce evidence under said § 7782, supra. The plaintiff appealed to this court from the decision of the district court as regards the garnishment action.

In our opinion the district court was in error in holding § 7782, supra, applicable in the garnishment action. The section reads as follows:

"The judge may order any property of the judgment debtor not exempt from execution in the hands either of himself or any other person or due the judgment debtor to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services at any time within sixty days next preceding the order cannot

be so applied when it is made to appear by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor."

That section in its present form was embodied in the Revised Code of the territory of Dakota of 1877, § 371 Code Civ. Proc. 1877, and has not been changed since. The section as originally adopted was part of the chapter relating to "Proceedings supplementary to execution" and still remains a part of that chapter. At the time this section was adopted garnishment actions were unknown in this jurisdiction. The statute now in force relating to exemptions in an action like this, viz., an action to enforce collection of a bill for groceries and other provisions reads as follows: "No personal property except absolute exemptions shall be exempt from execution or attachment in an action for laborer or mechanic's wages or for a debt incurred for property obtained under false pretenses; and no personal property shall be exempt from such process in an action for the collection of a bill of a nurse for professional service, or in an action for the collection of a bill for board, medicine or attendants furnished patients at any hospital in this state, or in an action for the collection of a bill for groceries and other provisions, except the absolute exemptions and household and kitchen furniture, stoves and two cows, the value of which exclusive of absolute exemptions shall not exceed five hundred dollars ($500), which value in case of dispute shall be determined by appraisers to be selected in accordance with the provisions of § 7120; provided this act shall not apply to accounts and debts contracted prior to the date of its passage and approval." Comp. Laws, 1913, § 7739, as amended by chap. 128, Laws 1919. The phraseology of the statute is all-inclusive. It purports to enumerate all the exemptions allowable in the cases enumerated. It says:—"no personal property shall be exempt from such process (execution or attachment) in an action for the collection of a bill . . . for groceries or other provisions, except the absolute exemptions and household and kitchen furniture, stoves and two cows, the value of which exclusive of absolute exemptions shall not exceed five hundred dollars." The language *"No personal property . . . shall be exempt,"* found in the section was first embodied in § 5526, Rev. Codes 1895. In 1901, the legislature amended the section in certain particulars, but in no manner changed the language referred

to; and it specifically repealed "all acts or parts of acts in conflict" with the act so adopted. Laws 1901, chap. 77.

It will be noted that under the statute only absolute exemptions and certain specified kinds of personal property are allowed to be claimed as exempt from attachment or execution in an action for the collection of a bill for groceries and other provisions. It will also be noted that moneys due for wages or salary are not exempted under the act. In other words, according to the plain words of this statute, wages or salary due to a defendant are subject to attachment or execution in actions for collection of the various kinds of claims enumerated therein. And there is, we think, no question but that is the way the statute has been construed generally by the bar and trial courts throughout the state. And it is our opinion that the legislature both in 1901 when it found occasion to deal with the specific subject of the amount of exemptions to be allowed in certain designated cases intended to cover it completely, and intended that the exemptions then enumerated in chap. 77, Laws 1901, should be all exemptions allowed in the cases with which the legislature was then dealing. It is, also, our opinion that the same is true of chapter 128, Laws 1921. We are wholly satisfied that the law-makers intended what they purported to say, namely, that "*no* personal property," except that which they specifically enumerated should be exempt in the particular cases which the legislature then had under consideration.

In certain cases the rule prescribed by the statute resulted in hardship and injustice. Where a debtor did not possess the articles exempted by the statute, he was practically denied all exemptions, except the absolute ones. Especial hardship was imposed in cases where a creditor, holding a claim of the kind enumerated against a wage earner, resorted to garnishment. Such creditor was thereby enabled to subject the moneys due such wage earner from his employer to the payment of any judgment which he might eventually obtain. To prevent this result many states have enacted laws providing that a certain amount of the wages or salary of a debtor shall be exempt from garnishment. § 25 C. J. p. 70, § 112. And in 1921 the legislature of this state enacted a law of this kind. The statute referred to is chapter 72, Laws 1921, and reads as follows:

"Any creditor shall be entitled to proceed by garnishment in any

court having jurisdiction of the subject of the action against any person, including a public corporation, who shall be indebted to or have any property whatever, real or personal, in his possession or under his control, belonging to such creditor's debtor, in the cases, upon the conditions and in the manner prescribed in this chapter. The term plaintiff is used in this chapter to embrace every judgment creditor and the term defendant a judgment debtor. Provided that the wages or salary of any person who is the head of a family and a resident of this state to the amount of $15 per week, shall be exempt from garnishment. Every employer shall pay to such person such exempt wages or salary not to exceed the sum of $15 per week of each week's wages earned by him, when due, upon such wage earner making and delivering to such employer his affidavit that he is such head of a family and residing with the same in this state, notwithstanding the service of such writ, and the surplus only of such exempt salary or wages shall be held by the employer to abide the event of the garnishment suit. At least two days prior to the issuance of any garnishment summons the creditor shall cause demand to be served upon the debtor and the employer for the excess above the amount herein exempted. Such demand with proof of service shall be filed with the court at the time of the issuance of garnishment summons. Failure to serve or file said notice as herein provided shall render said garnishment void. The excess of wages over and above the amount herein exempted shall be held by the employer subject to such garnishment from the time of service of such demand and for five days thereafter."

It will be noted that this statute by its terms applies to all garnishment actions instituted in this state. That is, it applies to garnishment actions in justices' courts, in county courts having increased jurisdiction, and in district courts. This statute was enacted for a specific purpose, namely to prescribe the amount of wages or salary which should be exempt from garnishment to a head of a family and resident of this state in all actions.

It follows therefore that in this case the defendant is entitled to claim and receive in the garnishment action the moneys which chapter 72, Laws 1921, says he is entitled to claim and receive, and no more. And as against execution issued on the judgment in the main action

he is only entitled to claim the exemptions prescribed by chapter 128, Laws 1919.

The order of the district court setting the garnishment action for trial, and permitting defendant to defend under § 7782, Comp. Laws, 1913, is set aside, and the cause is remanded for further proceedings according to law and not inconsistent with the views expressed in this opinion.

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

BRONSON, J. (dissenting). In territorial days, a debtor, in addition to his absolute exemptions, was entitled to select from his personal property not absolutely exempt, money not exceeding $1,500. Terr. Code Civ. Proc. 1877, § 324. In addition, the power was granted to a judge to withhold, in the satisfaction of a judgment, out of the debtor's *nonexempt* property, the earnings of his personal services at any time within sixty days next preceding the order when it was made to appear that such earnings were necessary for the use of a family, supported wholly or partly by his labor. Terr. Code Civ. Proc. 1877, § 371. When this state was formed the provisions of the territorial law above mentioned were enacted as a part of the law of this state. Rev. Codes, 1895, §§ 5518, 5567. In the territorial code, no statutory provisions existed concerning garnishment. In this state, statutory provisions concerning garnishment first appeared in 1895. The statute then authorized any creditor to proceed by garnishment in any court having jurisdiction and, upon proper garnishment summons and affidavit, to impound in the possession of a garnishee, a debtor's property *not exempt* from execution. Rev. Codes, 1895, §§ 5382, 5383. Either the garnishee or the defendant might claim that the property so impounded was exempt from execution. §§ 5390–5395 Rev. Codes, 1895, now §§ 7575–7580 Comp. Laws, 1913. Such garnishment action might be maintained at the time of issuing summons, at any time thereafter before final judgment, in any action to recover damages founded upon contract, express or implied, or upon judgment or decree or at any time after issuing execution. § 5383, Rev. Codes, 1895, now § 7568, Comp. Laws, 1913. The liability of a garnishee to the creditor extended to all property of the defendant *except such as might be by law exempt* from

execution. § 5398, Rev. Codes, 1895, now § 7583 Comp. Laws, 1913. The proceedings were, and now are, deemed an action and the court was authorized to render judgment protecting the interests of the parties and adjudging the recovery of indebtedness. § 5396, Rev. Codes, 1895, now § 7581, Comp. Laws, 1913. All provisions of law relating to proceedings in civil actions at issue, including all provisions for enforcing judgments, are applicable thereto. § 7581 Comp. Laws, 1913. See F. B. Scott Co. v. Scheidt, 35 N. D. 433, 434, 160 N. W. 502; Park, Grant & Morris v. Nordale, 41 N. D. 351, 355, 170 N. W. 555; Ruso Farmers Supply Co. v. Jacobson, 47 N. D. 223, 181 N. W. 371.

In the territorial code no personal property was exempt from execution for laborers or mechanics wages except property absolutely exempt. Terr. Code Civ. Proc. 1887, § 332. In an early state statute it was enacted that no personal property except absolute exemptions shall be exempt from execution or attachment in an action for laborers or mechanics' wages; or for a debt incurred for property obtained under false pretenses; and no personal property shall be exempt from such process in an action for the collection of the bills of a legally practising physician for professional service or medicine except absolute exemptions and certain household and kitchen furniture, etc., not exceeding $500. Rev. Codes, 1895, § 5526. This latter act was amended in 1901 by including within its provisions bills for a nurse or in an action for the collection of a bill for board, medicine, or attendance furnished patients at any hospital in this state. Laws 1901, chap. 77. In the same year the amount of additional exemptions was reduced from $1,500 to $1,000. Laws 1901, chap. 76. In 1911 these additional exemptions were further reduced to the amount of $500. Laws 1911, chap. 132. In 1915 the Law of 1901 was further amended by including therein collection of bills for wearing apparel, clothing, groceries, and other provisions. Laws 1915, chap. 155. In 1919 the additional exemptions were increased to $1,000. Laws 1919, chap. 128. In 1919, chapter 155, Laws 1915, was amended by striking out the provision therein in favor of doctors. Laws 1919, chap. 128. This statute is quoted in full in the majority opinion. In 1921, the garnishment statute, which had existed substantially in the same form from statehood, was amended by providing that the wages or salary of any person who is the head of a family and resident of this state, to the amount of $15 per week shall

be exempt from garnishment. Laws 1921, chap. 72. This statute is quoted in full in the majority opinion. The majority opinion asserts that, with respect to attachment or execution, only absolute exemptions and certain specified kinds of personal property are exempt in an action for collection of a bill for groceries; but, with respect to garnishment, certain specific exemptions are afforded the doctor by statute. Accordingly, the majority opinion concludes that the lawmakers intended no personal property to be exempt except that which is specifically enumerated, and definitely mentioned, in a proceeding under attachment or execution, and, otherwise specifically defined, in proceedings by garnishment.

With due deference to the opinion of my associates, the error of the majority opinion consists, in my opinion, by not recognizing the statutory distinction between exempt property and property not exempt; and particularly so in the consideration of § 7782, Comp. Laws, 1913.

Since statehood and pursuant to the constitutional provisions § 208, Const. this court has always applied the rule of liberal construction in considering the statutes for exemptions. See Jessen v. Schiller, 46 N. D. 41, 179 N. W. 373.

Reviewing the exemption statutes from statehood, it may be noted that a debtor's property, whether subjected to execution, attachment, or garnishment, is, for purposes of exemptions, divided into two classes: One class, *exempt property,* not subject to seizure either by attachment, execution, or garnishment, where the debtor avails himself of his statutory rights; the other class *nonexempt property,* not subjected either to attachment, execution, or garnishment. In other words, the statutory provisions, whether they refer to attachment, execution, or garnishment, specifically declare what property is *exempt* and what property is *not exempt.*

The statute involved, § 7782, Comp. Laws, 1913, is a statute that concerns property *not exempt.* It is not a statute of exemption in any strict sense of the word. It is a statute that permits the court to set aside, out of property *not exempt,* a certain amount to the debtor necessary for the use of a family, wholly or partly supported by his labor. It is, accordingly, a statute that operates outside of the statutes that create and define exempt property. It may or may not operate, dependent entirely upon judicial order.

When property is seized, whether upon execution, through attachment, or by garnishment, the statute, in any case, fixes the specific property which is and may be claimed by the debtor as exempt. It thus fixes the status of such property which may be termed *exempt property.* The debtor may avail himself of the statutory provisions, applicable as the case may be, and thus secure to himself his *exempt property.* All proceedings for the seizure of a debtor's property must finally rest upon a valid judgment. After a debtor's property has been seized by attachment, the subjection of the debtor's property for the benefit of a creditor must occur through a valid judgment and proceedings subsequent thereto. When a debtor's property is likewise seized through garnishment proceedings, again, the subjection of the property garnished for the benefit of a creditor must rest upon proceedings pursuant, and subsequent to, the rendition of a valid judgment. As heretofore stated, all provisions of the law for enforcing judgments are applicable to garnishment proceedings. The court must render the judgment of garnishment and enforce it. Comp. Laws, 1913, § 7581.

Accordingly, in the enforcement and collection of a judgment, whether property is seized upon attachment, or garnishment, or through execution, the statutory provision (§ 7782, Comp. Laws, 1913), by its general terms, applies. It applies for the reason that it grants to the court a power to set aside, not *exempt property,* but certain property out of *nonexempt property* of a debtor, necessary for the use of a family supported wholly or partly by his labors.

I am not disposed to reverse the order of the trial court, by reason of his procedure in placing the garnishment action upon the calendar for purposes of considering proof that defendant might offer under this statute; instead of, first determining the amount of the nonexempt property and the judgment to be rendered thereon and, thereafter, concerning any proceeding to enforce such judgment, holding himself ready to hear any application of defendant, pursuant to § 7782, Comp. Laws, 1913.

GRACE, J. (concurring in the dissenting opinion of Mr. Justice Bronson). I concur in the conclusion and result arrived at in the dissenting opinion of Mr. Justice Bronson. I do not concur in all of the reasoning of his opinion.

COUNTY OF BURKE, Respondent, v. W. J. GERDING and Fred Rubow. W. J. GERDING, Appellant.

(191 N. W. 493.)

Agriculture — applicant for seed grain held liable on contract with county.

Under chapter 13, Laws 1918, as the complaint shows, appellant and his tenant made an application to Burke County for seed grain at a certain price amounting to $352. The tenant signed the formal contract and at the foot of the same appellant signed as follows: "As owner of the real estate described in the above contract I hereby agree to the terms of the same."

Held, that the word terms as here used means conditions and stipulations; also, an interpretation which gives effect is to be preferred to that which makes void. He who takes the benefit must bear the burden. As the complaint shows, appellant has taken the benefit of his application and contract to obtain the seed grain amounting to $352, and of course he must pay for it. Affirmed.

Opinion filed November 3, 1922. Rehearing denied December 30, 1922.

Agriculture, 2 C. J. § 3, p. 989, n. 22 New. Contracts, 13 C. J. § 506, p. 539, n. 12; § 511, p. 540, n. 22. Term or Terms, 38 Cyc. p. 184, n. 36.

Appeal from the District Court of Burke County, *Moellring*, J. Affirmed.

Funke, Campbell & Eide, for appellants.

Statutes are to be construed with a view to carrying out the intent of the legislature. State v. Bickford, 28 N. D. 36; Minot v. Amundson, 22 N. D. 236; State v. Kositzky, 38 N. D. 616; State v. Taylor, 33 N. D. 76; Power v. Hamilton, 22 N. D. 177; Cass County v. Nixon, 35 N. D. 601; Murray v. Buttles, 32 N. D. 565; Lee v. Dolen, 34 N. D. 449; Statutes, 25 R. C. L. 216.

Statutes are to be construed so as to give effect to every part thereof and not to render parts and portions thereof useless and senseless. 36 Cyc. 1128.

The terms being ambiguous or uncertain it must be interpreted in the sense in which the promisor (William J. Gerding) believed at the

Note.—Ascertainment of intention of legislature primary rule in construction of statutes, see 25 R. C. L. 960 et seq.; 3 R. C. L. Supp. 1435; 4 R. C. L. Supp. 1611; 5 R. C. L. Supp. 1355.

time of making it that the promisee understood it. Contracts 13 C. J. 482–484; Harney v. Wirtz, 30 N. D. 292.

A. H. Hanson, State's Attorney, Burke county, for respondent.

ROBINSON, J. In this action Burke county recovered a judgment against appellant on a complaint for seed and feed grain sold and delivered pursuant to his written application and pursuant to a written contract under chap. 13, Special Session Laws, 1918. The judgment was given on a general demurrer to the complaint, which contains a copy of the contract. The gist of the complaint is that in March, 1918, the defendants, William J. Gerding and Fred Rubow made application, in writing, to the board of county commissioners of Burke county for aid in procuring seed grain. The application was considered and allowed. The defendants made a written contract agreeing to pay for the grain $352, with interest. The contract recites that in consideration of the delivery of specified seed and feed grain the parties of the first part promise and agree to pay Burke county $352 on October 1, 1918, with interest at 6 per cent from the 1st day of April, 1918, and that this contract shall have the force and effect of a promissory note. (Signed) Fred Rubow.

"As owner of the real estate described in the above contract I hereby agree to the terms of the same.

"(Signed) William J. Gerding."

The contract describes the land on which the grain is to be sowed.

The statute in question is chapter 13, Laws, 1918.

Section 7: This section provides for a written application to be made and filed with the county auditor by persons desiring to avail themselves of the act; and, as alleged in the complaint, defendants duly made such an application and it was allowed by the county commissioners and pursuant to such application the grain was delivered at an agreed price.

Section 9: The contract shall be made in duplicate and shall have the same force and effect as a promissory note. It shall be the duty of the county treasurer to collect said notes as they fall due.

It shall further be the duty of the county treasurer to deliver to the state's attorney a statement of all the contracts which remain unpaid on the first day of January following said year and it shall be the duty

of the state's attorney immediately in behalf of and in the name of said county to commence an action for the placing of such indebtedness in judgment.

Now it must be remembered that appellant signed the application for the seed and feed grain and at the foot of the contract signed by his tenant he did sign thus:

"As owner of the real estate described in the above contract I hereby agree to the terms of the same.

"William J. Gerding."

Pursuant to his written application and his agreement to abide the terms of the contract the grain was delivered to his tenant to be used on the land, and that was in fact a delivery to himself. But the contention of counsel is that by making the written application and receiving the grain according to the terms of the contract appellant did not oblige himself to pay for the grain and that the sum due should be enforced only as a lien or tax against the land. However, it is conceded that the statute forms a part of the contract or gives a basis for its construction, and so does the formal written application for the grain, and so does the delivery of the grain as requested in the application. Indeed, the statute clearly contemplates and expressly authorizes an action to recover a personal judgment on the contract the same as on a promissory note. The purpose of the statute was to give the county every possible means of collecting the notes or contracts, and for that there was good reason, because it was a poor man's contract. In the application to purchase the grain the parties had to certify that they were unable to procure the necessary seed grain for the current year. The sale of the grain by the county was not made on speculation. The county was not permitted to make the least profit on the purchase and sale of the grain. And it is well known that the lands of those who applied for aid were heavily mortgaged and that was one reason why they could not procure the seed grain without the aid of the county.

The complaint shows a cause of action. It shows a formal written application by appellant for the purchase of the grain, the delivery of the same at a stated price pursuant to the application and a writing whereby appellant agrees to the terms of the contract. Here the word *terms* means conditions and stipulations. Century Dictionary. Inter-

pretation must be reasonable. Comp. Laws, § 7276. An interpretation which gives effect is to be preferred to one that makes void, § 7275. He who takes the benefit must bear the burden, § 7255. Appellant has taken the benefit of the application and contract. He obtained the grain for use on his farm, and of course he must pay for it. That is in accordance with the law and the contract. Judgment affirmed.

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

GRACE, J. (specially concurring). I am of the opinion that the judgment should be affirmed. The defendants signed the contract upon which the grain was furnished to his tenant and to himself. He agreed in writing to the terms therein stated. The description of the land was in the contract. In these circumstances, we think he became personally liable for the agreed value of the seed purchased.

HERMAN G. BRISSMAN, Respondent, v. R. H. THISTLETHWAITE, Appellant.

(192 N. W. 85.)

Criminal law — appellant has burden to show affirmatively prejudicial error by record; appellant held not to have sustained burden of showing prejudicial error in record.

The appellant in a certiorari proceeding has the burden of showing prejudicial error, affirmatively, by the record. For reasons stated in the opinion it is *held* that the appellant here has failed to do so.

Opinion filed November 23, 1922. Rehearing denied December 30, 1922.

Criminal Law, 17 C. J. § 3601, p. 274, n. 18.

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

Theodore Koffel, Joseph Coghlan, and *J. K. Murray,* for appellant.

A justice of the peace has power to determine whether or not a criminal action brought before him shall be dismissed, and is not bound to obey

the order of the district attorney for such dismissal. Re Voss, 11 N. D. 540, 90 N. W. 15.

This case was cited in State ex rel. Clyde v. Lauder, 11 N. D. 136, 90 N. W. 564, holding a wilful refusal by a state's attorney to file an information and prosecute a criminal action where a defendant was held by a justice of the peace to answer in district court for a public offense would constitute a misdemeanor and render him liable to prosecution for professional misconduct; and the court actually disbarred him.

In Michigan it was held that a prosecuting attorney has no right at his own discretion, to stop criminal proceedings instituted before a justice of the peace, or direct the sheriff not to execute a valid warrant of arrest in his hands for execution. Judge Cooley, one of the most eminent constitutional lawyers of this country, wrote the opinion. Beecher v. Anderson, 8 N. W. 539.

In another case it was held that it was not necessary that the prosecuting attorney should have authorized the prosecution, or that the complaining witness should have given security for costs. People v. Griswold, 31 N. W. 809; State v. Yakey, 85 Pac. 990.

O'Hare & Cox, for respondent.

PER CURIAM. This is an appeal from an order of the district court of Burleigh county reviewing and setting aside proceedings had before a justice of the peace in a certain criminal action. The controlling facts are as follows: A criminal complaint was made before a justice of the peace, the charging part of which was as follows: "That at said time and place the said defendant did wilfully, wrongfully, and unlawfully assume the title of a certified public accountant of this state and, by misrepresenting himself as such, made and submitted to the board of auditors and senate and house of representatives of the state of North Dakota a certain audit of the books and records of the Bank of North Dakota, he, the said Herman G. Brissman, not having received a certificate as a certified public accountant, contrary to the statute in such case made and provided and against the peace and dignity of the state of North Dakota." A warrant of arrest was issued upon such complaint and Brissman was arrested. When the matter came on for hearing in the justice's court objection was made by the defendant in such criminal action to the jurisdiction of the justice on the ground that the complaint

had not been approved by the state's attorney as required by law, and that it did not appear from statements in the complaint or other written evidence submitted to the magistrate that the defendant was liable to escape from the county before the approval of the state's attorney could be had. The objection was overruled. Thereafter Brissman made application to the district court for a writ of certiorari to review the action of the justice. The district court issued an order to show cause why the relief prayed for should not be granted and stayed proceedings pending such hearing. On the return day the justice of the peace appeared and filed a demurrer and a return to the petition. The demurrer was based on the grounds that the district court had no jurisdiction of the person or subject-matter; that the plaintiff had no legal capacity to sue; that there was a defect of parties plaintiff; and that the petition failed to set forth sufficient facts to constitute a cause of action or to authorize the issuance of a writ of certiorari or injunctional order. The demurrer was overruled. The matter in issue upon the return was thereupon submitted, and the district court having determined that a writ of certiorari should issue directing the said justice of the peace to certify to said district court for review all proceedings had in said alleged criminal action, said justice of the peace through his counsel in open court specifically waived the issuance of the writ, and informed the court that he had no further defense to offer, and submitted the entire matter in issue to said district court at said time and place. In the return of the justice, it is admitted that the warrant of arrest was issued without the approval of the state's attorney, and upon the hearing the petitioner Brissman submitted the affidavit of the state's attorney showing that a criminal complaint submitted by the same complaining witness who presented the complaint under consideration here was submitted to him for investigation and approval; that he conferred with the attorney general of the state with regard to the matter and after such conference and full investigation indorsed upon the complaint his disapproval in writing for the reason that said complaint did not state facts constituting a crime under the laws of this state. The affidavit further shows that the state's attorney was not absent at the time the warrant of arrest under consideration here was issued. It will be noted that the act charged in the alleged criminal complaint is that Brissman practised as an accountant, and assumed the title of a certified public

accountant, in this state without having received a certificate as certified public accountant from the board of accountancy. The laws of this state provide for the appointment of a board of accountancy to examine and license public accountants. Comp. Laws, 1913, §§ 549–557. This statute, however, does not purport to create a crime or to impose any penalty or punishment whatsoever upon anyone who practises accountancy without having been so licensed. "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed upon conviction a punishment or penalty." Comp. Laws, 1913, § 9195. Inasmuch as the statute relating to accountancy does not either declare that it is a crime for one to practise or prescribe any punishment or penalty whatever upon one who practises, as an accountant without having received a certificate from the board of accountancy, manifestly no punishment can be prescribed by the courts. Hence, it is obvious that the alleged criminal complaint did not charge a crime at all.

It is contended, however, on this appeal that the action of the justice of the peace is not reviewable on certiorari, and that the district court erred in granting such writ. In this state "a writ of certiorari may be granted by the supreme and district courts, when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction and there is no appeal, nor in the judgment of the court any other plain, speedy, or adequate remedy, and also when in the judgment of the court it is deemed necessary to prevent miscarriage of justice." Laws 1919, chap. 76. "The review upon this writ cannot be extended further than to the determination whether the inferior court, tribunal, board, or officer has regularly pursued the authority of such inferior court, tribunal, board, or officer." Comp. Laws, 1913, § 8453. The court may "in its discretion permit either party to produce affidavits or other written proofs relative to any alleged error of fact or any other question of fact, which is essential to the jurisdiction of the body or officer to make the determination to be reviewed, when the facts in relation thereto are not sufficiently stated in the return and the court is satisfied that they cannot be made to appear by means of an order for a further return." Comp. Laws, 1913, § 8451.

The district court is vested with original jurisdiction of all causes both at law and equity, except as otherwise expressly provided in the

Constitution, and with such appellate jurisdiction as the legislature confers upon it. N. D. Const. § 103. Under the provisions of the statute the district court of Burleigh county, and it alone, has appellate jurisdiction in civil and criminal actions tried before a justice of the peace of that county. Comp. Laws, 1913, §§ 9163–9174. That court, and that alone, has jurisdiction to try criminal causes, except those minor offenses where a justice of the peace or police magistrate has jurisdiction to try and determine, originating in said county. And in all cases where a preliminary examination is conducted before a justice of the peace sitting as a committing magistrate, for criminal offenses committed or alleged to have been committed within said Burleigh county the magistrate must immediately return all papers and proceedings in the action to that court. Comp. Laws, 1913, § 10,624. If in this case the hearing had proceeded and the justice of the peace had made an order holding the defendant to answer, it would have been the duty of the justice of the peace to have made a return, and transmitted all the papers in the case, to the district court. And it is clear, under the undisputed facts here, that if such order had been made the defendant in such alleged criminal action would have been entitled to be released upon habeas corpus. Comp. Laws, 1913, § 11,373. The district court would have had jurisdiction to issue the writ. And upon application for such writ it would, under the undisputed facts in this case, have been its unquestioned duty to do so.

The ordinary presumptions on appeal are applicable on appeal from a judgment in a certiorari proceeding. 11 C. J. 221. The appellate court will only consider the errors which are urged before it and specifically pointed out and the review is confined to matters or objections urged below. 11 C. J. 221. It is a well-settled rule of general 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 is 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 the appellant or plaintiff in error." 4 C. J. 731–733. See, also Erickson v. Wiper, 33 N. D. 193, 222, 157

N. W. 592. And on an "incomplete record, the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent." 4 C. J. 736. To support and sustain the order or judgment appealed from the appellate court will, where there is some basis in the record therefor, indulge in the presumption that a certain ground of defense was abandoned. 4 C. J. 738. In the case before us no statement of the case has been settled and we have no means of knowing what took place in the district court except as appears from the recitals in the order appealed from. According to the recitals therein the respondent, after the demurrer was overruled, and after the trial court had indicated its views with respect to the issue presented by the return, in open court stated that he waived the issuance of a writ of certiorari and further stated that he had no defense to offer and "submitted the entire matter in issue to said court at said time and place."

When the record presented on this appeal is viewed in the light of the fundamental rules above referred to, we are of the opinion that the question of the propriety of the remedy is not before us. It must be assumed that the justice of the peace had no personal interest in the alleged criminal action pending before him. That his only interest therein was to properly discharge the duties imposed upon him by law, —the duties which he had assumed under his oath of office. It certainly cannot be assumed that he would issue warrants of arrest except in cases where it was charged that some crime had been committed, or that he would insist on subjecting a person not charged with the commission of any crime to the expense and ignominy attendant to a criminal prosecution. Indeed it is only reasonable to assume that when the matter came on for hearing in the district court, the justice of the peace, even if he had intended to object to a consideration of the merits on the ground that a wrong remedy had been pursued, would abandon such intention; for manifestly it would be to his interest to ascertain whether there was in fact any criminal action pending before him, and whether the alleged complaint did or did not state that an offense had been committed. In other words, it seems quite natural that the justice of the

peace should be interested in having the merits of the controversy determined, and that even if he first sought to question the propriety of the remedy, he would, on further consideration, decide to waive that question and ask the district court to determine the controversy on the merits. And upon the record here—where the justice of the peace, after his demurrer had been overruled, announced that he waived the issuance of a writ of certiorari; that he had no further defense to submit, and that he "submitted the entire matter in issue to the court at said time and place,"—we are of the opinion that he must be deemed to have waived all question as to the propriety of the remedy, and hence cannot raise that question now.

While we find it unnecessary to determine whether certiorari is or is not the proper remedy to be invoked under the facts shown here, we are, as already indicated, wholly agreed that the alleged criminal complaint did not state facts sufficient to constitute, or even to foreshadow, a public offense. We are, also, of the opinion that, without regard to whether the approval of the criminal complaint by the state's attorney, as required by § 10,535, Comp. Laws 1913, is or is not a jurisdictional prerequisite, a justice of the peace is not regularly pursuing his authority in the manner prescribed by law when he issues a warrant of arrest upon an alleged criminal complaint where the state's attorney has theretofore specifically disapproved the issuance of a warrant of arrest upon another alleged criminal complaint containing the same identical charge, and presented by the same complaining witness. There can, therefore, be no question but that the result reached by the district court in its decision in this case was the only decision which ultimately could be reached with respect to the alleged criminal proceeding. Hence it would seem that the judgment ought to be affirmed in any event for it is a well-settled rule that a judgment will not be reversed on appeal although infected with error where the result reached is manifestly the correct one, and a reversal would prove wholly ineffectual and be of no benefit to the party asking it. 4 C. J. 1131, 1134.

Judgment affirmed.

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

ROBINSON, J. (concurring specially). This was a criminal prosecu-

tion before a justice of the peace under the act relating to certified public accountants, Laws 1913, chap. 2. The justice of the peace appeals from an order or judgment dismissing the prosecution for want of jurisdiction. The points in the case are three:

1. The justice of the peace was not a party to the action and in no manner interested in the judgment or the dismissal, and hence he had no right to appeal. That point needs no argument.

2. The prosecution was without the consent and against the will of the state's attorney.

3. The complaint does not state a cause of action.

So far as material, the statute is as follows: Sec. 3.—

"Any person in order to assume the title of a certified public accountant, on the abbreviation C. P. A., or any other words, or letters, or abbreviations, tending to indicate that the person, firm, or corporation, so using the same, is a certified public accountant, must receive a certificate as a certified public accountant."

The complaint is based on that section. It avers that defendant did commit the crime of misrepresentation as a certified public accountant; that he did wrongfully and unlawfully assume the title of a certified public accountant of this state, and by misrepresenting himself as such, made and submitted to the board of auditors, and senate and house of representatives of the state of North Dakota, a certain audit of the books and records of the Bank of North Dakota, he, the said Herman G. Brissman, not having received a certificate as a certified public accountant. The complaint is drafted under that statute, but the statute does not create a crime because a violation of the command is not made penal or in any way punishable.

"A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, a punishment or penalty." Comp. Laws, § 9195.

Obviously there is no penalty or punishment annexed to the violation of § 3, and hence the section does not create a crime. The averment of the complaint concerning the defendant, does not charge him with a crime any more than if it were that the moon is made of green cheese. The justice of the peace had no color or shade of jurisdiction; that is so obvious that it is in no way debatable and it seems that lawyers, hav-

ing regard for their reputations, should be more careful how they prosecute such groundless cases, and appeal same to this court.

In this case the state's attorney did not approve the issuing of a warrant and for good reasons he disapproved it. The rule is that criminal prosecution must be conducted in the name and by the authority of the state, and by the state's attorney, and such is the statute:

"When a complaint is made to a magistrate, charging the commission of a public offense, before issuing a warrant, he must submit the matter to the state's attorney, for approval, or disapproval, and if the state's attorney disapproves, no warrant shall be issued." § 10,535.

GRACE, J. (specially concurring). The complaint purports to charge a violation of § 9991, Comp. Laws 1913, relating to false and misleading advertising. I am of the opinion that the complaint fails to state a cause of action and, that for this reason, the judgment should be affirmed.

On petition for rehearing.

PER CURIAM. Appellant has petitioned for a rehearing.

It is said that this court, in its former decision, overlooked § 9433, Comp. Laws 1913, which provides: "When the performance of an act is prohibited by any statute and no penalty for the violation of such statute is imposed in any statute, the doing of such act is a misdemeanor." And it is contended that when the statutory provisions relating to the examination and certification of public accountants, §§ 549–557, Comp. Laws 1913, are read in connection with this statute, that it constitutes a misdemeanor to do what the criminal complaint in this case charges that Brissman did.

In our opinion the contention is not well founded. Section 9433, supra, is a general provision intended to apply in those cases where the legislature has enacted a law declaring certain acts to be prohibited or unlawful, but prescribed no punishment for a violation thereof. It seems that, in each of the various acts relating to the regulation of professions or vocations and licensing of those engaged therein, the legislature has seen fit to say specifically what shall constitute a violation of the statute, and, also, what the punishment shall be for such violation. This is true as regards the statutes relating to the examination and

licensing of physicians and surgeons, §§ 458–471, pharmacists, §§ 475–506; dentists, §§ 507–515; osteopathists, §§ 516–523; embalmers, §§ 540–572; optometrists, §§ 524–539, and barbers §§ 558–572. It will be noted that the provisions relating to the examination and certification of accountants are both preceded and followed by provisions relating to other professions and vocations. And the statute relating to accountants is no exception to the general rule thus adopted by the legislature. That statute, also, contains a provision enumerating the acts which shall be deemed punishable under it, and prescribes the punishment. The last section in the act reads thus: "Any certified public accountant who shall falsify a report, statement, investigation, or audit, or who shall in any manner be guilty of a misrepresentation as a certified public accountant, shall be guilty of a misdemeanor and shall be punished accordingly." Comp. Laws 1913, § 557. Hence, we do not have a situation where the legislature passing a law, either intentionally or otherwise, failed to consider the question of its violation and make provision therefor. Here, the legislature considered that question, and stated what acts should be punishable as violative of the act. It is a maxim of the law that the expression of one thing is the exclusion of another. The rule of construction thus expressed is applicable here. Where, as here, a statute purports to regulate the carrying on of a vocation or profession not formerly subject to regulation, and designates certain acts and a certain class of persons as subject to its penalties, the acts and persons so designated are exclusive and all other acts and persons are deemed to be exempted. 2 Lewis's Sutherland, Stat. Constr. 2d ed. § 491, pp. 916–918. The complaint involved in this case wholly fails to show the commission by Brissman of any act made punishable under § 557, supra; and, hence fails to state facts sufficient to constitute a public offense.

It is, also, said that we were in error in stating in the former opinion that no statement of case had been settled. And attention is called to what is denominated an order settling the statement of case. The order mentioned enumerates and identifies the various papers and records in the case, states that the same "constitute all the papers, files and records in said action, and the judgment roll and the whole thereof, and that there are no exhibits and no evidence taken before the district court." The order is sufficient for the purpose of identifying the papers on

which the order appealed from was based, and also to show that there was no *evidence* other than the papers enumerated, submitted to the court, upon the hearing. It does not purport however to show what *proceedings* were had upon hearing in the district court. As to that we have no information except that recitals in the order appealed from. It is a misnomer to call the papers identified by the court a statement of case, or the order identifying such papers and showing what the order was based on, an order settling the statement of case. The purpose of a statement of case is to place in the record matters occurring on the trial or hearing, and which would otherwise not be a part of the record,—matters sometimes resting in the stenographers notes, or the minutes of the court, and at other times resting only in the recollection of the court or counsel. See 4 C. J. 330. See also § 7655, Comp. Laws 1913.

Appellant invokes the rule that certiorari lies only to review acts in excess of jurisdiction. The rule was recognized, and the statutory provisions announcing it were set forth, in the former opinion, but for reasons therein stated the rule was held not applicable in this case. In other words, we held that under the facts disclosed or inferable from the record in this case, we are not concerned with the propriety of the remedy. As pointed out, the district court is one of general jurisdiction. The ultimate question which gave rise to the litigation was one within the general jurisdiction of that court. And for reasons stated in the former opinion it must be assumed on this appeal that the objection first interposed by the justice of the peace to the propriety of the remedy was abandoned,—that the justice of the peace waived the issuance of a writ of certiorari, and in effect asked, or at least consented, that the district court decide the "entire matter in issue" at "said time and place." This court has repeatedly held that when a case, which involves a question within the general jurisdiction of the district court, is presented to the district court, with either the express or tacit consent of the parties that the question so presented be determined, the question of the propriety of the remedy becomes immaterial and cannot be subsequently raised. Thus in Minneapolis, St. P. & S. Ste. M. R. Co. v. Stutsman, 31 N. D. 597, 154 N. W. 654, this court held that where a matter was heard before the board of railroad commissioners, and an appeal taken from the decision of such board to the district court, and

the controversy tried in that court, without objection, the parties cannot afterwards be heard to say that the board of railroad commissioners in the first instance had no jurisdiction to hear or determine the matter, and the district court no right to hear and determine the matter on appeal. And in Lobe v. Bartaschawich, 37 N. D. 572, 164 N. W. 276, this court ruled that where an application was made in the district court to vacate a default judgment entered by a county court with increased jurisdiction, and the parties in effect invited the district court's ruling on the merits of the application, the order of the district court setting the judgment aside is valid, even though the application properly should have been made in the county court. In the opinion in that case it was said: "The district court, being a court of general jurisdiction, has power to determine all controversies or questions of difference which can possibly be made the subject of civil action. . . . The subject-matter being with the scope of the jurisdiction of the court in which the motion was made, and such court having determined the controversy by consent of the parties, they are now precluded from questioning the jurisdiction. There are but few analogous cases, presumably due to the fact that parties who consent to the exercise of the judicial powers of a court of general jurisdiction seldom have the hardihood to impeach the action of the tribunal on jurisdictional grounds." In our decision in this case, we merely applied the principle announced and applied in these cases. We have not, as appellant contends, held that the practice adopted in this case is the proper mode of determining the sufficiency of a criminal complaint. We have merely held that where, as here, the matter is presented to the district court, and that court is in effect asked to determine whether there is in fact and in law a criminal action pending before a justice of the peace; and the court determines that question, that a party who has invited such decision cannot afterwards question the propriety of the remedy utilized in the first instance in bringing this matter before the district court for determination.

Rehearing denied.

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

HERMAN G. BRISSMAN, Respondent, v. R. H. THISTLETHWAITE, Appellant.

(192 N. W. 90.)

Former case controlling.

This case is governed by the decision rendered in Brissman v. Thistlethwaite, ante, 417.

Opinion filed November 23, 1922. Rehearing denied December 30, 1922.

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

Affirmed.

Theodore Koffel, Joseph Coghlan, and *J. K. Murray,* for appellant.

A justice of the peace is not bound to dismiss a prosecution of a criminal offense upon motion of the state's attorney, and he has authority to issue a warrant without the approval of the state's attorney. Comp. Laws, 1913, § 10,535; Re Voss, 11 N. D. 541, 90 N. W. 15.

The same question was also raised and decided in the same way in the case of Clyde v. Lauder, 7 N. D. 136, 90 N. W. 564.

It has been held that a prosecuting attorney has no right at his own discretion to stop criminal proceedings instituted before a justice of the peace or direct the sheriff not to execute a valid warrant of arrest in his hands for execution issued by a justice of the peace and not approved by the prosecuting attorney. Beecher v. Anderson, 8 N. W. 539; State v. Yakey, 85 Pac. 990.

That the magistrate is not limited to the matter approved by the state's attorney is clearly evidenced by reading the remainder of the Code of Criminal Procedure relating to preliminary examinations. Section 10611 provides. State v. Rossum, 8 N. D. 548, 80 N. W. 47; 170 S. W. 624; People v. Kingston, 139 N. Y. Supp. 649; Read v. Shipley, 104 S. W. 1001; Foley v. Ham, 169 Pac. 183; Hutchinson v. Ionia County, 89 N. W. 561.

Where the court has jurisdiction of the class of cases complained of, and acquired jurisdiction of the subject-matter, the mere fact that the petition or complaint by which the proceeding was inaugurated is defective is no ground for certiorari or prohibition. State v. Scobie, 92 S. W. 191.

O'Hare & Cox, for respondent.

That certiorari is and was the proper remedy in this proceeding in view of the question of law raised in the court below, seems too apparent for argument. 11 C. J. 88 and cases cited thereunder.

Inferior courts and justices of the peace have only such jurisdiction as is expressly given. Bowers v. Green, 2 Ill. 42.

In Robinson v. Harlan, 2 Ill. 237, it is said: "By adverting to the organization and powers of a justice's court, it will be perceived that it is one of limited jurisdiction. The statute is the charter of its authority; and, whenever it assumes jurisdiction in a case not conferred by the statute, its acts are null and void, and the officer obeying its process in such a case makes himself liable." In Evans v. Pierce, 3 Ill. 468, it is said: "A justice's jurisdiction is conferred by statute, and, in its exercise he must proceed in strict conformity with the manner prescribed."

And the powers of a justice of the peace are strictly limited to what is conferred upon him by statute. 24 R. C. L. 706; 12 Cyc. 210; State v. Peterson, 13 A.L.R. 1284, 194 Pac. 342.

This question has also been raised in the courts of the state of New York, and in the case of People ex rel. Brown v. Tighe, 146 App. Div. 491, it is held that a magistrate has no arbitrary power to issue a warrant of arrest, but must rest his authority to do so on provisions of law, citing in support thereof McKelvey v. Marsh, 63 App. Div. 396. See also 16 C. J. 299 under Issuance of Warrant.

PER CURIAM. This case was submitted together with Brissman v. Thistlethwaite, ante, 417, 192 N. W. 85. The complaint here purports to charge a violation of the statute relating to false and misleading advertising. Comp. Laws 1913, § 9991. No good purpose would be subserved by setting forth the allegations of the complaint. The complaint clearly does not state facts constituting a public offense, nor is there any contention on this appeal that it can be amended so as to obviate the defects. The appellant asserts that wholly without regard to whether the complaint states facts constituting a public offense, the action of the justice of the peace was not subject to review by certiorari, and that the trial court erred in so reviewing it.

It appears that the alleged criminal action under consideration here was instituted at the same time that the action considered in Brissman v. Thistlethwaite, supra, was instituted. All the facts stated in the

opinion in that case with respect to the criminal action involved in that case exist here. Here also the state's attorney disapproved the issuance of a warrant of arrest, and the record on appeal is in all material respects similar to that considered there. Hence, this case is necessarily controlled by the decision in Brissman v. Thistlethwaite, and on authority of that case the judgment of the district court is affirmed.

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

ROBINSON, J. (concurring specially). This is a prosecution before a justice of the peace, under Comp. Laws, § 9989, Laws of 1913, chap. 2. After hearing on an order to show cause the district court gave judgment dismissing the prosecution and the justice of the peace appeals. The case presents three questions on each of which the appeal may be dismissed or the judgment affirmed.

1. The prosecution was commenced; the warrant issued and the arrest made without the consent and against the will of the state's attorney and the attorney general.

2. The complaint does not state facts sufficient to constitute a public offense.

3. *The justice of the peace was no party of record, he had no interest in the case, and hence no right to appeal.*

The last point needs no argument. The justice was neither plaintiff nor defendant; dismissal of the case was of no concern to him; he had no rights as a party to the action.

The rule is that criminal prosecution must be conducted in the name, and by the authority, of the state, and by the state's attorney. The statute reads:

"When a complaint is made to a magistrate, charging the commission of a public offense, before issuing a warrant, he must submit the matter to the state's attorney for approval, or disapproval, and if the state's attorney disapproves, no warrant shall be issued." Sec. 10535.

That is the rule with a few exceptions. In this case, the state's attorney did not approve the issuing of a warrant and for good reasons he disapproved it, and for that reason alone it was competent, for the district court, to order a dismissal of the case.

2. The complaint does not charge a public offense; it is framed under

the statute against false and misleading advertising. Comp. Laws 1913, § 9989. The statute is in effect that any person who, with intent to sell certain specific things, including services, publish concerning the same any advertisements or representations of fact which are untrue, deceptive, or misleading shall be guilty of a misdemeanor. The complaint avers that in January, 1921, defendant committed the crime of false and misleading advertising with intent to sell and dispose of services, to wit: Services of accountancy, directly or indirectly to the public, did, in divers ways publish advertisements of a certain sort regarding services, to wit: Services as a certified public accountant, and to offer the same to the public, which advertisements contain assertions, representations, and statements of fact which were then and there untrue, deceptive and misleading.

The complaint does not state any alleged untrue advertisements, assertions, or representations, nor does it state wherein the same is untrue, misleading or deceptive. It is similar to a complaint for perjury, alleging that in a certain action the accused did wilfully and feloniously swear falsely, without any averment, showing the false testimony or its untruthfulness. It is similar to an averment that at a certain time and place defendant did feloniously steal, take, and carry away a great lot of personal property, without any averment describing the property, or its value. It is similar to a complaint for libel and slander without any averment showing libelous statements. In all such cases the pleading must be specific, definite, and certain. A party cannot state a cause of action based on a false statement, or advertisement, without alleging the statement or advertisement. The averment that a party made any number of false and deceptive or slanderous statements concerning a matter amounts to nothing without an averment showing the statements. That is elementary. In a complaint for false and misleading advertising, the advertisement is an essential fact. It is the very basis of a cause of action and hence it must be pleaded, 31 Cyc. subject, Pleading; 21 R. C. L. 438–626.

Inasmuch as the complaint makes no attempt to state any advertisement, or any false assertion, it well fails to state a cause of action, and hence the justice court had no jurisdiction.

GRACE, J. (specially concurring). The complaint purports to

charge a violation of § 9991, Comp. Laws 1913, relating to false and misleading advertising. I am of the opinion that the complaint fails to state a cause of action and, that for this reason, the judgment should be affirmed.

MARTHA STEINKE, Respondent, v. NORTHERN TELEPHONE COMPANY, a Corporation, and The Northwestern Telephone Exchange Company, a Corporation, Appellants.

(191 N. W. 477.)

Damages — facts proved held to support facts alleged; questions of negligence and contributory negligence held for jury; $12,230 for personal injuries held not excessive.

In an action for personal injuries sustained by plaintiff in opening a cellar door and being precipitated into a cellar adjacent to a street, it is *held:*

(a) That the law of the case upon the alleged facts is fully set forth in Steinke v. Halverson, 46 N. D. 10.

(b) That the facts proved support the facts alleged.

(c) That the trial court did not err in its instructions to the jury.

(d) That the verdict is not excessive.

Opinion filed December 6, 1922. Rehearing denied December 30, 1922.

Damages, 17 C. J. § 408, p. 1091, n. 85. Negligence, 29 Cyc. p. 621, n. 92; p. 635, n. 68; p. 640, n. 13.

Action in District Court, Ward County, *Lowe,* J., for personal injuries.

Defendant has appealed from the judgment and, an order denying judgment non obstante, or, in the alternative, for a new trial.

Affirmed.

Bangs, Hamilton & Bangs, Fisk, Murphy & Nash, and *E. A. Prendergast,* for appellants.

Negligence is a breach of some legal duty that the defendant tele-

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Note.—On excessiveness of verdicts in actions for personal injuries other than death, see notes in L.R.A.1915F, 30; 8 R. C. L. 674; 2 R. C. L. Supp. 638; 4 R. C. L. Supp. 567; 5 R. C. L. Supp. 480.

On questions of negligence or contributory negligence held one of fact for the jury, see 14 R. C. L. 747.

phone company might owe to the plaintiff. Costello v. Farmers Bank, (N. D.) 157 N. W. 982.

A property owner or lessee owes no duty to a trespasser or a mere licensee on his premises to protect him from injury other than to refrain from wilfully and wantonly inflicting injuries to such person. Rhode v. Duff, 208 Fed. 115, 8th Circuit.

Plaintiff's negligence, which directly contributed to her injury, will bar her recovery from the defendant, even though there be some negligence on its part. Costello v. Farmers Bank, 157 N. W. 982; Steger v. Immen (Mich.) 24 L.R.A.(N.S.) 246.

The maintaining of a closed door leading from the street to a basement, which door is kept closed by a catch, and also a six pound weight does not constitute negligence.

Such a cellarway, basement, or door does not constitute a trap or pitfall, and neither does it come within the purview of the city ordinance of Minot. Rhode v. Duff, 208 Fed. 115; Stanwood v. Clancey (Me.) 26 L.R.A.(N.S.) 1213, 75 Atl. 293; Larned v. Vanderlinde (Mich.) 131 N. W. 165.

McGee & Goss, for respondent.

Negligence, common law and ordinance. Common-law negligence, established by (1st) independent proof; (2nd) law of case on former appeal, 178 N. W. 964; Rhode v. Duff, 208 Fed. 115; Standwood v. Clancey (Me.) 26 L.R.A.(N.S.) 1213; Larned v. Vanderlinde (Mich.) 131 N. D. 165; Costello v. Farmers Bank (N. D.) 157 N. W. 982.

We think the proper and true test of legal liability is whether the excavation is substantially adjoining the way. 178 N. W. 966.

Two rules are to be borne in mind in determining whether contributory negligence exists under the circumstances in evidence in this case. The first is whether fair-minded men might differ under all the facts disclosed by the evidence whether plaintiff was careless, that is, negligent. Coulter v. G. N. R. Co. 5 N. D. 568, 67 N. W. 1046.

And the second principle applicable in this case is that the plaintiff was "bound to use care commensurate with and known on reasonably apprehended danger only." Pendroy v. G. N. R. Co. 17 N. D. 433, 442, 117 N. W. 531.

Bronson, J. In an action for personal injuries plaintiff recovered

a verdict for $12,230 with interest. Defendant has appealed from the judgment and the order denying judgment non obstante or, in the alternative, for a new trial. The cause was before this court heretofore upon a demurrer to the complaint. See 46 N. D. 10, 178 N. W. 965. The facts, as alleged in the complaint, are fully stated in such former opinion. The law of the case was fully and well set forth in such opinion.

In the complaint negligence was predicated against three defendants. At the trial it was stipulated that the appellant-defendant would pay any liability arising from the negligent acts of the defendant Northern Telephone Company. The trial court, at the conclusion of the evidence, dismissed the action against defendant Halvorson.

Defendant challenges the sufficiency of the evidence to support the alleged facts upon which this court formulated the law of the case and found a cause of action to be stated. The pertinent inquiry, therefore, is whether the facts proved support the facts alleged.

Defendant maintains that the evidence fails to show that there was any flying snow or that plaintiff's vision was in any way obscured. Plaintiff, however, testifies to the contrary. In response to a question by defendant's counsel, viz.: "As a matter of fact there was not enough snow to affect your vision at all?" plaintiff responded: "It was blowing. It was a blustery day. It was very stormy and snow in the air. I do not remember any more. It was a stormy day; the snow was in the air something like yesterday, hard, loose snow in the air." The defendant contends that the evidence shows that the plaintiff was not misled at all by the similarity in appearance of the two doors. One, into the meat market, and the other, into the cellar. However, we are of the opinion that the verdict finds ample support in the evidence concerning the allegations of the complaint that plaintiff opened the door into the cellar believing it to be the door opening into the meat market in the same building, adjacent thereto by some 30 feet and similar to it in appearance. Defendant further contends that the complaint simply describes this cellar door in most general terms while the evidence discloses that such door had a large transparent glass through which could be seen the cellarway and basement stairs; that the basement door was opened by turning a doorknob while the meat market door was opened by pressing down a thumb attachment; that, furthermore, such

basement door was held closed by a six pound weight against which force had to be used in order to open the door. Such facts in the record do not alter the law of the case applied upon the alleged facts. Such evidence afforded some corroborative proof of plaintiff's mistake through the similarity in the doors involved; otherwise, such evidence affected the question of plaintiff's contributory negligence. Defendant further maintains that the evidence discloses familiarity by the plaintiff with the premises. This again concerns the question of contributory negligence. Defendant maintains that the evidence discloses the true facts concerning the condition of the cellarway and the basement door which were not alleged in the complaint and upon which there can be found no violation of the city ordinance. This is covered by the opinion of this court in the former case and properly, in our opinion, the trial court submitted to the jury, as we instructed, the question of whether the ordinance had been violated by defendant.

Defendant complains of the instructions which submitted the questions of negligence and contributory negligence in general terms and in an indefinite manner, and, which refused the requested instructions of defendant. On examination of the instructions we find that the trial court properly instructed upon the questions of negligence and contributory negligence and followed specifically, in its instructions, the law of the case as laid down by this court in its previous opinion. Properly, the trial court denied defendant's requested instructions which assumed, directly or indirectly, as a matter of law, the proper construction and maintenance of the cellar door and cellarway and plaintiff's contributory negligence in opening such cellar door and falling into the cellarway. Upon the record, the question of defendant's negligence and plaintiff's contributory negligence were wholly questions of fact for the jury and were properly submitted to the jury.

We are satisfied that the verdict may not be declared excessive by this court. Between the time of the injury and the trial nearly five years elapsed. The record discloses that plaintiff was severely and permanently injured. She has spent large sums of money in trying to recover her health and former physical well being.

We are of the opinion that defendant has been accorded a fair trial

without the occurrence of any prejudicial error. The judgment and order should be, and are, affirmed with costs.

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

ROBINSON, J., dissents.

W. G. MEAD, Appellant, v. HERMAN BOCKORNY and Mike Kukk, Respondents.

(191 N. W. 626.)

Animals — herder's lien sustained.

Under the laws of South Dakota and North Dakota (S. D. Rev. Codes 1919, §§ 1669, 1670; N. D. Comp. Laws 1913, §§ 6844, 6845), a person who is employed to herd and care for sheep at a monthly wage is entitled to a herder's lien, as against the owner who consented to such employment, upon the sheep so placed under his care and in his custody.

Opinion filed December 15, 1922. Rehearing denied December 30, 1922.

Animals, 3 C. J. § 63 p. 34 n. 82.

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

Plaintiff appeals from a judgment and from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

Affirmed.

P. B. Garberg, and *W. F. Corrigan*, for appellant.

F. M. Jackson, for respondents.

CHRISTIANSON, J. This is an action in claim and delivery to recover the possession of a flock of sheep. Plaintiff asserts that he is the owner and entitled to possession as such. The defendants claim to have a lien for moneys due them for herding the sheep. The jury returned a verdict in favor of the defendants. The plaintiff moved for judgment

NOTE.—On excessiveness of verdicts in action for personal injuries other than death, see note in L.R.A.1915F, 30.

notwithstanding the verdict or for a new trial. The motion was denied, and plaintiff appeals.

Did the defendants have a lien on the sheep for the amount due them for herding? That is the sole question argued on this appeal.

If such lien exists it is by virtue of the following statutory provisions:

"Any farmer, ranchman, or herder of cattle, innkeeper or livery stable keeper to whom any horses, mules, cattle, or sheep shall be intrusted for the purpose of feeding, herding, pasturing, or ranching shall have a lien thereon for the amount that may be due for such feeding, herding, pasturing, and ranching and shall be authorized to retain possession of the same until the said amount is paid; provided, that these provisions shall not be construed to apply to stolen stock." S. D. Rev. Codes 1919, § 1669; N. D. Comp. Laws 1913, § 6844.

"The provisions of this article shall not be construed to give any farmer, ranchman, or herder of cattle, innkeeper or livery stable keeper, any lien upon horses, mules, cattle, or sheep, put into their keeping for the purpose mentioned in the previous section, when said property was not owned by the person intrusting the same at the time of delivering them into the possession of said farmer, ranchman, herder, innkeeper, or livery stable keeper." S. D. Rev. Codes 1919, § 1670; N. D. Comp. Laws, 1913, § 6845.

In October, 1919, the plaintiff agreed to deliver a certain number of sheep to one Stubbert upon what is termed a "share plan." The agreement was subsequently reduced to writing, and was executed by the parties in February, 1920. By the terms of the agreement each of the parties was obligated to pay one half of the shearing, one half of the salt and grain used in feeding the sheep, and one half of the taxes on the sheep. The wool and lambs were to be divided equally between the plaintiff and Stubbert. Stubbert was to pay all the running expenses, except as stated above, and he agreed to deliver all lambs and sheep coming to the plaintiff at the termination of the agreement for shipment f. o. b. cars at a shipping point. The plaintiff agreed to stand 5 per cent loss on the sheep during the life of the lease, and in case the loss exceeded 5 per cent, Stubbert was to deliver to Mead a number of ewe lambs equal to the loss so assumed by him (Stubbert) on or before October 1, 1920.

It appears that the plaintiff desired that the defendant Bockorny,

should be employed to herd and care for the sheep. He stated to Stubbert that he (Bockorny) would be a cheap man at $150 per month, and suggested that if necessary he be admitted into some sort of partnership arrangement. In a letter written by the plaintiff to Stubbert in the early part of January, 1920, he said: "Had Herman (Bockorny) been herding he would have noticed the lambs failing or losing flesh, in fact if he had been herding they wouldn't have lost flesh. Nor would he have let the bucks in as Mark did and if he had he would have got them out, besides he would have fed the sheep in the blizzard and not lost so many. That's the difference between a man who knows and a man who doesn't know."

Stubbert entered into negotiations with Bockorny with the result that Bockorny was engaged to herd, feed, and care for the sheep at $100 per month. Bockorny went to work about January 5, 1920, and continued in active charge of the sheep as herder and caretaker until about October 1, 1920, viz. until the commencement of this action. It is apparent that the plaintiff was notified of defendant's employment, for on January 28, 1920, he (plaintiff) wrote the defendant Bockorny, a letter, wherein he said: "I am real glad you are back on your old camping ground once more. I feel the sheep are in good hands when you have them. . . . I hope you will stay all winter and summer. I think you have a better job than farming for your position is sure. . . . I want you to take most of the ewes to the Galvin ranch in the spring to lamb and then in June take the balance of the ewes down there and save our range for winter and late fall." The evidence discloses that these instructions given by the plaintiff were carried out by the defendant Bockorny. The plaintiff visited the ranch in February, 1920, but did not see the defendant Bockorny as he was out on the range caring for the sheep. In May 1920, the plaintiff again visited the ranch and inspected a herd of sheep and lambs that were in charge of the defendant Kukk and expressed himself as satisfied with his work and when leaving he told him to save all the lambs he could for "us," apparently meaning plaintiff and Stubbert. In July 1920, the plaintiff again visited the ranch and talked with the defendant Bockorny and counted all the sheep. At that time plaintiff was informed by Bockorny that his wages had not been paid. At that time plaintiff gave Bockorny $15 in cash, which the plaintiff in his testimony claimed he advanced

as a loan while the defendant Bockorny testified he received it as a payment on his wages. According to the testimony of Bockorny he then informed the plaintiff that there was no need of his returning to work if he could not get his wages paid, whereupon the plaintiff stated that he would see that he was paid. This, however, is denied by the plaintiff.

The defendant Kukk went to work in May 1920, at an agreed wage of $75 per month and he and the defendant Bockorny from that time on cared for the sheep together. The plaintiff knew that Kukk as well as Bockorny was working and caring for the sheep, because, as already indicated, he visited the ranch in May 1920, and examined the band in charge of Kukk. In October 1920, the plaintiff came and directed the defendants to drive the sheep to Hettinger, North Dakota, which they did. At that point the plaintiff desired to put them on board cars and ship them to Melette, South Dakota. The defendants refused to surrender the sheep until the amount due them was paid. The plaintiff refused to pay and brought this action in claim and delivery.

Do these facts bring the defendants within the above-quoted statutory provisions? In other words were the defendants "herders" to whom the sheep in controversy were intrusted, by or with the consent of the owner, for the purpose of feeding, herding, or pasturing within the purview of the statute? Both parties agree that that is the ultimate question presented for determination. Plaintiff contends that the statute grants a lien only where the animals on which a lien is claimed have been placed in the actual and legal possession of the lien claimant; and that a person who herds and cares for stock as a servant of the plaintiff for hire and is subject to the directions of the master is not entitled to a lien. In support of this contention he cites: Hooker v. McAllister, 12 Wash. 46, 40 Pac. 617; Underwood v. Birdsell, 6 Mont. 142, 9 Pac. 922; Thomas v. Mann, 22 Wyo. 99, 135 Pac. 1088; McDearmid v. Foster, 14 Or. 417, 12 Pac. 813; Wenz v. McBride, 20 Colo. 195, 36 Pac. 1105; King v. Indian Orchard Canal Co. 11 Cush. 231; Bailey v. Davis, 19 Or. 217, 23 Pac. 881; 3 C. J. p. 33, § 61. The defendants, on the other hand, contend that the statute applies not only under the conditions outlined by the plaintiff, but, also, in cases like the one here, where a person is employed for the sole and express purpose of herding, feeding, and caring for certain live stock at a monthly wage; and where such live stock, though subject to the owner's orders and

directions and not in a strict, legal sense in the possession of the herder, nevertheless is in his custody and under his care. In support of this contention defendants' counsel cites Lydell v. First Bank, 65 Or. 243, 132 Pac. 518; National Bank v. McDaniel, 71 Okla. 6, 174 Pac. 286; and Becker v. Brown, 65 Neb. 264, 91 N. W. 178. While the authorities cited by these parties are interesting and illuminating on the questions there considered, the question before us after all is one of legislative intention, for not one of the authorities cited deals with a statute identical with our own, and many of the statutes considered are quite dissimilar.

We have given the matter careful consideration, and while the writer of this opinion is inclined to the view that the statute does not apply in this case, a majority of the court are of the opinion that the statute does apply here, and that the defendants are entitled to claim a lien and have a lien for the amount due them for herding the sheep.

The judgment and order appealed from must therefore be affirmed. It is so ordered.

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

BRONSON, J., concurs in result.

THE NATIONAL CASH REGISTER COMPANY, a Corporation, Respondent, v. MIDWAY CITY CREAMERY COMPANY, a Corporation, Appellant.

(191 N. W. 762.)

Evidence — refusal of defendant's evidence of plaintiff's unfulfilled promises at time of sale of cash register held erroneous.

The defendant on the trial attempted to give certain evidence to substantiate certain defenses set forth in the answer. On objection, the same was not received. It then made an offer of proof, setting forth the evidence which it desired to introduce. The offer was denied.

For reasons stated in the opinion: It is *held* that the court erred in refusing to receive the evidence and in the denial of the offer thereof.

Opinion filed December 30, 1922.

Evidence, 22 C. J. § 1621 p. 1215 n. 65, p. 1217 n. 66; § 1623 p. 1218 n. 83.

An appeal from a judgment and an order denying motion for a new trial of the District Court of Eddy County, *Nuessle, J.*

Judgment and order reversed.

N. J. Bothne, for appellant.

Proof of fraud is admissible and does not vary terms of written contract.

This question came up and was discussed and decided in the late case of Hansen v. Daniel Hayes Co. 188 N. W. 317.

"Even though a contract contains a provision that 'this contract contains all the conditions and agreement between the parties, and the purchaser hereby acknowledges a receipt of a duplicate hereof,' and the contract as signed contains no reference to the general wholesale price of the articles sold, a defense may yet be interposed in a suit upon the contract based upon fraud and deceit in obtaining the execution of the same by a false representation as to such wholesale price. *Such defense does not seek to vary the terms of the contract, but merely to show fraud in its inception.*" Elliott Supply Co. v. Green, 35 N. D. 641. See also Rochford v. Barrett, 115 N. W. 522.

"A promise made without any intention of performing it" is actual fraud. Comp. Laws 1913, § 5849; Tamlyn v. Peterson, 15 N. D. 488; Pollard v. McKenney, 96 N. W. 679; Cerney v. Paxton Co. 110 N. W. 882; Langley v. Rodriquez, 122 Cal. 580.

In the case of Walters v. Rock, 18 N. D. 45, the court says: "A promise made by the payee of a note in reference to the consideration for giving the same that he does not intend to fulfill constitutes a fraud that will defeat the note except in the hands of an innocent holder."

"The defrauded party, on discovery of the fraud, may affirm the transaction, keep whatever property or advantage he has derived under it, and recover in an action of deceit the damages caused by the fraud; or he may, within a reasonable time after discovery of the fraud, repudiate the contract, and tendering back what he has received under it, recover what he has parted with, or its value." Guild v. More, 32 N. D. 432; Bank v. Mailloux, 132 N. W. 168; 20 Cyc. 87, and citations.

James A. Manly, for respondent.

GRACE, J. This is an appeal from a judgment in plaintiff's favor and from an order denying defendant's motion for a new trial. The

action is one to recover the sum of $310, with interest, since April 12th, 1921, claimed by plaintiff to be due and owing it from the defendant on a certain $500 note, executed by defendant to plaintiff, representing the purchase price of a certain cash register.

The complaint, in addition to stating a cause of action on the note, sets forth the contents of a certain written order, directing plaintiff to manufacture and ship by prepaid freight, a cash register, fully describing it and stating the amount of the purchase price and terms of payment.

It is not deemed essential to set forth in this opinion the terms of the contract more specifically. The promissory note was an instalment note. By way of defense and counterclaim, the defendant alleged the following in its answer: "That on or about the 7th day of October, 1919, the plaintiff's agent and representative came to defendant in the city of New Rockford, North Dakota, and then and there attempted to sell to defendant a cash register to be used in defendant's place of business in said city of New Rockford; that defendant at that time had a cash register in its business and was therefore unwilling to buy another one; that, in order to induce defendant to buy said cash register, the plaintiff's said agent and representative did then and there falsely and fraudulently represent and state to defendant that the said cash register so offered for sale by the plaintiff was an entirely new invention and of such wonderful and remarkable construction and make-up that it would dispense with and eliminate a bookkeeper in defendant's place of business and thus save the salary and expenses of one person; that, in order to further induce defendant to buy the said cash register, the plaintiff's said agent and representative did then and there also falsely and fraudulently represent, state, and promise to defendant that if defendant would buy the said cash register, the plaintiff would furnish and send an expert up to New Rockford, North Dakota, and set up the said cash register in defendant's place of business and show and instruct defendant how to use and operate the same so as to save the work of a bookkeeper.

"That defendant, relying upon the said representations, statements, and promises of the plaintiff, and believing them to be true and not otherwise, was thereby induced to sign Exhibit "A" set out in the complaint herein, and to buy the said cash register from the plaintiff, and

to sign the said promissory note, and to pay part of the purchase price for said cash register.

"That afterwards, the plaintiff shipped the said cash register to defendant and defendant paid to the plaintiff the purchase price therefor, as follows: $30 in money; an old cash register valued at $30; and the said promissory note sued upon herein for $440; and that defendant later paid to the plaintiff the sum of $130 on the said promissory note.

"That the plaintiff has at all times failed, neglected, and refused to send up or furnish an expert to set up the said cash register in defendant's place of business and to show and instruct defendant how to use and operate the same, as it had promised and agreed to do; that the said cash register was a complicated piece of machinery, and defendant did not know how to correctly use, run, or operate the same, without the aid or instructions from an expert which the plaintiff has at all times failed, neglected, and refused to furnish; that the said statements, representations, and promises of the plaintiff, as aforesaid, were false and fraudulent and were known to be false and fraudulent by the plaintiff; that the promise made by the plaintiff, namely, to send up and furnish an expert to set up the said cash register in defendant's place of business and show and instruct defendant how to use and operate the same, was made by the plaintiff without any intention of performing it, and simply for the purpose of fraudulently inducing defendant to sign the said promissory note, and Exhibit "A" and to buy the said cash register and pay the purchase price therefor; and that the said cash register was not as represented by the plaintiff, and did not eliminate or dispense with a bookkeeper in defendant's place of business or save any salary or expenses to defendant, as the plaintiff had represented and promised it would do; and that the same therefore was practically useless and of no value to defendant.

"That on account of plaintiff's false and fraudulent representations, statements, and promises, as aforesaid, defendant on or about the 23d day of July, 1920, duly rescinded the said contract for the purchase of the said cash register, and did then duly return the said cash register to the plaintiff, and that the plaintiff has ever since kept and retained the same, and has duly consented to such return and to the rescission of the said contract.

"That as a result of the plaintiff's fraudulent representations, state-

ments, and promises, as aforesaid, defendant was induced to pay and part with $160 in money, an old cash register valued at $30, and the said promissory note sued upon herein; and that defendant has been damaged thereby in the sum of five hundred and no/100 dollars ($500).

"As a further defense to the plaintiff's alleged cause of action herein, the defendant alleges:

"That on or about the 23d day of July, 1920, defendant duly returned the said cash register to the plaintiff, and that the plaintiff has ever since kept and retained the same, and has duly consented to such return; that the consideration and the only consideration for the note sued upon in this action has been and is now kept and retained by the plaintiff; that defendant has not received value or consideration of any kind for the said note; and that the said note sued upon herein is wholly without consideration and is therefore absolutely null and void."

Defendant asked judgment that the plaintiff take nothing in the action and that defendant recover judgment against plaintiff for $190, the sum of the payments made. Plaintiff in its reply to the allegations of the answer states the following: "Plaintiff admits that on or about the 23d day of July 1920, defendant attempted to rescind the contract for the purchase of said cash register, and returned the same to plaintiff's agent at Fargo, North Dakota. But that plaintiff expressly denies that it has kept and retained said cash register, or consented to such return, or to the rescission of the contract for the purchase of the same. That on receiving notice of the return of said register the plaintiff promptly, on or about the 30th day of July 1920, notified defendant that plaintiff could not accept the return of said register or consent to the rescission of said contract, and that said register would be held subject to the order of and at the risk of the defendant. That the said register now is and at all times since the return of the same as aforesaid has been held by the plaintiff subject to the order of and at the risk of said defendant."

The only assignment of error necessary to consider is that relating to the exclusion of certain evidence and the offer of proof of that evidence. The evidence excluded is as follows:

Q. Now, in the fall of 1919 did you have any transactions with a representative of the National Cash Register Company?

A. I did.

Q. A man came up here to see you about selling a cash register?

A. Yes, sir.

Q. Do you know the name of the representative?

A. No, I do not recall it.

Q. That is the man that sold you the cash register?

A. Yes, sir.

Q. Where was the conversation had that you had with him?

A. In the creamery office.

Q. In your office in this city?

A. In the creamery, yes.

Q. You may state to the jury what the conversation was between you and him relative to the sale of this cash register?

Mr. Manly: That is objected to as incompetent, irrelevant, and immaterial and not the best evidence. It is an attempt to vary the terms of the written contract.

The court: Sustained.

Mr. Bothne: We have alleged in this case—

The court: A mere allegation will not vary the rule. If that were the case no written contract would stand. All you would have to do would be to allege fraud and prove any other.

Q. Before you entered into this written contract and signed this note, Mr. Jacobsen, you had some conversation and talk with this representative, did you?

A. Yes, sir.

Mr. Manly: Same objection.

The court: Let answer stand.

Q. What did the representative say to you at that time?

Mr. Manly: Same objection.

The court: Sustained.

Mr. Bothne: I do not know if I understand the court's ruling in this case. Do I understand it to mean that we could not show any conversation between these parties tending to show a misrepresentation in regard to the sale of this machine?

The court: That depends. Not on the present state of the record.

Mr. Bothne: That is in view of this contract and note?

The court: Yes.

Mr. Bothne: Well, of course that is the defendant's case and if we are excluded from that, of course we will be foreclosed from showing. I want to make an offer here about that.

Q. You may state whether or not you were able to get any more use out of that than any ordinary machine?

Mr. Manly: That is objected to as incompetent, irrelevant, and immaterial, no proper foundation having been laid.

Q. When you were on the stand a while ago and Mr. Manly showed you that note and the contract and he asked you if that was the only contract you had made with the plaintiff, I believe you stated that it was the only written contract that you had made, did you not?

A. Yes, sir.

Q. Now, Mr. Jacobsen, did you have any other talk or conversation with this agent about this machine which is not included in this note or contract?

A. I did.

Q. What was that conversation?

Mr. Manly: That is objected to as incompetent, irrelevant and immaterial, and an attempt to vary the terms of a written contract.

The court: Sustained.

Q. That was at the same time as you signed this note and contract, was it?

A. Yes, sir.

The proof offered and excluded is as follows:

The defendant at this time offers to show by this witness that on or about the 7th day of October, 1919, at the time of the making of the contract and note introduced by the plaintiff in this action, the plaintiff's agent and representative who sold the cash register to the defendant and for which this note and contract here were given, made statements and representations to this witness that this cash register was something new and an entirely new invention and of such construction and make-up that if the defendant would use it in its business it would save and eliminate an employee or bookkeeper in the defendant's business. That said representative of the plaintiff corporation further stated and represented to the defendant at said time and place that as

soon as said cash register was shipped up to New Rockford the plaintiff would send an expert up here to set up the said machine and show the defendant how to use and operate the same so as to save the expenses of one man in defendant's business. That said defendant relied upon said representations and believed them and was thereby induced to purchase the said machine and to execute the said note sued upon in this action and contract referred to in plaintiff's complaint. That said representations so made by the representative of the plaintiff corporation were fraudulent and made for the purpose of deceiving the defendant and for the purpose of inducing defendant to purchase the said machine. That the said promise of the representative of the plaintiff corporation to send up an expert to set up the said machine and show the defendant how to use and operate the same was made without any intention on the part of the plaintiff to perform the same. That the plaintiff has at all times failed and neglected to send up an expert and representative to show the defendant how to use and operate the said machine and that the defendant did not know how to use and operate the same so as to eliminate or save an employee in his business. The defendant further offers to show by this witness that on account of these misrepresentations by the plaintiff on or about the 23d day of July, 1920, the defendant duly returned the said machine to the plaintiff and that the plaintiff has ever since and does yet retain the possession of said machine and that therefore there is no consideration for said note.

Mr. Manly: Same objection.

The court: I will adhere to the ruling in the light of the offer.

The refusal of the court to receive the above testimony and the offer of testimony upon the objection of plaintiff is the only assignment of error necessary to consider. We think the court erred in refusing to receive the testimony as it was competent to prove the defense pleaded, which was, in substance, that at the time of the sale of the cash register and the signing of the note and contract the defendant was induced by false and fraudulent representations, statements and promises of plaintiff, to purchase the cash register and execute the note and contract. The evidence offered was not offered for the purpose of varying the terms of either the note or contract, but only to show that plaintiff was induced to purchase the cash register by the false and fraudulent repre-

sentations of plaintiff and that while relying on these he executed the note and contract. Elliott Supply Co. v. Green, 35 N. D. 641, 160 N. W. 1002; General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404; Hansen v. Daniel Hayes Co. 152 Minn. 222, 188 N. W. 317.

The provisions in the contract that "this contract covers all agreements between the parties and shall not be countermanded," does not preclude defendant from showing fraudulent representations which induced the signing of these instruments. Elliott Supply Co. v. Green, supra; Edward Thompson Co. v. Schroeder, 131 Minn. 125, 154 N. W. 792.

The judgment and order appealed from are reversed. The case is remanded for further proceedings not inconsistent with the opinion. The appellant is entitled to its costs and disbursements on appeal.

ROBINSON, J., concurs.

BRONSON, J. (specially concurring). In defendant's answer, asserted by way of defense as well as counterclaim, allegations are made of false and fraudulent misrepresentations by plaintiff as inducement for execution of the contract and note, and of due rescission of the contract by reason thereof. The trial court submitted to the jury, as an issue, the question whether defendant rescinded the contract with consent of the plaintiff through the return of the cash register and the acceptance thereof by plaintiff. By reason of the rulings of the trial court, as stated in the opinion of Mr. Justice Grace, the issues of fraudulent misrepresentations and rescission, if any, resulting therefrom, were eliminated from the consideration of the jury.

Upon the offer so made, in its broad terms, I am rather of the opinion that facts might be established which would present a question of fact whether the promise, if made, would amount to deceit or would grant a right of rescission. See § 5944 Comp. Laws, 1913; Hellebust v. Bonde, 42 N. D. 324, 172 N. W. 812; McLennan v. Plummer, 34 N. D. 269, 276, 158 N. W. 269; Guild v. More, 32 N. D. 432, 472, 155 N. W. 44; Andrieux v. Kaeding, 47 N. D. 17, 181 N. W. 162; Nelson v. Berkner, 139 Minn. 301, 166 N. W. 348; Edward Thompson Co. v. Schroeder, 131 Minn. 125, 154 N. W. 792; Rectenbaugh v. North

Western Port Huron Co. 22 S. D. 410, 414, 118 N. W. 697; note in 10 L.R.A.(N.S.) 640. A new trial should be awarded.

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

FIRST NATIONAL BANK OF TURTLE LAKE, a Corporation, Respondent, v. BOVEY, SHUTE & JACKSON, INC., a Corporation, Appellant.

(191 N. W. 765.)

Statutory provisions.

1. Section 7762, Comp. Laws 1913, which provides: "The purchaser from the time of the sale until a redemption . . . is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof," was amended by chapter 132, Laws 1919, to read as follows: "The debtor under an execution or foreclosure sale of his property shall be entitled to the rents, use and benefit of the property sold from the date of such sale until the expiration of the period of redemption."

Mortgages — law providing debtor under execution of foreclosure sale entitled to rents and benefit of property from sale until expiration of redemption applicable only to mortgages delivered after it became operative.

2. For reasons stated in the opinion, it is *held* that said chapter 132, Laws 1919, is applicable only to mortgages executed and delivered after it became operative, and is inapplicable to mortgages executed and delivered prior to that time.

Opinion filed December 30, 1922.

Mortgages, 27 Cyc. p. 1450 n. 52, 53.

From a judgment in the District Court of McLean County, *Nuessle*, J., defendant appeals.

Affirmed.

W. H. Stutsman, for appellant.

C. L. Foster, for respondent.

Note.—On right of purchaser at foreclosure sale to rents and profits during period of redemption, see 19 R. C. L. 630; 4 R. C. L. Supp. 1285.

CHRISTIANSON, J. The controversy before us involves the ownership and right of possession of certain grain which was grown during the redemption period on certain lands purchased by the plaintiff at a mortgage foreclosure sale.

The facts are not in dispute. Briefly they are as follows: In September, 1915, one Stanley Strupsky, the then owner of a certain 160 acre tract of land in McLean county, in this state, executed and delivered to the plaintiff bank a first mortgage on such land to secure the payment of $1,100. Default having been made in the payment of the debt secured, plaintiff caused the mortgage to be foreclosed by advertisement, pursuant to the power of sale contained therein. The sale was held June 28, 1921. Plaintiff bid the property in for the full amount due for principal, interest, and costs of sale, and received the usual sheriff's certificate of sale. The defendant, Bovey, Shute & Jackson became the owner of the premises, subject to plaintiff's mortgage, on January 24, 1921. Defendant, thereafter, leased the premises to one Boyke on the share plan for the year 1921. There is no dispute as to the amount of grain produced under such arrangement, or the amount plaintiff is entitled to recover, if it is entitled to recover at all. The sole question is whether the rights of the parties to this action are controlled by § 7762, Comp. Laws, 1913, or by chapter 132, Laws 1919.

Section 7762, Comp. Laws, 1913, provides: "The purchaser from the time of the sale until a redemption . . . is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. . . ."

Chapter 132, Laws 1919, amended § 7762, supra, to read as follows: "The debtor under an execution or foreclosure sale of his property shall be entitled to the possession, rents, use, and benefit of the property sold from the date of such sale until the expiration of the period of redemption."

Plaintiff's cause of action herein is predicated upon § 7762, supra. Defendant contends that this statute is no longer in effect; that the rights of the parties to this action are not controlled thereby, but that such rights are controlled by chapter 132, Laws 1919. Plaintiff answers the contentions thus advanced as follows: (1) That chapter 132, Laws 1919 was intended to apply only to mortgages executed and delivered after that law became operative; and (2) That if said chapter

132 was intended to apply to mortgages which, like the one involved here, was executed and delivered before that statute became operative, it is unconstitutional on the ground that as to such mortgages it impairs the obligations of a contract.

The legislature is forbidden by both the Federal and the state Constitution to pass any "law impairing the obligation of contracts." U. S. Const. § 10, art. 1; N. D. Const. § 16. While it is true that "in placing the obligation of contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution," and left to the legislature to prescribe and shape the remedy to enforce it, McCracken v. Hayward, 2 How. 608, 612, 11 L. ed. 397, 399; it is equally true that the legislature may not, under the guise of a statute relating to the remedy, change the substantial rights of the parties. 12 C. J. 1067, 1068; 15 Am. & Eng. Enc. Law, pp. 1055, 1056; Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; Cleveland v. United States, 93 C. C. A. 274, 166 Fed. 677. Under the constitutional inhibition against legislation impairing the obligation of contracts, it is immaterial whether the obligation of a contract is impaired by acting on the remedy or directly upon the contract. Impairment in either case is prohibited. 6 R. C. L. p. 356; E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 924.

In his great work on the Constitution, Story said:

"It is perfectly clear that any law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it. The manner or degree in which this change is effected can in no respect influence the conclusion; for whether the law affect the validity, the construction, the duration, the discharge, or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all the supposed cases. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial in their effect upon it, impairs its obligation." Story, Const. 5th ed. § 1385.

The provision in the Federal Constitution prohibiting a state from passing any law impairing the obligation of contracts has been considered by the United States Supreme Court in many cases. In Sturges v. Crowninshield, 4 Wheat. 197, 198, 4 L. ed. 549, opinion by Mr. Chief Justice Marshall, it was said: "What is the obligation of a contract, and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and that is, of course the obligation of his contract. . . . Any law which releases a part of this obligation must, in the literal sense of the word, impair it. . . . But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity constitute a fund which is as confidently trusted to as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation." And in Planters' Bank v. Sharp, 6 How. 327, 12 L. ed. 458, opinion by Mr. Justice Woodbury, the court said: "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force." The language quoted from these two opinions was quoted with approval by the United States Supreme Court in the late case of Bank of Minden v. Clement, 256 U. S. 126, 65 L. ed. 857, 41 Sup. Ct. Rep. 408.

In applying these rules the Supreme Court of the United States has held that the law in force at the time a mortgage is executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of a mortgage; and, consequently, that changes in the laws imposing conditions and restrictions on a mortgagee in the enforcement of his right, and which affect its substance, are invalid as impairing the obligation, and cannot prevail. Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Brine v. Hartford F. Ins. Co. 95 U. S. 627, 24 L. ed. 858; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042;

Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65, 24 Sup. Ct. Rep. 748. Thus it is held a statute which extends the period of redemption, or gives a right of redemption where no such right previously existed, impairs the obligation of a mortgage executed before its enactment. Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042, supra; Howard v. Hugbee, 24 How. 461, 16 L. ed. 753; Gantly v. Ewing, 3 How. 707, 11 L. ed. 794; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143, supra; Bradley v. Lightcap, supra. The rule announced by the Federal Supreme Court has been applied by many state courts in dealing with the same or analogous questions. Haynes v. Tredway, 133 Cal. 400, 65 Pac. 892; Malone v. Roy, 134 Cal. 344, 66 Pac. 313; Travellers Ins. Co. v. Brouse, 83 Ind. 62; Swinburne v. Mills, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489; Hollister v. Donahoe, 11 S. D. 497, 78 N. W. 959; Paris v. Nordburg, 6 Kan. App. 260, 51 Pac. 799; Muller v. McCann, 50 Okla. 710, 151 Pac. 621; Turk v. Mayberry, 32 Okla. 66, 121 Pac. 665.

In Bradley v. Lightcap, supra, opinion by Mr. Chief Justice Fuller, it was said:

"Confessedly subsequent laws, which in their operation amount to the denial of rights accruing by a prior contract, are obnoxious to constitutional objection."

"In Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143, the statute objected to gave the mortgagor twelve months to redeem after the sale, and Mr. Chief Justice Taney said: 'It declares that, although tthe mortgaged premises shall be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. . . . Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution.' "

And many state courts have held that a statute which alters the rights of the mortgagor and mortgagee as regard the right to possession of the premises, or the rents or the value of the use and occupation, during the

year of redemption, cannot be applied constitutionally to mortgages executed and delivered before its enactment. Swinburne v. Mills, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489; Canadian & A. Mortg. & T. Co. v. Blake, 24 Wash. 102, 85 Am. St. Rep. 946, 63 Pac. 1100; Travellers Ins. Co. v. Brouse, 83 Ind. 62; Blackwood v. Van Vleet, 11 Mich. 252; Mundy v. Monroe, 1 Mich. 68.

In Swinburne v. Mills, supra, the court said: "The Constitution prohibits the passing of laws which impair the obligation of a contract. The practical question then is, What is an impairment of a contract? Webster's definition of 'impair' is, 'To make worse; to diminish in quantity, value, excellence, or strength; to deteriorate.' Then, if the value of a contract is deteriorated or lessened by the passage of an act, the obligation of the contract is most certainly impaired. The question arises, Was the contract of this mortgagee deteriorated or made less valuable by the passage of this act? It is a principle of law so often enunciated and so uniformly maintained that the law which is in existence at the time a contract is made becomes a part of the contract that it would be idle to cite authorities on that proposition or to further mention it."

Let us apply these principles to the facts in this case. The law in existence at the time plaintiff received the mortgage from Strupsky expressly provided that the purchaser at a foreclosure sale "from the time of the sale until a redemption is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof." Sec. 7762, supra. The mortgagee, his assigns, or their legal representatives, might fairly and in good faith purchase the premises or any part thereof. Comp. Laws, 1913, § 8053. The parties in contracting contemplated the possibility of a foreclosure, and inserted a power of sale in the mortgage. Under the law in existence at the time the mortgage was executed, plaintiff knew that in event it became necessary to foreclose the mortgage and to bid in the premises, it would obtain a certificate of sale which would entitle it not only to a sheriff's deed at the end of the redemption period, but which also would entitle it to receive from the tenant in possession the rent of the property, or the value of the use and occupation thereof, from the time of the sale until a redemption was made; and if there was no redemption then during the period allowed therefor. Can it be said that the taking

away of this right did not diminish the value of plaintiff's mortgage? It seems to us, there can be only one answer to that question. The facts in this case bear quite positive testimony that the right possessed by plaintiff under § 7762, supra, and which defendant claims was taken away from the plaintiff and vested in the defendant by chapter 132, Laws 1919 was one of value. At the time the action was tried in the district court the period of redemption had not expired. In fact, more than four months of the redemption period remained at the time judgment was entered. If defendant had desired to do so, it could of course have redeemed. Yet it did not see fit to do so. The only thing which it deemed of sufficient value to defend was the right to the rent which the tenant in possession of the premises owed and was required to pay to someone. In other words, in this case the right to recover rent seems to have been of greater value than the right to redeem.

It does not follow, however, that chapter 132, Laws 1919, is unconstitutional. If, as the trial court held, it was the intention of the legislature that chapter 132, Laws 1919, should apply only to mortgages executed and delivered after it became operative, then of course, no constitutional objection exists.

The legislature is presumed to have intended to enact a valid law. And "when reasonably possible, a statute must be so construed as to uphold its validity. Indeed a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score. In other words, in testing the constitutionality of a statute, the language must receive such construction as will conform it to any constitutional limitation or requirement, if it is susceptible of such interpretation; and the statute and the constitutional provisions must be read together and so harmonized as to give effect to both when this can be consistently done." 12 C. J. 787, 788. And "statutes which, if applied to existing contracts would impair their obligation, will, if possible, be construed as prospective so as to sustain their validity and avoid conflict with the constitution." 2 Lewis's Sutherland Stat. Constr. 2d ed. p. 1191. See also 6 R. C. L. p. 79.

The American & English Encyclopædia of Law (vol. 26, p. 640) says:

"There is a presumption in favor of the constitutionality of a statute, and in accordance therewith, when a statute is susceptible of two con-

structions, one of which supports the act and gives it effect and the other renders it unconstitutional and void, the former will be adopted, even though the latter may be the more natural interpretation of the language used."

But even as to those statutes which the legislature may constitutionally give retrospective effect, there is no presumption that such effect was intended. The presumption is to the contrary. The rule declared by our statute is that no law like chapter 132, Laws 1919, is "retroactive unless expressly so declared." Comp. Laws, 1913, § 7320. See also E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 926. The statute is merely a declaration of a well-recognized rule of construction. For it is well settled that

"Statutes will be construed to operate prospectively only, unless an intent to the contrary clearly appears. It is said: 'That a law will not be given a retrospective operation unless that intention has been manifested by the most clear and unequivocal expression.' And in another case: 'The rule is that statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction.' The rule is supported by numerous cases. The rule is especially applicable where the statute, if given a retrospective operation, would be invalid, as impairing the obligation of contracts or interfering with vested rights. The principle that all statutes are to be so construed, if possible, as to be valid, requires that a statute shall never be given a retrospective operation when to do so would render it unconstitutional, and the words of the statute admit of any other construction. It is always presumed that statutes were intended to operate prospectively and all doubts are resolved in favor of such a construction." Lewis's Sutherland, Stat. Constr. 2d ed. § 642.

See also 6 R. C. L. 78.

The supreme court of Minnesota says:

"It is well-settled rule that laws are not to be construed retrospectively, or to have a retrospective effect, unless it shall clearly appear that it was so intended by the enacting body, and unless such construction is absolutely necessary to give meaning to the language used." Brown v. Hughes, 89 Minn. 150, 153, 94 N. W. 439.

See also Adams & F. Co. v. Kenoyer, 17 N. D. 302, 308, 16 L.R.A.

(N.S.) 681, 116 N. W. 98; Blakemore v. Cooper, 15 N. D. 5, 19, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; 8 Cyc. 731; 12 C. J. 721; 6 R. C. L. p. 78; E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 927.

Chapter 132, Laws 1919, contains no express declaration that it shall apply to existing mortgages. If it is applied to a mortgage executed and delivered prior to its passage it will give to such mortgage a different legal effect as regards the respective rights of the mortgagor and the mortgagee, in event the mortgage is foreclosed and the mortgagee becomes purchaser at the foreclosure sale. That is quite forcibly demonstrated here. At the time the mortgage involved in this case was executed and delivered the rights of the mortgagee under the mortgage and their existing provisions of law were: In case of default, the mortgage might be foreclosed by advertisement; the mortgagee had a right to purchase at the sale; if he purchased he would be entitled to receive from the tenant in possession of the property the rents, or the value of the use and occupation thereof, from the time of the sale until redemption was made; and if there was no redemption then during the period allowed for redemption. See, Geo. B. Clifford & Co. v. Henry, 40 N. D. 604, 169 N. W. 508. In this case there was a default. The power of sale was exercised. The mortgagee purchased at the foreclosure sale, and received the usual certificate of sale; but if chapter 132, Laws 1919, is applicable then it has taken away from the mortgagee the right to receive rent or the value of the use and occupation of the premises sold, and vested this right in the mortgagor's successor in interest. It would seem that if the legislature had intended that the striking change proposed to be made by chapter 132, Laws 1919, as regards the right to rent or the value of the use and occupation during the redemption period, should apply as well to mortgages then existing as to those thereafter made, it would have "expressly so declared."

Judgment affirmed.

BIRDZELL, Ch. J., concurs.

BRONSON, J. (concurring specially). I concur in an affirmance upon principles of law stated by the writer in his concurring opinion in E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 927.

GRACE, J. (dissenting). This appeal is from a judgment of the district court of McLean county. The material facts are as follows: On September 28th, 1915, one Krupsky owned a quarter section of land in McLean county, North Dakota. On that day he mortgaged it to the First National Bank of Turtle Lake for $1,100. Subsequently the mortgage was foreclosed by advertisement, and the land sold to pay the mortgage debt, interest thereon, and costs of foreclosure sale. The foreclosure sale occurred on the 20th day of June 1921. The sheriff pursuant to law, sold the land for $1,983.87, a sum which paid the mortgage, the interest, and the cost of sale. In other words, the full amount of the indebtedness. At the sale, the land was purchased by the mortgagee, the plaintiff herein.

On September 16th, 1917, Krupsky mortgaged the land to this defendant. Thereafter this mortgage was foreclosed, a sale had, the sheriff's certificate of foreclosure issued, which ripened into a right of sheriff's deed on January 4th, 1921. The defendant took possession of the land and raised a crop thereon during the season of 1921. The plaintiff brought this action for rents and profits. It is claimed that the principal question of the case is the constitutionality of chapter 132, Session Laws of 1919, which provides as follows: "An act to amend and re-enact § 7762 of the Compiled Laws of North Dakota for the year 1913, relating to the rent, use, and benefit of property sold under execution or foreclosure sale. Be it enacted by the legislative assembly of the state of North Dakota:

"Sec. 1. That § 7762 of the Compiled Laws of North Dakota for the year 1913 is hereby amended and re-enacted to read as follows:

"Sec. 7762. The debtor under an execution or foreclosure sale of his property shall be entitled to the possession, rents, use and benefit of the property sold from the date of such sale until the expiration of the period of redemption.

"Approved February 18, 1919."

The plaintiff claims the rents and profits under § 7762, Comp. Laws as it was prior to its amendment, which, so far as necessary to state here provides: "The purchaser from the time of the sale until a redemption and a redemptioner from the time of his redemption until another redemption is entitled to receive from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof."

This section refers to the alleged rights of the purchaser after a foreclosure and during the period of redemption.

Section 6740, Comp. Laws provides: "A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage."

Section 8085, Comp. Laws provides: "The property sold may be redeemed within one year from the date of the sale in like manner and to the same effect as provided in chapter 12 of this Code for redemption of real property sold upon execution so far as the same may be applicable by:

"1. The mortgagor or his successor in interest in the whole or any part of the property.

"2. A creditor having a lien by judgment or mortgage on the property sold or on some share or part thereof, subsequent to that on which the property was sold. Such creditor is termed a redemptioner and has all the rights of a redemptioner under that chapter. And the mortgagor and his successors in interest has all the rights of the judgment debtor and his successor in interest as provided therein."

Upon sale of the real property a certificate of the officer making the sale must be issued immediately to the purchaser which shall contain a description of the property sold, the whole price paid, and the cost and fees of making the sale. The certificate must be acknowledged and may be recorded.

In this case, we will assume that the defendant is in the same position as if it were the original owner and the mortgagor of the land at the commencement of this action. Under § 6740 it will be seen that the mortgagee is not entitled to possession of the property mortgaged, unless it is expressly so provided in the mortgage. The mortgage here does not so expressly provide. In such circumstances, the meaning to be derived from the language of that section is, that the mortgagor or the owner of the land is entitled to possession of the land. This being true, the mortgagor or owner is also entitled to the use of the land or property during the period of redemption as provided by § 8085. But, it is claimed that the right to the use and profits during the period of redemption is taken away by § 7762, as it existed, prior to its amendment. This section will be given particular attention later in the opinion. It cannot be successfully denied that the right of possession of

the land during the period of redemption, coupled with the right and use of the profits thereof, during that time, are valuable property rights and are in fact valuable property, none of which the mortgagor or owner of the land parted with by any stipulation or agreement in the mortgage. Neither can it be denied that the law providing for a period of redemption contemplates that the mortgagor or owner shall have the use and profits of the land during that time, for this may perhaps be the very means of preventing the loss of his property by foreclosure.

The first question, which we will here examine, is not a constitutional one. Whatever we have to say with respect to any constitutional question will receive attention later. The question which we desire first to examine is that of payment. The relation established between plaintiff and the mortgagor or owner of the land by the mortgage was that of debtor and creditor. When the mortgage was foreclosed and a sale of the land effected by reason of that foreclosure, that relation ceased at the completion of the sale and thereafter the relation was that of purchaser and owner. At the plaintiff's foreclosure sale of this land, the land was sold for an amount sufficient to pay in full the mortgage, all of the interest thereon and all costs of foreclosure. Hence, the mortgage debt was fully paid. It makes no difference that the mortgagee was the purchaser; he stands in exactly the same position as if a stranger had been the purchaser, instead of the mortgagee. By the sale of the land in the above manner and for the above amount, the land was discharged from the lien of the mortgage and the purchaser received a sheriff's certificate, which at the expiration of the period of redemption, and if no redemption were made, entitled it to a sheriff's deed, conveying to it a fee title thereof. It received the deed January 4th, 1921.

The court held in Geo. B. Clifford & Co. v. Henry, 40 N. D. 604, 169 N. W. 508, that the lien of the mortgage still continued after the foreclosure sale. This holding is clearly erroneous, as will be shown by the language of the Supreme Court of the United States in the case of Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep. 106, where it was said: "It is seen that the amount due on the mortgage in question at the time of the sale upon foreclosure was $6,782.49, and that the property sold for $9,500. That amount was paid by the purchaser to the sheriff, and it resulted in the payment of the mortgage debt, principal and interest, and the release of the land from the lien of the mort-

gage. Subsequently to that payment the mortgagee had no interest in further proceedings."

We think it is clear that where the mortgage debt, the interest thereon, and the costs of foreclosure sale have been paid to the mortgagee that he has no further claim upon the mortgaged property; or if he is the purchaser, and bids the full amount of the debt, interest and costs, that he has no other right than to receive the fee title to the property mortgaged and described in the mortgage, if a redemption, as provided by law, is not made within the time specified by law. We think what has been said is sufficient to dispose of plaintiff's claim to the rents, profits, or crops grown on the land during the period of redemption adversely to him. It is not really necessary to consider here any constitutional question, but, as the constitutional question here presented is one that both sides desire should have some consideration, we have no hesitancy in discussing it to some extent.

It is claimed that chapter 132, supra, if held to be constitutional, impairs plaintiff's contract, the mortgage, and that it purports to take away from him a right claimed by him under § 7762, that is, the right to the rents and profits, including in a case like this, the crops of grain grown on the land during the period of redemption. If it were true, and we do not think it is (which we will later show), that plaintiff had the right under § 7762 to the rents, profits, and crops of this land during the period of redemption and if chapter 132 impaired the obligation of his contract with reference to those rights, he is not injured thereby, since by the foreclosure sale under his mortgage, he has realized the full amount of his debt, principal, interests and costs, by receiving a sheriff's certificate of the land described in the mortgage, through which at the expiration of the time of redemption, if no redemption is made, he receives the title of the property. And as we have before stated, it makes no difference whether a stranger purchased the property at the foreclosure sale for the full amount of principal, interest and costs, or whether the mortgagee does the same thing. Their rights as purchasers by reason of such purchase are similar. Hooker v. Burr, supra.

There is another reason why plaintiff is not entitled to the rents, profits, and the crops. It is this. We think that, that part of § 7762, above set forth, is unconstitutional.

1. Because the legislature was without power to enact it.

2. Because it is contrary to the 14th Amendment of the Constitution of the United States, in that it takes property from the mortgagor or the owner without due process of law.

3. That it denies the mortgagor or owner of the property, equal protection of the law, the law itself being only a penalty to compel the payment of the debt.

In the case of Davis v. Wallace, 257 U. S. 478, 66 L. ed. 325, 42 Sup. Ct. Rep. 164, decided at the October 1921 term of the Supreme Court of the United States the court said: "The case made by the bill involved a real and substantial question under the Constitution of the United States and the amount in controversy exceeded three thousand dollars, exclusive of interest and costs, so the case plainly was cognizable in the district court. In such case the jurisdiction of that court, and of ours in reviewing its action, extends to every question involved, whether of Federal or of state law, and enables the court to rest its judgment or decree on the decision of such of the questions as in its opinion effectively dispose of the case."

So in the case now before this court, where the constitutionality of chapter 132 is challenged, any question or any principle of law which will tend to show either that the statute (chapter 132) is or is not constitutional, is pertinent. In this view, we are justified in examining the constitutionality of that part of § 7762, above mentioned. We have before stated, and it is true, that the right of possession and of the rents, profits, and crops raised upon the land during the period of redemption, are valuable property rights which belong to the mortgagor or owner. Section 7762 without any consent of the mortgagor or owner and without any authority under the Constitution or otherwise, and contrary to our Constitution and the Federal Constitution, by this enacted law, attempts to take the private property of one individual citizen and hand it over to another.

In 6 R. C. L., page 310, in § 297, it is stated: "The state cannot, by a mere act of the legislature take property from one man and vest it in another directly." It is further stated that "a statute would be unconstitutional which in effect, either by legislative fiat or by direct or indirect operation should take the property of one man and give it to another." Citing cases in the notes. The section further states: "There is probably no instance in the history of the American common-

wealths of an attempt by a legislature to deprive any citizen of his property for the avowed purpose of giving it to another; but many statutes have been attacked on the ground that they operate to produce that unjust and unlawful result, and some of these attacks have been successful." Yet, that is just what has in effect been attempted by § 7762, the mortgagor or owner is deprived of the rents, profits, and crops of the land during the period of redemption, though they are not mentioned in nor included in the contract, the mortgage.

The Geo. B. Clifford & Co. v. Henry Case, supra, illustrates what may occur under this section. Henry purchased a section of land for $22,400. He paid $5,000 cash. The balance of the purchase price was divided into sixteen annual payments of $1,000 each and one of $1,400, with interest at 6 per cent secured by a mortgage on the land. Default was made in some of the payments and the whole sum secured by the mortgage declared due; the mortgage foreclosed and the land sold at a foreclosure sale for $19,297.82, the total of principal, interest, and costs of foreclosure. But the mortgagee was not satisfied with the payment of his debt. It wished also to recover the value of the occupation during the year of redemption, which included the value of the crops on the premises. It brought suit for $5,000, and recovered $960. If the crops had been worth $5,000, on the theory of that case, the plaintiff there would have recovered that amount and in such case the law would have taken $5,000, of defendant's money and given to plaintiff without any other authority than that of § 7762, there being no agreement in that mortgage that the mortgagee was entitled to the rents, profits, or crops. We think a law that prescribes this may be done, is unconstitutional, and hence, § 7762 which takes the private property of one person and gives it to another, we think, is unconstitutional, either under the Federal or state Constitution. If § 7762 is unconstitutional the plaintiff may not be heard to assert any rights under it. If it is unconstitutional, and we believe it is, no question can arise concerning the unconstitutionality of chapter 132, as it accords to the mortgagor or owner, only such rights as are his under the right of redemption, that is, the rights of possession and the use and ownership of profits of the property mortgaged or crops raised thereon during that time.

Considering the second and third reasons of the unconstitutionality of this section, we think it is clear that § 7762 takes the mortgagor's or owner's property without due process of law and denies him the equal protection of the law. 6 R. C. L. page 442, § 438 says: "As has already been seen the principle of due process of law has its origin in England, as a protection to individuals from arbitrary action on the part of the Crown. It has been said that in this country the requirement is intended to have a similar effect against legislative powers, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. The primary purpose of the guaranty was the security of the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." See also notes to the section. Section 7762 is an arbitrary taking of the mortgagor's or owner's property and is without any due process of law. Furthermore, that section is simply a penalty upon the mortgagor or owner to compel payment of the debt and for that reason is not due process of law. Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Chicago & N. W. R. Co. v. Nye Schneider Fowler Co. 260 U. S. 35, 67 L. ed. 115, 43 Sup. Ct. Rep. 55, decided at the October 1922 term of the United States Court.

But, if § 7762 were not unconstitutional—though it seems clear that it is for the reasons above given—still we think plaintiff could not invoke the contract impairment clause of the Federal Constitution, and this for the reason that the origin of the right that he claims, is wholly statutory. It is claimed, asserted, and based wholly on § 7762, and hence cannot be based upon the contract, the mortgage. In such case, the United States Supreme Court in the case of Crane v. Hahlo, 258 U. S. 142, 66 L. ed. 514, 42 Sup. Ct. Rep. 214, held that there is nothing for the contract impairment clause of the Constitution to operate upon.

ROBINSON, J. (dissenting). In this case the question presented is on the right of a mortgagee, or his assignee, to possession of land during the year of redemption. It is true that by statute it is provided that the purchaser of land at an execution sale, until a redemption, is entitled to receive from the tenant in possession the rents of the property

sold or the value of the use and occupation thereof. Comp. Laws 1913, § 7762. But that section has not the least application to a foreclosure sale. I regret that courts are too much disposed to follow erroneous precedents and in that way to strain the law, oppress the poor, and aid one party in robbing another. Such was the decision, by one majority, in case of Geo. B. Clifford & Co. v. Henry, 40 N. D. 605, 169 N. W. 508. To avoid the recurrence of similar decisions, and to guard against the Shylock tendency of the creditor to oppress debtors, the writer drafted and secured the passage of chapters 130, 131 and 132, Laws 1919. Each act was in keeping with the other, and each was plainly intended to apply to any and all foreclosure sales after the act took effect.

Chapter 132 reads:

"The debtor under an execution or foreclosure sale of his property shall be entitled to the possession, rents, use, and benefits of the property sold from the date of such sale until the expiration of the period of redemption."

The purpose of each chapter was to give full and immediate relief against oppression and against the effect of erroneous decisions. Neither act is intended as a mockery of debtors.

Chapter 130 declares that on any foreclosure by advertisement the attorney's fee shall in no case exceed $25, and in no case more than 10 per cent of the principal sum actually due.

Chapter 131: That no action or proceeding shall be commenced to foreclose a mortgage on real property without first giving to the mortgagor thirty days' notice.

Chapter 132: That the debtor shall be entitled to possession, rents and profits during the year of redemption.

Each act is remedial and should be so construed as to advance the remedy and to give effect to the purpose of the act. Neither act contains a redundant word. The necessity for each act was manifest, pressing, urgent, and immediate. Hence, there is no fairness in saying that to each act the legislature should have added a declaration that it should apply to all past, as well as to all future, mortgages.

A mortgage is merely a lien on property. There is nothing in any statute which gives to a mortgagee of land any title or possession until after the year of redemption and until he obtains a sheriff's deed. Neither in the notice of foreclosure sale nor the certificate of sale is

there a thing to indicate that the purchaser buys any title or possession or rents before receiving the sheriff's deed.

But it is said that if the act applies to past mortgages, it may impair the obligations of contracts. That is based on a mere assumption. A mortgage is a mere lien. It does not entitle the mortgagee to possession of the property unless authorized by the express terms of the mortgage. Sec. 6740. A contract for a lien transfers no title. Sec. 6708. Neither possession nor title is given by the foreclosure sale. That is given only by the sheriff's deed. Sec. 8106.

Another answer is that there is no contract or law giving the mortgagee or purchaser at foreclosure sale possession or title prior to a sheriff's deed. There is no proof that the land itself is not worth much more than the mortgage debts. Were the debt insecure, then the mortgagee had a right to apply to the court for a receiver. That was his remedy. When the land is ample security for a mortgage debt, regardless of possession, it is vain to say that the security is impaired by possession of the mortgagor during the year of redemption. There is no reason for giving a Shylock construction to the statute in question, because it is not within either the letter or the spirit of the law. The act expressly applies to every sale made after it becomes a law.

EMIL HARTH, Appellant, v. ST. PAUL CATTLE LOAN COMPANY, a Corporation, Respondent.

(191 N. W. 615.)

Chattel mortgages — notice of redemption at foreclosure sale held sufficient although erroneous as to designation of mortgagee.

1. In an action to recover damages for conversion of property alleged to have been redeemed by the plaintiff, under § 8134 of the Comp. Laws, 1913, from mortgage foreclosure sale, it is *held:*

A notice of redemption, under § 8134, is sufficient if it apprise the agent conducting the sale of the mortgagor's intention to redeem certain property sold from the foreclosure sale, though it may contain an erroneous designation of the mortgagee.

Chattel mortgages — law requiring redemptioner to tender for which property sold on foreclosure sale held to include sheriff's fees; "costs of sale."

2. Section 8134 of the Compiled Laws of 1913, which requires the redemp-

tioner to tender the amount for which the property was sold "with the costs of sale." is construed and held to embrace the item of sheriff's fees in the costs of sale.

Opinion filed December 30, 1922.

Chattel Mortgages, 11 C. J. § 582 p. 744 n. 78; § 583 p. 744 n. 88.

Appeal from District Court, Logan County, *Allen*, J.

Affirmed.

Scott Cameron and *Arthur B. Atkins*, for appellant.

No contention was made at the trial or on motion that the notice was not served in proper time, as the record shows that the notice was served about thirty minutes after the sale, and this court has already held that if it is served on the day of the sale it is a sufficient compliance with our statute. Norris v. German American State Bank, 38 N. D. 276; Brown v. Smith, 13 N. D. 580.

"The word 'tender' as used in connection with mutual and concurrent promises does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it and nothing further remains to be done, and the transaction is completed and ended, but it only means a readiness and willingness, accompanied with the ability, on the part of one of the parties to do the acts which the agreement requires him to perform, provided that the other will concurrently do the acts which he is required to do by it, and a notice of the former to the latter of such readiness." 8 Words & Phrases, p. 6910; Smith v. Lewis, 26 Conn. 110, 119; Raudabaugh v. Hart, 55 N. E. 214, 218, 61 Ohio St. 73, 76 Am. St. Rep. 361; Aborn v. Mason (U. S.) 1 Fed. Cas. 37, 39 (citing Smith v. Lewis, 26 Conn. 110); Adams v. Clark, 9 Cush. 215, 57 Am. Dec. 41; Cook v. Doggett, 2 Allen, 439, 441; Guilford v. Mason, 48 Atl. 386, 388, 22 R. I. 422; See also Manistee Lumber Co. v. Union Nat. Bank, 32 N. E. 449, 453, 143 Ill. 490; Shouse v. Deane, 21 So. 807, 811, 39 Fla. 95; Ugland v. Farmers & M. State Bank, 23 N. D. 536.

Sullivan, Hanley & Sullivan, for respondent.

Under the common law the sale by foreclosure of a chattel mortgage immediately devested the mortgagor of all right of redemption, and no right of redemption existed, and while it is the policy of the courts to

construe redemption statutes to the end that property of the debtor may go as far as possible to the payment of his obligation, yet the courts are of one accord upon the proposition that even in actions to compel redemptions (which this is not) that in order to effect a redemption the redemptioner must bring himself fully within the terms of the statute, and comply with the legal requirements therein set out. Leverson v. Olson, 25 N. D. 624, 142 N. W. 177; State ex rel. Forest Lake Bank v. Herman, 36 N. D. 177, 161 N. W. 1017; N. D. Horse and Cattle Co. v. Serrumgaard, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 117 N. W. 453.

"It will be further observed that the money was not deposited in the name of the creditor, as provided by § 3473, but the bank was simply directed to pay it to the plaintiff in case they should deliver up the notes upon which they claimed there was a balance due. In order to extinguish the debt under the provision of our Code, there must be not only a proper offer of the money, but the money must be deposited in the bank to the credit of the creditor. It must be so placed in the bank as to be in the name of the creditor, and subject to his absolute control." Stakke v. Chapman, 83 N. W. 261; Brown v. Smith, 13 N. D. 580; Dunn v. Hunt (Minn.) 65 N. W. 948.

BIRDZELL, Ch. J. This is an appeal from a judgment in favor of the defendant in an action to recover damages for conversion. One C. P. Burnstad, in January 1920, executed a chattel mortgage to the defendant to secure the payment of an indebtedness of $50,000, payable July 15, 1920. This mortgage was foreclosed and the property sold on March 31, 1921. On the day of the sale and about an hour thereafter, the mortgagor served upon "John Anderson, agent for the Stock Yards National Bank of South St. Paul, Minnesota, and H. B. Scott, St. Paul, Minnesota, agent," a notice that he would redeem thirty-four steers and two other small items of personal property from the sale. By written assignment, dated April 4, 1921, Burnstad, the mortgagor, assigned to Emil Harth, plaintiff in this action, his equity of redemption from the foreclosure sale. The thirty-four steers had been sold for $918. On April 4th, the plaintiff tendered to Anderson $988, and demanded immediate possession of the cattle. He also served notice that he had deposited in the First National Bank of Napoleon the sum

of $988, payable to Anderson's order or to the order of his principal, on delivery to the bank of a certificate of redemption. On April 9th, Anderson made a report of sale, showing the sale of the thirty-four steers at $27 each, total $918, and containing a statement of the amount due, costs and fees, showing the amount due on the mortgage to be $53,351.84; sheriff's fees $204, and other small items, making the total of costs and fees, $233.75 and leaving a net balance to apply on indebtedness, $675.25. Later this action was brought, predicating a conversion on the plaintiff's redemption from the sale and the defendant's refusal to surrender possession. The trial resulted in a verdict for the plaintiff for $525 with interest from April 4th. Thereafter the trial court granted the defendant's motion for judgment notwithstanding the verdict, and directed the entry of the judgment appealed from in favor of the defendant and against the plaintiff for costs.

In order for the plaintiff to sustain a recovery as for conversion in this action, it is incumbent upon him to establish the sufficiency of the notice of intention to redeem and that a proper tender was made. The defendant and respondent argues that the notice is insufficient in that it refers to a mortgage executed to the Stock Yards National Bank while the mortgage on these cattle that was in fact foreclosed was that of the St. Paul Cattle Loan Company, which company had made the sale through one Anderson, its agent; and further in that it was addressed to and served upon Anderson as agent for the bank instead of to and upon him as agent for the mortgagee in this particular mortgage. The statute, § 8134, provides:

"The mortgagor or his assignee desiring to redeem such property shall at the time of sale give written notice to *the person making the sale* of his desire to make such redemption; otherwise he shall be deemed to have waived his right to do so."

This statute, in so far as it provides for redemption, is remedial in character and designed to serve the purpose of enabling a mortgagor who is in default to regain his property after sale by discharging the indebtedness to the extent that it has been realized out of the property. If he has any equity in the property, the statute permits him to realize on it, but, as a condition of so doing, he is required to apprise the person making the sale of his intention to that effect. We think the statute is one that should be liberally construed to effect the legislative inten-

tion and purpose. There is no requirement as to what the notice shall contain. The only requirements are that it shall be written and shall be given to the person making the sale. The notice given in the instant case is addressed to John Anderson, agent for the Stock Yards National Bank of South St. Paul, Minnesota, and H. B. Scott, St. Paul, Minnesota, agent, and it purports to notify him or them that the mortgagor will redeem the "following described personal property from chattel mortgage foreclosure made by you this 31st day of March, 1921; three wagons, one manure loader, and thirty-four head of steers. The above-described property is given in two mortgages which mortgages were this day foreclosed by said mortgagee. Said mortgagor, C. P. Burnstad, does hereby redeem the above-described personal property.

Three wagons $ 71.00
One manure loader $ 10.00
Thirty-four steers $918.00

"This property was sold by you this day under two mortgage foreclosures, both mortgages were made by the undersigned payable to the Stock Yards National Bank." The fact is that Anderson acted as agent for the Stock Yards National Bank in foreclosing its mortgage, the sales being noticed and held at the same time. It will be seen, then, that the notice is addressed to the person who acted as agent in the foreclosure of the mortgage in question, but the wrong principal or mortgagee was named. It described the steers and referred to them as having been sold under mortgage foreclosure, and they were not sold under any other mortgage. In so far as this property is concerned, therefore, it is identified as property which the agent who received the notice must have known had been sold under the defendant's mortgage and not under that of the Stock Yards National Bank. We think that under a fair construction the notice apprised Anderson, agent of the defendant herein, that the mortgagor intended and desired to redeem the thirty-four steers from the mortgage that was actually foreclosed on them, and that his knowledge to this effect is attributable to his principal, the defendant. We are of the opinion that the notice was sufficient.

It is said that the tender was insufficient in amount in that only $70 above the sale bid was allowed to cover the costs of sale and the reasonable expenses of caring for the property redeemed and interest. A *report of this sale, filed on April 9th, shows total sheriff's fees on*

account of the foreclosure of $204, and other costs and expenses which bring the total up to $232.75. It will be seen that § 8134, which provides for the completion of the redemption by payment or tender, gives to the mortgagor or his assignee five days within which to redeem, and § 8128 gives the person making the sale ten days in which to file a report of the sale, showing, among other things, the costs and expenses.

It is thus apparent that the legislature has deliberately subjected the redemptioner to the peril of having to guess at the amount of costs which he will include in his tender of redemption money. We cannot cure this defect in the statute by judicial fiat. It is suggested, however, that a distinction was intended to be observed between "costs of sale" to be included in the redemption money, and some other expenses that might have been incurred prior to the sale; such, for instance, as the expenses incidental to obtaining possession of the property, and that if such expenses be excluded, the amount tendered was sufficient. We are unable to glean from the statute any satisfactory basis for the distinction claimed. In fact, the statute appears to us to have been framed upon no consistent principle whatever in reference to the costs of sale. *The owner of the mortgage is, of course, made whole, so far as the foreclosure is concerned, if he receive the amount of the bid, plus interest and subsequent expenses.* Similarly, if the property is purchased by any third party, he is made whole when the amount of his bid, interest and subsequent expenses may be tendered to him, or refunded by the agent who made the sale. Then too, § 8129 requires the one who conducts the sale to pay the costs and expenses of foreclosure from the proceeds of the sale, that is, out of the amount bid, and directs the balance only, to be credited on the mortgage indebtedness. Hence, in the absence of a redemption, the costs come out of and are represented in the amount bid, and we can perceive of no reason for imposing, as a condition of redemption, the payment of an additional amount as representing costs or expenses prior to the sale. Whatever reason was sufficiently potent to cause the legislature to require a redemptioner to tender anterior costs in addition to the amount bid, we can see none at all, would apparently operate with the same force upon chargeable items of every character anterior to the sale. This statute was long ago characterized by this court as a "very crude piece of legislation," Brown v. Smith, 13 N. D. 580, 583, 102 N. W. 171, and its crudeness

becomes more apparent as attempts are made to take advantage of its pretended beneficent provisions. We cannot, however, remedy its glaring defects. We are at a loss to supply a definition of "costs of sale" that will exclude sheriff's fees and include other legitimate items. It is admitted that the amount tendered was not adequate to cover these fees, and, this being an action for damages for conversion, we cannot hold that a redemption was effected under the statute. It follows that the judgment appealed from must be affirmed. It is so ordered.

CHRISTIANSON, J., concurs.

BRONSON, J. (specially concurring). This is an action for conversion. Plaintiff is the assignee of the mortgagor's right of redemption concerning cattle sold at a mortgage foreclosure sale. Four days after the sale on April 24th, 1921, the mortgagee, for a recited consideration of $100, assigned to plaintiff his right of redemption. Then, on that day, plaintiff tendered to defendant $988, as inclusive of the sale price, the cost of sale, and the costs of keeping since the date of sale, with interest. Plaintiff also notified defendant that he had on that day deposited in the First Nat'l Bank of Napoleon, North Dakota, $988 payable to the order of defendant or its agent upon delivery to the bank of a certificate of redemption carrying with it the possession of the cattle.

The assistant cashier of the bank testified that plaintiff deposited in the bank $1,000; that the bank carried the money on open account; that it was deposited with instructions the same as those given in the notice to defendant; that it was carried in a kind of blanket trust account and that, thus, the money is still at the bank.

Thus, does it appear that plaintiff, as a redemptioner, seeks a recovery at law upon technical rights, and not the right to redeem under equitable principles. He seeks the right to receive the verdict of $525.04 awarded for a consideration of $100 paid. To be entitled, as a matter of law, to this right plaintiff must show compliance with the law.

In my opinion the deposit made was, at law, insufficient. Upon redemption from a lien, the law specifically requires an offer of performance to be followed by a deposit. Comp. Laws, 1913, § 6719. Under the law the deposit required was a deposit of the money offered in the

name of the creditor with some bank, within this state, of good repute. Comp. Laws, 1913, §§ 5,815, 5,819. There is no proof in this record that a deposit was made in the name of the defendant creditor or its agent. On the contrary, the effect of the cashier's testimony is that the money was carried on open account, presumably in plaintiff's name, in a sort of trust account subject to, and dependent upon, instructions given. Obviously, the statutory mandate was not observed. See Brown v. Smith, 13 N. D. 580, 586, 102 N. W. 171; Ryding v. Hanson, 30 N. D. 99, 102, 152 N. W. 120; Swallow v. First State Bank, 35 N. D. 608, 618, 161 N. W. 207; Raad v. Grant, 43 N. D. 546, 551, 169 N. W. 588; Fox v. Nelson, 30 N. D. 610, 153 N. W. 395; Streeter v. Archer, 46 N. D. 266, 176 N. W. 832. The judgment should be affirmed.

GRACE, J. I concur in the greater part of the reasoning and the result herein.

ROBINSON, J. (dissenting). This is an appeal from a judgment in favor of defendant notwithstanding a verdict against him for $525. On March 31, 1921, at a chattel mortgage sale, one John Anderson, an appointed agent of the mortgagee defendant, offered for sale at public auction twenty-seven steers and sold the same to the defendant for $918. The plaintiff gave due notice of intention to redeem and within five days from the date of sale he offered to redeem by paying to the agent $918, with $70 for cost of sale, interest, and subsequent expense. It does not appear that the agent refused to allow a redemption because the $70 was not sufficient. The jury found that it was sufficient and there is no evidence to the contrary.

The redemption statute is to this effect: That a mortgagor or his assignee having given the proper redemption notice, may redeem the property sold at foreclosure sale within five days after the sale "by paying or tendering to the owner of the mortgage, his agent or attorney, or the person making the sale, the amount for which the property was sold, with the cost of sale and interest at the rate of 7 per cent from the date of the sale. And the reasonable expenses in caring for the property after the sale." Comp. Laws, 1913, § 8134. It may be true that this statute is "a crude piece of legislation," but that is no reason for this court by a narrow and crude construction to defeat its purpose

or give to it the aspect of a mockery or a barbarism. The manifest purpose of the statute was to protect the mortgagor against the confiscation of his property by a sale for much less than its value. The sale was made by the agent of the mortgagee. There is no showing that it cost anything to make the sale, and, of course, the mortgagee was not at liberty to pay his agent any more than the reasonable cost of making the sale, and in no event should that have exceeded $10. The making of the sale was not more than the work of one hour. The expense of the keeping of the property did not exceed $10 a day, or, in all, $50; the interest, $1. Total, $61. But to make assurance doubly sure, the plaintiff tendered $70, and the verdict of the jury has found the tender sufficient, and there is no evidence to the contrary.

But it is said: The report of sale shows the total of the sheriff's fees on account of the foreclosure was $204. That is not true. The report merely shows a lump sum of $204 for sheriff's fees. There is no itemized statement to show any legal charge by the sheriff. But that is of no consequence. The sheriff did not make the sale. And the statute does not provide that a redemptioner must pay the cost of foreclosure. It is only that he shall pay the cost of the sale, with interest, and the subsequent care of the property.

It does not appear that the agent refused to allow a redemption because the $70 was not sufficient. The jury found that it was sufficient and that finding is correct. The answer does not state the cost of the sale or show that the refusal to allow a redemption was because of the failure to pay or tender any specified amount. In fairness, if the mortgagee or his agent claimed that the sum tendered was not sufficient, it was for them to show the exact sum necessary to redeem. But obviously the sum tendered was sufficient and the judgment against the plaintiff should be reversed and judgment entered in his favor on the verdict.

THE AMERICAN COMMERCIAL COMPANY, a Corporation, Respondent, v. JAMES S. RANDOLPH, Appellant.

(191 N. W. 779.)

Attachment — order of sale of attached herd of cattle not shown perishable or likely to depreciate in value, where attached property ample to secure claim, held erroneous.

In this action the plaintiffs sue to recover $18,000, though they may recover a much smaller sum. They have levied an attachment on property which is amply sufficient to secure their claim and have secured an order for sale of a herd of pure bred live stock worth about twice the amount of their claim. Defendant appeals from such order and from a subsequent order denying a motion to vacate the same. Both orders are reversed.

Opinion filed December 30, 1922.

Attachment, 6 C. J. § 784 p. 361 n. 76.

Appeal from the District Court of Barnes County, *Cole*, J.
Reversed.
Lawrence, Murphy & Nilles, for appellant.
Young, Conmy & Young, for respondent.

ROBINSON, J. In this action plaintiffs sue to recover $18,000. They have levied an attachment on lands and on property which appear amply sufficient to secure their claim. The property is in Stutsman county and in Barnes county. In Barnes county, as shown by the inventory of the sheriff, they have levied on 2,168 acres, worth $65 an acre, amounting to $140,940.50; also, crops on said land, $12,300; live stock, $33,000; farm machinery, plows, tractor, threshing outfit and such like, $12,000. The plaintiff obtained an order for the sale of the live stock, including a herd of pure bred shorthorn cattle valued at $39,500 and a herd bull, $10,000. Regardless of any prior liens and claims, it does appear reasonably certain that the property is amply sufficient, and more than sufficient, to secure the plaintiff's claim. Then they have levied an attachment on a large amount of other property in Stutsman county. Defendant appeals from an order directing the sale of the live stock under Comp. Laws, § 7554, and also from an order of November 8, 1922, refusing to vacate the first order. Both orders were made on the pleadings and proceedings and on numerous affidavits

which fairly show that on the trial of the case the claim of plaintiff may be reduced a considerable amount and that the property attached is ample security for any judgment which plaintiff may recover. Indeed, it looks like an excessive levy. The live stock is not perishable property. It is on defendant's farm in Barnes county, where there is ample feed for the same. With good care the live stock will continue to increase in value and the increase in value should be more than the expense of the food and care. There is really no apparent object in forcing the sale of the live stock before judgment, unless to give some one a chance to buy the property at a nominal price. The court will take official notice of the fact that there is now a financial stringency; that responsible men find it difficult to borrow $10,000, and it is still more difficult for a debtor to borrow when his property is attached. The Merchant of Venice was accounted a rich man, and still he found it impossible to borrow three thousand crowns till his three ships came into port richly laden. Furthermore, this is no time to expose for sale any such large and splendid herd of pure-bred stock. Such a herd might be given away or sacrificed, but not sold at any reasonable value. The purpose of the attaching statute is to give the creditor a fair security for payment of such a judgment as he may recover, not to permit him to use the process of the law as a means of oppression by sacrificing attached property. Indeed, in this case it appears to the writer that it is hard to conceive that a creditor should have the nerve to attach so much property and then to ask an order for the sale of such a splendid herd of pure-bred live stock. It is high time for creditors to learn that debtors have some rights which both they and the courts are bound to respect.

Both orders are reversed.

BRONSON, J. (specially concurring). I am of the opinion that the trial court erred in ordering the sale upon attachment and in refusing to vacate its order thereof. Upon the record, the evidence fairly discloses that there exists no reason for an immediate sale of this property in advance of any judgment that may be obtained and that no emergency exists which requires a sale similar to that which obtains concerning perishable property. On the contrary it rather appears that if such sale be had great loss may be sustained affecting not only the

parties to this action but to an industry of great potential value in this state. The orders of the trial court should be reversed and the application of plaintiff for sale of the property upon the attachment dismissed.

GRACE, J., concurs.

CHRISTIANSON, J. (dissenting). The situation presented in this case is somewhat perplexing. There is room for doubt as to whether the live stock should be sold. The record is quite voluminous,—lengthy affidavits were submitted on both sides; there are many incidents and facts having a direct bearing on the question under consideration, to which no reference has been made in the majority opinion. In the very nature of things, the determination of the question whether attached perishable property, or live stock, should, or should not, be sold before judgment is entered in the action, is one which rests largely in the sound judicial discretion of the trial court. In this case, the matter was fully submitted to the trial court; that court seems to have given the matter careful and conscientious consideration, and I am not prepared to say that it abused its discretion in making the order which it did.

BIRDZELL, Ch J., concurs.

JACOB ROQUETTE, Respondent, v. FARMERS INSURANCE COMPANY, a Corporation, Appellant.

(191 N. W. 772.)

Insurance — not error to refuse insured's amendment to show assignment of policy under which assignees make no claim.

1. In an action, on a policy of insurance, for damages caused by windstorm it is *held:*

That the trial court did not err in denying defendant's application for leave to amend the answer.

Insurance — instruction on measure of damages, where total loss of insured property, held proper; refusal of instruction on good faith of insurer

to repair, where building total loss, held not erroneous; instruction as to false representation in application and proof of loss held proper.

2. That instructions complained of were nonprejudicial.

Opinion filed December 30, 1922.

Appeal and Error, 4 C. J. § 2890 p. 918 n. 42; § 3013 p. 1029 n. 30; § 3031 p. 1048 n. 76. Insurance, 33 C. J. § 807 p. 92 n. 71; § 877 p. 142 n. 57. Trial, 38 Cyc. p. 1711 n. 19.

From a judgment of the District Court of Stark County, *Lembke,* J., defendant appeals.

Affirmed.

T. F. Murtha, for appellant.

"No formal words are necessary to make an assignment of the policy *after loss;* anything showing an intent to assign on the one side and an intent to receive on the other will so operate. In the absence of a provision to the contrary, it need not be in writing, a parol assignment being sufficient. *The assignment may be effected by an order on the insurer to pay the amount due,* by an indorsement without delivery, or by assignment *of the loss or damage* which has accrued." 26 C. J. 447.

A party cannot maintain an action after assigning his claim. Sylvester v. Mackey (N. D.) 183 N. W. 1019.

"The rule that policies of insurance should be liberally construed in favor of insured, because prepared by the insurer, has no application, where the contract is in the form prescribed by statute." McCready v. Ins. Co. 70 N. Y. Supp. 778; Tepman v. Ins. Co. 120 Ill. App. 379; Shoe Co. v. Ins. Co. 178 S. W. 246.

The defense should have gone to the jury. If defendant made the offer to repair in good faith and within time, such offer if kept good is a bar to an action on the policy for money damage. 26 C. J. 448–451; Winston v. Ins. Co. (D. C.) 20 L.R.A.(N.S.) 960; Platt v. Ins. Co. (Ill.) 26 L.R.A.(N.S.) 853; Inc. Co. v. Barnard, 29 C. C. A. 562, 11 Fed. 705; Beals v. Ins. Co. 36 N. Y. 522.

Crawford & Burnett, for respondent.

The execution of exhibit C, the benefit of which was waived by W. R. Everett did not deprive plaintiff of the right to bring this action. 19 Cyc. 886; Minnock v. Eureka F. Ins. Co. (Mich.) 51 N. W. 367; **Measure of Damages**: See 17 C. J. p. 694 ¶ 8.

There was no fraud practised by plaintiff in filing his application. H. E. Skauge was agent of the company and his knowledge was the knowledge of the insurance company. Fosmark v. Equitable Fire Asso. 23 S. D. 102, 120 N. W. 777; Lawyer v. Globe Mut. Ins. Co. (S. D.) 127 N. W. 615; Stearns v. Merchants L. Ins. Co. 38 N. C. 524.

Neglect of agent is chargeable to the insurance company. French v. State Farmers Mutual Hail Ins. Co. 29 N. D. 426.

Failure to ascertain loss by arbitration is chargeable to the insurance company. Merger v. Equitable Fire Asso. (S. D.) 107 N. W. 531.

CHRISTIANSON, J. On January 22, 1921, the defendant issued to the plaintiff an insurance policy, of the usual standard form adopted in this state, whereby it insured the plaintiff against loss or damage by fire, lightning, windstorm, cyclone, and tornado, in the sum of $1,500, upon a certain frame barn situated on plaintiff's farm, in Stark county, in this state. On June 25, 1921, the barn was injured by a severe windstorm. On June 27, 1921, the plaintiff filed a written notice of loss, claiming that there was a total loss. A controversy arose between the plaintiff and the defendant as to the extent of damage caused by the storm. The principal difference arose with respect to the concrete foundation under the barn. The plaintiff claimed that certain cracks in the foundation had been caused by the windstorm. The defendant claimed that they were not so occasioned. The parties were unable to agree upon an adjustment, and the plaintiff, thereupon, brought this action.

In its answer, defendant admitted the execution of the policy, also that the barn was injured by the windstorm on June 27, 1921, but specifically alleged that the damage caused did not exceed the sum of $400. The defendant admitted the presentation by the plaintiff of written notice and proof of loss under the policy; but in connection therewith alleged, affirmatively, that the same was false, and untrue, in this, that in such notice and claim the plaintiff wilfully and intentionally represented the loss to be $1,500, whereas the amount of the loss, in truth and fact, did not exceed the sum of $400. The answer further averred that the policy authorized the defendant to repair or restore the property; that, on or about September 15, 1921, it offered to repair the barn, and at all times since has been ready, willing, and able to do

so; but that plaintiff has refused to allow defendant to make such repairs. The answer further averred that the plaintiff, subsequent to June 27, 1921, was adjudged a bankrupt; that a trustee has been appointed in the bankruptcy proceeding, and that, hence, said trustee, and not the plaintiff, is the proper party plaintiff. The answer further averred that the written application of the plaintiff, on which the policy was issued, represented that there was outstanding against said property mortgages amounting only to the sum of $1,000; that said representation was untrue; that the mortgages against the property aggregated about $2,000; that such additional encumbrances increased the risk and hazard, and that said false representations in regard to the encumbrances were made wilfully, and intentionally, for the purpose of deceiving and defrauding the defendant; that by reason of said fraudulent representations, the policy never became effective.

The plaintiff replied denying all the new matter set forth in the answer, except the allegations with regard to the additional encumbrances; and as regards such defense, the reply averred that the plaintiff truthfully represented the amount of outstanding encumbrances; that the agent who prepared the application, and who issued the policy to the plaintiff, had personal knowledge of, and in fact, had personally taken, the mortgage on the premises, which constituted the additional encumbrance, referred to in the answer. The cause was tried to the jury upon the issues thus framed. The jury returned a verdict in favor of the plaintiff in the sum of $800, and interest. Defendant has appealed from the judgment entered upon the verdict.

The first error assigned, and argued, in appellant's brief is that the trial court erred in refusing to permit the defendant to amend its answer so as to allege that the plaintiff had assigned the claim under the policy to Everett Real Estate & Loan Company, or to W. R. Everett. The proposed amendment was based upon the following letter written by the plaintiff to the defendant:

"Dickinson, N. Dak., Dec. 16, 1921.

"Farmers Insurance Co.,

"Dickinson, N. D.

"Gentlemen:

"Please attach to your records of Policy No. F. 1824, loss if any,

payable to Everett Real Estate & Loan Co., or W. R. Everett, as their interest may appear.

"Jacob Roquette."

While the trial court refused the amendment, the letter was received in evidence, and Mr. Everett, who is also the principal officer of the Everett Real Estate & Loan Company, testified as a witness for the defendant. The undisputed evidence shows that the proposed loss payable clause was intended only as security for the payment of some $200 to $300, and was not intended as an assignment of the entire claim. And Everett specifically disclaimed that he or the company had or made any claim against the defendant so far as any part of the cause of action was concerned. Upon the record here it is not at all apparent that the proposed amendment would have constituted any defense, 26 C. J. 483, 484, and it is manifest that the defendant was in no manner prejudiced by the ruling complained of, as Everett, and the Everett Real Estate & Loan Company are concluded by the verdict here and have no cause of action against the defendant under the so-called assignment.

It is next contended that the court erred in instructing the jury as to the measure of damages. The instruction complained of is as follows:

"And if you find for the plaintiff, gentlemen of the jury, then you will assess his damages. And the measure of damages in this case, gentlemen of the jury, is the difference in the value of the barn to the plaintiff before the windstorm on the 25th day of June, 1921, and the value of the same to the plaintiff after said storm."

Appellant contends that this instruction is erroneous for two reasons:

(1) That it permits the jury to allow plaintiff damages based upon the value of the barn to *him*, that is, "the value of the same to the plaintiff," without regard to the actual cash or market value thereof.

(2) That it is contrary to the following stipulation in the policy:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or

estimates shall be made by the insured and this company, or, if they differ, then by appraiser, as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. *It shall be optional,* however, with this company to take all, or any part of the articles at such ascertainment or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on *giving notice,* within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment of this company of the property described."

In our opinion, neither contention is well founded. It is true the phraseology of the instruction is not happy, but under the evidence in the case, it is inconceivable that the plaintiff could have been prejudiced by the peculiar language in which the instruction was couched. There was no evidence tending to show that the barn had any peculiar value to the plaintiff. All of the evidence adduced by the plaintiff, as well as by the defendant, had reference to the question of value generally, and the witnesses were examined and cross-examined fully upon the various elements entering into the question of value. The witnesses called on behalf of the plaintiff were cross-examined at great length by the defendant's counsel as to the cost of construction, the depreciation during the course of the years, etc. It is utterly improbable that intelligent men could have been misled by the language of the instruction.

The second contention advanced by the defendant ignores the language of the stipulation in the policy. The stipulation quoted does not say that plaintiff shall be entitled to recover an amount equal to the cost of restoring, or replacing, the property. On the contrary, the provision expressly says that "the loss or damage shall be ascertained, or estimated according to (such) actual cash value, with proper deduction for depreciation, however caused." The further provisions that the "company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs," and that such loss or damage "shall in no event exceed what it would then cost the insured to

repair or replace the same with material of like kind and quality," do not purport to fix the rule to be applied in determining the amount of compensation to which the insured will be entitled in case of loss; they are limitations upon the amount which may be awarded, upon ascertainment of the amount of loss, under the rule prescribed. It would seem that the two limitations thus prescribed virtually mean the same thing, and that was, in effect, the ruling of the supreme court of Iowa, in Erb v. German-American Ins. Co. 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583, wherein the court said:

"To show the damages sustained, the plaintiff was used as a witness, and, for the purposes of the examination, the stock was itemized as goods, chemicals, syrups, etc., patent medicines, lamps, lamp goods, paints and oils, etc. The witness under objections, stated the value of the different items. The following is a provision of the policy:

" 'This company shall not be liable beyond the actual cash value of the property at the time any damage or loss occurs, and the loss or damage shall be ascertained and estimated according to such actual cash value with proper deductions for depreciation and shall in no event exceed what it would cost to repair and replace the same with materials of like kind and quality.'

"It is urged that the question asked did not show the measure of damage agreed upon. We think it tended to. The witness was asked to state the value which is presumed to mean the actual cash value of the goods at the time of the loss and that would include any depreciation. Such cash value would also fix, presumably, the cost of replacing in a case where result must be had to the markets for that purpose."

It is also well to bear in mind, that in this case, the plaintiff in his complaint alleged, and contended upon the trial, that there was a total loss. He at no time abandoned this contention, and according to the evidence adduced by the plaintiff, the barn, as such, was a total loss. The evidence so adduced also tended to show that the barn could not be repaired; that the structure as a whole was so damaged that it could not reasonably be adapted for use as a basis for restoration. Of course, there need not be a complete destruction, or obliteration, of a building, in order to constitute a total loss. It is sufficient that it is so destroyed that it is deprived of the character in which it was insured and rendered useless for that purpose. 26 C. J. pp. 349, 350. And where the por-

tion left standing is not reasonably adapted for use as a basis on which to restore the building, that is, where a reasonably prudent owner, uninsured, desiring such a structure as the one in question before the damage, would not use the remnant as a basis for restoration, there is a total loss. 26 C. J. p. 350.

It is next contended that the court erred in failing to instruct the jury as to the effect of a good faith offer to repair. The court in substance told the jury that they might take this into consideration in assessing the damages, but did not make any further instruction. In our opinion, the defendant has no cause to complain of the instruction given. If anything, it was more favorable than the defendant was entitled to under the evidence. In this case, according to the contention of the plaintiff, the entire building, including both the superstructure and the foundation had been destroyed. It will be noted that the provision in the policy gives the company the right "to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time *on giving notice,* within thirty days after the receipt of the proof herein required, of its intention so to do."

The sole evidence adduced on the part of the defendant relating to the offer to repair consisted of the testimony of a builder. He testified that in June 1921, the manager of the defendant company requested him to go out and examine the barn and submit an estimate of the cost of repairing it. That he went out and made such examination and submitted an estimate. The estimate was $543.70. The witness testified that this estimate included only the superstructure, and did not include the foundation. The witness further testified that on or about September 14, 1921, he was instructed by the defendant company to go out and repair the barn. That he proceeded to do so, and upon arriving at the farm informed plaintiff that he had come to repair the barn, and that the plaintiff said: "You don't need to touch it." That he thereupon refrained from repairing the barn. The witness admitted that he was sent out, and that it was his intention, to repair the superstructure only, and that he had no intention of repairing the foundation,—although he said he would have made such repairs if he had found the foundation to be in need of repairs. So far as the evidence shows the only information given to the plaintiff that the defendant intended to exercise the option to repair was the statement by the builder. According

to the evidence there has been no ascertainment of damage, nor has the defendant given any notice of intention to repair.

In our opinion, the evidence adduced by the insurance company on this question did not establish any such condition as bars plaintiff's right to recover in this action. As has been stated, the loss occurred on June 25, 1921; two days after the loss occurred, notice of loss was given; later, on or about September 8th or 9th, the plaintiff submitted a formal, written, verified proof of loss. This action was not commenced until February 17, 1922, and it was not tried until March, 1922. Yet, so far as the evidence shows, the insurance company did not make any repairs, nor did it give any notice of intention to do so. The only thing it did was to send a carpenter out there, with directions to go on and make certain repairs in the superstructure. It also appears that negotiations were had looking toward adjustment and payment of the loss. In the schedules attached to plaintiff's petition in bankruptcy, dated January 23, 1922,—which were offered in evidence by the defendant,—it is stated that the defendant had offered $500 in settlement. And on March 13, 1922, defendant served and filed a written offer of judgment for $550, with accrued costs. Where the insurer exercises the option conferred by the policy by electing to repair, replace, or rebuild, the policy becomes in effect a new and independent contract to replace the property or restore it to its former condition, 26 C. J. p. 450, and it becomes the duty of the insurer to carry out the agreement within the time stipulated in the policy, or if no time is stipulated, then within a reasonable time. We do not believe that the evidence in this case establishes any exercise by the insurer of the option to rebuild so as to create such contract. The primary purpose of an insurance contract is to indemnify the insured against loss, not exceeding the amount stated in the policy. And, within such limit, the insured, except as otherwise provided by law or the provisions of the policy, is entitled to be put in the same pecuniary condition in which he would have been had there been no fire. The policy under consideration here contemplates that ordinarily the loss or damage sustained shall be paid in cash. The option to repair or rebuild is inserted for the benefit of the insurer alone, and if he desires to avail himself of the provisions he must do so at the time and in the manner prescribed therein.

Error is also predicated upon instructions relating to the alleged

false representations in the application for insurance, and the alleged false proof of loss. No instructions were requested by the defendant upon either of these questions, or upon any other question involved in the case.

So far as the question of false and fraudulent representations in the application for insurance is concerned, the instruction was, if anything, more favorable to the defendant than the facts in the case warranted, for the defendant was not entitled to have this defense submitted at all. The undisputed evidence was to the effect that the application for insurance was prepared by the agent, who issued and delivered the policy, and that this same agent had actual knowledge of the then-existing encumbrances. There is no contention that there was any collusion between the plaintiff and such agent. It is the settled law in this state, that the agent of an insurance company, who prepares an application for insurance and issues the policy thereon, acts as the agent of the insurance company and not as the agent of the applicant.

So far as concerns the instruction regarding the alleged false proof of loss, we do not believe that the plaintiff was prejudiced thereby, although we do not approve of the form in which the instruction was given.

It may, also, be noted that the position taken by the defendant that it was willing and ready to repair the barn, was wholly inconsistent with the contention that the policy had been forfeited, or rendered null and void either by false representations in the application for insurance, or in the proof of loss. According to the undisputed testimony, the insurance company had knowledge of the outstanding encumbrances at the time the policy was issued. Two days after the storm it received notice from the plaintiff claiming total loss. Shortly thereafter it caused personal inspection of the barn to be made to ascertain the damage inflicted by the storm. Yet, according to the testimony adduced by the defendant, it recognized the validity of the policy and sought to make repairs on September 14, 1921. Generally, an election by an insurance company to rebuild, or repair, with knowledge of the right to declare a forfeiture, will be deemed a waiver of all defenses of every kind which otherwise it might assert. 26 C. J. p. 338. So far as the evidence here discloses, the defendant at no time disclaimed liability under the policy until after suit was brought; but, on the contrary, treated the policy as a valid and binding contract.

What has been said, covers all assignments of error supported by argument, and, as already indicated, we find no error requiring a reversal. In its rulings on evidence, the trial court was eminently fair to the defendant. Viewing the record as a whole, including the verdict, we are satisfied that the defendant has no reason to complain of the result. The jury viewed the barn at defendant's request. The verdict seems fair and reasonable, and we see no good reason for disturbing it.

Affirmed.

BIRDZELL, Ch. J., and ROBINSON, BRONSON, and GRACE, JJ., concur.

STATE OF NORTH DAKOTA, Respondent, v. J. W. PAULEY and Pearlie Pauley, Appellants.

(192 N. W. 91.)

Criminal law — admission of instrumentalities for manufacture of intoxicating liquors seized at arrest of defendants not violative of Constitution providing that no one shall be compelled to be a witness against himself.

1. Where officers of the law, even though uninvited, entered the dwelling house of defendants and there found defendant committing the crime of manufacturing intoxicating liquors, whereupon they arrested the defendants and seized instrumentalities, of an evidentiary nature, then being used in the commission of the crime, it is *held*, that the proof of such instrumentalities and their reception in evidence was not violative of the constitutional provision that no party in any criminal case shall be compelled to be a witness against himself.

Intoxicating liquors — indictment for unlawful manufacture held sufficient.

2. A criminal information alleging that defendants committed the crime of manufacturing liquor, through wilfully and unlawfully making, fermenting, and distilling a liquor which was intoxicating for a beverage, states a criminal offense, pursuant to § 10,092 Comp. Laws 1913.

Opinion filed December 8, 1922. Rehearing denied January 8, 1923.

Criminal Law, 16 C. J. § 1098 p. 567 n. 2. Intoxicating Liquors, 33 C. J. § 451 p. 729 n. 42.

Note.—On admissibility in evidence against defendant of document or articles taken from him, see notes in 59 L.R.A. 465; 8 L.R.A.(N.S.) 762; 34 L.R.A.(N.S.) 58; L.R.A.1915B, 834; and L.R.A.1916E, 715; 10 R. C. L. pp. 932-934; 2 R. C. L. Supp. 1112; 4 R. C. L. Supp. 680; 5 R. C. L. Supp. 574.

On necessity of warrant for search for or seizure of intoxicating liquors, see notes in 3 A.L.R. 1516; 13 A.L.R. 1316; and 27 A.L.R. 711.

Criminal prosecution in District Court, Burleigh County, *Nuessle*, J. Defendants have appealed from a judgment of conviction.

Affirmed.

Edward S. Allen, for appellants.

The dwelling house, used as a home by the defendants, cannot be searched and seizures made unless the officer making said search and seizure is authorized so to do by having in his possession search warrant duly issued, and if seizures are so made the property so taken, whether without value or only valuable as evidence cannot be permitted as evidence against the defendant. U. S. Const. 4th and 5th Amendments; N. D. Const. §§ 13, 18; Boyd v. United States, 116 U. S. 616; Amos v. United States, 255 U. S. 313; Story, Const. Law, §§ 1901, 1902; Cooley, Const. Lim. 299; Sedgw. Stat. & Consol. Law, 2d ed. 498; Wharton, Crim. Am. Law, § 560; Weeks v. United States, 232 U. S. 383; Silverthorne Lumber Co. v. United States, 251 U. S. 385; Flagg v. United States, 230 Fed. 481–483; People v. De La Meter, 182 N. W. 57; People v. Mayhew, 182 N. W. 676.

F. E. McCurdy, State's Attorney, for respondent.

Statement.

Bronson, J. Defendants were convicted of the crime of manufacturing intoxicating liquors. They have appealed from the judgment. The facts are: In February, 1922, the sheriff, the chief of police, and a deputy sheriff visited the home of defendants in Bismarck. They possessed neither a warrant of arrest nor a search warrant. At the door they told the wife of one of the defendants that they desired to see her husband. She stated that she would call him. The officers stated that they would go to see him. They proceeded down in the basement and there they found the defendants manufacturing intoxicating liquor, and there possessed of the instrumentalities so to do. They seized the equipment used in distilling the liquor and also some of the material wherewith the same was manufactured. Defendants were thereupon arrested. At the trial defendants objected to the production of this equipment and its introduction in evidence.

Upon this appeal, defendants contend that the information does not state facts sufficient to constitute a crime and that the trial court er-

roneously received in evidence the equipment, in violation of defendants' constitutional privileges.

Opinion.

The information alleges that defendants committed the crime of manufacturing liquor; that they did wilfully and unlawfully make, ferment, and distill a liquor which was intoxicating for a beverage. Section 10,092, Comp. Laws, 1913, prohibits the manufacture of intoxicating liquor. This section is not violative of the constitutional provision, Section 217, N. D. Const. that no person shall manufacture, for sale or gift, intoxicating liquors. The information states a criminal offense. The officers were not denied admittance within defendants' home. They were not denied the right to see defendants. It is true that they were not invited guests. But, in the basement of their home, they saw defendants in the act of committing a crime. As peace officers it was their duty to arrest defendants, then and there without a warrant. Comp. Laws, 1913, § 10,567. They did there arrest them and seized the instrumentalities through which the crime was being committed. The instrumentalities seized were of an evidentiary nature. They were a part of the res gestæ in committing the crime. They were properly received in evidence. See note in 18 L.R.A.(N.S.) 253. Even though it should be conceded that the seizure of these instrumentalities by the officers was unreasonable and violative of defendants' constitutional rights against unreasonable searches and seizures, § 18, N. D. Const., it does not follow that the testimony of the officers or the introduction, as evidence, of such instrumentalities compels defendants in a criminal case to be witnesses against themselves, § 13 N. D. Const. Wigmore, in his work on Evidence, has elaborately considered the growth, development, and status of the principles established in the constitutional provisions quoted. He states: "It has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence. The illegality is by no means condoned; it is merely ignored." § 2183. Otherwise he states, concerning the constitutional provision compelling one to be a witness against himself, that, "it is not merely compulsion that is the kernel of the privilege, in history, and in the constitutional

definitions, but testimonial compulsion." § 2263, "If there was ever any rule well settled (until the opinion in Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524) it was this: That an illegality in the mode of obtaining evidence cannot exclude it, but must be redressed, or punished, or resisted, by appropriate proceedings otherwise taken. There is, therefore, no respect whatever in which the principle of the fourth amendment can be properly invoked in applying the principle of the fifth amendment." Such principles mentioned, concerning the fourth and fifth amendments to our United States Constitution, are embodied in §§ 13 and 18 of our Constitution. But it is unnecessary to discuss the principles announced in Boyd v. United States, supra, or the extent to which the same have been modified by later Federal decisions. Upon this record, we are satisfied that the officers as peace officers, had the right, and it was their duty, to arrest the defendants while committing a crime (Comp. Laws, 1913, § 10,567) and to seize the instrumentalities which evidenced the commission of such crime. Surely, as peace officers, with the imposed duty to preserve the peace and the law, they could have properly arrested and seized such instrumentalities while such crime was being committed before their eyes on a highway. Their right to interrupt the performance of a crime and to apprehend the offenders and to seize the instrumentalities then being used to commit the crime is not to be denied because defendants happened to be operating within the confines of their own home. Whether the seizure was unreasonable is not at issue in this cause. The judgment should be affirmed.

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

GRACE, J. (dissenting). This is an appeal by the defendants from a judgment given on a verdict, finding the defendants guilty of manufacturing intoxicating liquors. The information charging defendants with the commission of the crime is as follows, omitting formal parts: "F. E. McCurdy, state's attorney in and for said county of Burleigh and state of North Dakota, in the name and by the authority of the state of North Dakota, informs this court, that heretofore, to wit: On or about the 1st day of February, in the year of our Lord, one thousand nine hundred and twenty-one, at Bismarck at the county of Bur-

leigh in the state of North Dakota, one J. W. Pauley and Pearlie Pauley late of the county of Burleigh and state aforesaid, did commit the crime of manufacturing intoxicating liquor committed in the manner following, to wit:

"That at the said time and place the said defendants did then and there wilfully and unlawfully make, ferment, and distill a liquid which was intoxicating for a beverage.

"This contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of North Dakota. Dated this 3d day of May, A. D. 1921."

After the filing of the information, the defendants were arraigned and requested to plead to the information. At this time no plea was entered. They instead demurred to the information on the ground that it appeared upon the face thereof that the facts there stated did not constitute a public offense. The demurrer was overruled and defendants entered a plea of not guilty. Thereafter the action was tried to the court and a jury and upon evidence introduced by the state, the defendants not introducing any evidence, but moving for a dismissal at the close of the state's testimony, the defendants were found guilty and thereafter sentenced to fine and imprisonment. The sentence of Pearlie Pauley being suspended. A motion for a new trial was made and denied. The defendants assign three errors.

(1) That the court erred in overruling defendant's demurrer to the information.

(2) That the court erred in admitting any evidence of the sheriff of Burleigh county, his deputies, the chief of police and other police of the city of Bismarck, in said county.

(3) That the court erred in certain of its instructions of the jury.

Considering the first assignment, it is claimed by appellants that under § 218 of our Constitution the manufacture and importation of intoxicating liquor, unless for sale or gift, is not a crime under existing law at the time of the arrest and conviction. The laws in force at the time of the arrest and conviction were the fundamental law, § 217 of the Constitution and § 10,092, Comp. Laws, 1913. Section 217 provides: "No person, association, or corporation shall within this state, manufacture for sale or gift, any intoxicating liquors, and no person, association, or corporation shall import any of the same for sale or gift,

or keep or sell or offer the same for sale, or gift, barter or trade as a beverage. The legislative assembly shall by law prescribe regulations for the enforcement of the provisions of this article, and shall thereby provide suitable penalties for the violation thereof."

Section 10,092 Comp. Laws, so far as material here, provides: "Any person, association, or corporation, who shall within this state, directly or indirectly manufacture any spirituous, malt, vinous, fermented or other intoxicating liquor, or shall import any of the same for sale or gift, as a beverage, or shall keep for sale or sell or offer for sale or gift, barter or trade, any of such intoxicating liquors as a beverage, shall for the first offense be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than two hundred nor more than one thousand dollars, and be imprisoned in the county jail not less than ninety days nor more than one year; and for the second and every successive offense, shall be deemed guilty of a felony and be punished by imprisonment in the penitentiary not exceeding two years and not less than one year."

The information charges only the manufacturing of intoxicating liquors and not the manufacture for sale or gift. It is the contention of defendants that whereas § 217 defines the crime as the manufacture for sale or gift and the information charges only the manufacture, that hence, the defendant is not charged with any crime defined in § 217. It may be admitted in order to arrive at a clear conception of defendant's contention, that the information does not charge them with any crime defined in § 217. If this be true, it is then equally clear that § 217 is in no way contravened by the charge contained in the information, hence, in this respect no constitutional question arises. But, notwithstanding such concession, that does not of itself show the information is bad. In short, though the information does not charge any crime under § 217, and if there were no other law to measure its legality than that section, it might be objectionable and perhaps demurrable on the ground claimed. We have no hesitancy, however, in stating that such is not the case. We believe the view is generally accepted, that the legislature has unlimited power to act in its own sphere, except where inhibited by the Constitution of the United States or the Constitution of this state. Taking this for granted, the legislature could enact any law which to it appeared wise, prohibiting the manufacture, sale or gift

of intoxicating liquors, or enact any law relative to intoxicating liquors that did not contravene the Federal or state Constitution. In the exercise of these broad powers it did enact § 10,092, which has hereinbefore been fully set forth. An examination of that section discloses that it prohibits the manufacture of intoxicating liquors within this state, irrespective of whether the same is manufactured for sale or gift. That section makes the manufacture of liquor without the addition of any other act, a crime, while § 217 of the Constitution includes the elements of sale, barter or gift with manufacture in order to constitute a crime, hence, the crime of manufacturing intoxicating liquors specified in § 10,092 is a distinct crime from that specified in § 217 in the respect just mentioned. It is clear, therefore, that this section of the statute does not conflict with § 217 of the Constitution, and that the legislature had the power through action in its own sphere to enact § 10,092, which does not offend against either the Federal or the state Constitution. Hence, the information does charge a crime under this section of the statute. The court therefore properly overruled defendant's demurrer.

Under appellants' second assignment of error, it is contended that the court erred in admitting in evidence over defendants' objection certain property taken from the dwelling house of the defendants by the sheriff of Burleigh county or his deputies, the chief of police of the city of Bismarck or other policemen of that city, and in receiving their evidence and that of other witnesses who obtained evidence by search and seizure in the dwelling house of defendants in the nighttime without having a warrant of arrest for the defendants, and without having a search warrant authorizing entry and search of the dwelling house. In other words, that the acts of such officers and the offering and receiving of such evidence at the trial, violates defendants' constitutional rights secured to them under §§ 18 and 13 of the state Constitution. The evidence so offered and received consisted of various utensils and instrumentalities which the officers or some of them took from defendants' home and which they claim to have been used by the defendants in the distillation of intoxicating liquors in their home or dwelling house. It is also clear from a full consideration of the evidence, that none of the officers were invited to or into defendants' home. The evidence clearly shows that it was the purpose of the officers to go to the home and enter and invade it for the purpose of determining whether

any intoxicating liquors were being manufactured there, for the officers nor any of them offer any other reason or excuse for their invasion.

Section 18 of the Constitution provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

Section 13 of the Constitution provides: "In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall twice be put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

Under the evidence and in the circumstances of this case, the entry by the officers and each of them upon the premises and into the home of the defendants, without a warrant for their arrest or for the arrest of either of them, without a search warrant, with no order or command from any court and with no authority whatever under our laws and Constitution, for the sole purpose of searching for and seizing intoxicating liquors and to discover if the same were manufactured in the home, was a wanton trespass and a direct and flagrant invasion of the constitutional rights of the defendants, who were occupying the premises as a home, guaranteed by § 18 of our Constitution. It is not necessary to elaborate this statement; it is true and can in no way be controverted by this record. The conclusion which we have reached in this respect, we believe, is sustained by the following cases: Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Ex parte Jordan, 96 U. S. 727–733, 24 L. ed. 877, 879; Bram v. United States, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183; Weeks v. United States, 232 U. S. 390, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177; Entick v. Carrington, 19 How. St. Tr. 1029; People v. Marxhausen, 204 Mich. 559, 3 A.L.R. 1505, 171 N. W. 557. Endless authority might be cited to the same effect. The cases in the United States Supreme Court just cited, principally had under con-

sideration the guaranty of rights of the people as preserved to them by the 4th and 5th articles of the amendments of the Constitution of the United States. Article 4 provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause; supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." It will be seen that this is identical with § 18 of our Constitution.

Construing the 4th amendment of the Federal Constitution, Mr. Justice Bradley delivered the opinion of the court in Boyd v. United States, supra, and after quoting from the celebrated judgment of Lord Camden in Entick v. Carrington, 19 How. St. Tr. 1029, said: "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense. It is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the 4th and 5th amendments run almost into each other."

Mr. Justice Day, in Weeks v. United States, said: "The effect of the 4th amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and

the duty of giving to it force and effect is obligatory upon all entrusted under one Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizure and enforced confession, the latter often obtained after subjecting accused persons to unwarranted practices, destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

It is so clear that the constitutional right of defendants under § 18 of our Constitution has wholly been invaded that further discussion could make it no more clear. But it is contended, that though the officers violated the defendants' constitutional rights in the manner of procuring the evidence, that is, the utensils and instrumentalities claimed by them to have been used by defendants, in the manufacture of the alleged intoxicating liquor, nevertheless it properly could be used against the defendants to secure their conviction and offered as competent evidence at the time of the trial, unless prior to the time of the trial defendants had applied to the court for a return of the evidence on the theory that it was their property and unconstitutionally had been taken from them, and this on the asserted principle that the court when engaged in trying a criminal cause will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property which are offered in evidence against the party accused of crime. This principle was announced in the case of People v. Adams, 176 N. Y. 351, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636, and affirmed by the United States Supreme Court in Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372. It is a principle that has been recognized by not a few decisions of various courts. In the Adams Case the officers were armed with a search warrant. Where there is a search warrant, and in executing it there is incidentally discovered evidence which may be competent in certain respects, that is a different case than where the home is invaded without any search warrant and all of the evidence is obtained by such unlawful invasion. But upon what principle do those decisions rest which assert that the court when engaged in trying a criminal cause will not

take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property which are offered in evidence against the party accused of crime where that party objects to their introduction on the ground that they came into the possession of those through whom they are offered, by the invasion of his constitutional rights. The principle declared in those cases is not declared in any statutory law nor in any constitutional provision, and such courts cannot point to any law in this respect which authorizes the declaration of such a principle; neither can they in all the well-recognized rules of evidence find any rule of such a nature. Such a rule is nowhere to be found in the books. From what source then does the principle have its inception? The answer is, and can only be, from the arbitrary action of the trial court. When evidence such as this is offered, and its reception timely and properly objected to, a determination on the trial whether it was obtained by violation of the constitutional rights of the accused should and must be made, otherwise one of the most sacred constitutional rights of the person accused of crime and of all persons in similar situation, is flagrantly violated. Where such evidence is offered, and on the ground hereinbefore stated is objected to, the question which thereby arises is not in any sense a collateral matter, but is an essential part of the proceedings at the trial and of the case on trial. Furthermore, the rule has no reason and will not bear analysis. If one is charged with crime and is arrested with or without a warrant, and after his arrest the officers by threats, personal abuse, the application of physical torture or by fraud or deception obtain from him a written confession signed by him, wherein the acts constituting the crime are fully described, and on the trial the accused is confronted with such confession and it is offered in evidence, is such confession competent and admissible where defendant shows or offers to show that the same was obtained from him in the manner above mentioned; and, has he waived all his rights to make any such showing, and to object to the reception of the confession as evidence by failing or neglecting prior to the time of the trial to petition the court to have such confession returned to him? or, rather is it not the business and is it not the general rule that the court in the course of the trial stops and determines whether the confession was obtained in the manner above indicated or whether it

was the free and voluntary act of the accused before it determines the competency and admissibility of the same.

Does not the court in such case determine the manner whereby the officers became possessed of the confession of the accused? We are convinced that in such case it is the general rule that the accused would have a perfect right to show all the circumstances and conditions surrounding the making of the confession, and if he succeeds in showing that it is not voluntary and free from the elements above mentioned, upon objection, the confession will be excluded on the ground that it violates his constitutional right of not being compelled to be a witness against himself, which right and other personal rights are secured him by § 13 of our Constitution. So in the case before us, we think on the trial it was proper for the defendants to show by their objection to it, that the evidence offered was obtained in violation of their constitutional rights under §§ 13 and 18 of our Constitution, and that to deny them the privilege of making that showing or the overruling of their objections to the reception of the evidence to which such objections relate, operated to deny them their constitutional rights and was prejudicial and reversible error. One of the principal functions of trial courts is to determine competency and admissibility of evidence when offered and under our law no preliminary applications, motions or petitions to it before the time of the trial are required, before it is incumbent upon it to so determine. The constitutional rights of persons accused of crime cannot be denied on any such theory. This case is not one where a person has been legally arrested and then his person searched to discover and seize the fruits or evidence of crime and it is not governed by any such rule as may be proper in that kind of case. Here the defendants' house and home was just as effectively broken into in the manner the evidence shows the entry was made, as if the doors had been closed and locked and the windows likewise and by force of the officers were broken in and the entry into the home thus effected, and this, without a warrant of arrest or one of search and seizure. The evidence offered was gotten in the manner and by this flagrant violation of defendants' constitutional rights. If the officers can lawfully do what they did in this case, they can with no more right, reason or authority break into any home in the state on any pretext at any time, day or night, without any reference to the sanctity of the home or the constitutional

guarantee that surrounds it. It is unlawful to manufacture, sell or give away intoxicating liquors; it is contrary to the laws of this state and those who do so should be arrested and punished according to law, but in doing so those charged with the enforcement of the law must proceed according to the law and the Constitution just the same in that class of cases as in the prosecution of those charged with other criminal offenses, defined in other of our laws, and provisions of the Constitution relating to such crimes. No violation of the prohibition laws shall be countenanced by any officers, and violators of it should be vigorously prosecuted, but always under the sanction and authority of the law and provisions of the Constitution relative thereto and to the rights of those accused of such crime.

In view of the conclusion at which we have arrived, it is unnecessary to give any attention to the 3d assignment of error, based upon the claim that certain of the instructions of the court were erroneous. The judgment appealed from should be reversed and the case remanded for further proceedings.

ROBINSON, J. (dissenting). In the main I do concur in the opinion as written by Mr. Justice Grace. This is a case of turning water into wine. It presents two questions; one on the complaint; the other on the evidence and the misconduct of the officers of the law. To secure conviction the officers committed a greater offense than that charged against the defendant. They obtruded themselves into his home, made searches, arrested him and seized some of his property which was offered in evidence against him. The officers should have known and respected the sacred and constitutional right of every man to be secure in his home and property against any such search and seizure. The complaint or information is that the defendant "did make, ferment and distill a liquid which was intoxicating for a beverage." It does not state an offense under the prohibition section of the Constitution, which is that no person shall manufacture for sale or gift any intoxicating liquors. § 217. It does state an offense under the statute which forbids the manufacture of intoxicating liquor for any purpose. § 10,092. But that statute is in direct conflict with the first section of the Constitution.

"All men have a right to acquire and possess property and to pursue and obtain safety and happiness."

Now liquor is property. It has been so considered always and everywhere. In every part of the world it has a good exchangeable value. Since every man has a right to acquire and possess property, defendant had a right to acquire and possess liquor property. The state may regulate the use of property and traffic in liquor and in milk, but it may not penalize anyone for possessing milk or liquor. It is a maxim of law that everyone must use his own property so as not to injure another. That is a universal law; it is good everywhere and at all times. The state had a right to abolish the saloons and to restrain the liquor traffic, because it became a nuisance and a menace to society, a destroyer of property and a promoter of crime and idleness. And to some extent, for like reasons, it may restrain and regulate the traffic in tobacco, cigars and games that lead to idleness, poverty, and crime. Those vices do commonly go together. The one induces the other. But property is property; and the purpose of every just law is to safeguard life, liberty, and property.

And what of civil liberty? It is natural liberty restrained by law so far as may be necessary to protect the members of society. On his lonely island Robinson Crusoe had the full enjoyment of natural liberty.

"He was monarch of all he surveyed;
His right there was none to dispute."

But when his good man Friday came upon the island, then came some restraint of natural liberty. For in every assembly of two, three, or more persons the law of civil liberty prevails. Every person must refrain from injury to another by force, fraud, deception, overreaching, sharp practices, sharp bargains, and otherwise. Manifestly the law of civil liberty did not bar Robinson Crusoe from his natural right to make and use wine and strong drink. When such a right is used inoffensively, it is natural and inherent just the same as the right to drink tea or coffee. To deny it by force and power is sheer tyranny and despotism. The right is fully assured by the first section of the state Constitution. Any person for his own use may grow and obtain grapes, hops, malt, barley, corn, wheat and use the same inoffensively to make wine, beer, or strong drink. He may "drink and forget his sorrows and remember his poverty no more" But as a member of society he must observe the proprieties of life. He must not appear in a nude or drunken state, like Noah after the flood. Such is the law and

it should appeal to the reason and common sense of every good citizen who is not a crank.

A different topic is the tyranny of the statute and its drastic enforcement. Since the fugitive slave act there has not been another statute so drastic and so questionable. It is strictly a crank statute. It does violence to the plain letter of the Constitution. It imposes excessive fines and unusual punishments. For turning grape juice or water into wine, the very thing that was done by Jesus Christ, the penalty is equal to that for a horse thief, and the expense of the crusade, the reckless destruction of life and property and the incentive to crime—all that is a fearful menace to the state. Surely it is time for decent, honest people to stop and think.

The judgment should be to dismiss the action.

KNUTE SAND, Respondent, v. THE ST. ANTHONY & DAKOTA ELEVATOR COMPANY, a Corporation, Appellant.

(191 N. W. 955.)

Chattel mortgages — refusal of elevator to deliver stored grain upon demand of mortgagee prima facie evidence of conversion.

1. The plaintiff held a chattel mortgage, given by one Elayer, upon certain grain. The mortgage had been duly filed in the office of the register of deeds of the proper county. The note secured by the mortgage was payable October 1st, 1920. On or about October 2d, 1920, Elayer delivered the grain to the defendant elevator company, who received it in storage, and thereafter on October 4th, 1920, issued storage tickets to Elayer and in his name for all of said grain. On that same date the elevator company received actual notice of plaintiff's mortgage. On January 29, 1921, plaintiff made formal demand upon the defendant for the delivery of the grain or the proceeds thereof. The demand was refused. On May 13, 1921, one Anderson brought action against Elayer and garnished the defendant elevator company. On June 18, 1921, plaintiff brought this action for conversion of the grain. On July 29th, 1921, the elevator company interposed an answer in the garnishment action and attached thereto duplicates of the storage tickets issued to Elayer and served notice upon the plaintiff in such garnishment action and upon the plaintiff in this action that such duplicate storage tickets had been deposited, in the office of the clerk of the district court where such actions were pending, as provided by § 7594, Comp. Laws 1913. It is *held*,

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Note.—On refusal of bailee to surrender property to owner as conversion, see 3 R. C. L. 131; 1 R. C. L. Supp. 773; 5 R. C. L. Supp. 158.

That the refusal of the defendant elevator company to comply with plaintiff's demand *prima facie* established a conversion.

Interpleader — elevator company refusing to deliver upon demand stored grain held not entitled to deposit money in court and avoid liability.

2. That the defendant has not brought itself within the provisions of § 7594, Comp. Laws 1913, permitting a bailee to make deposit in court when adverse claims are made to moneys or property in his custody, so as to be relieved from liability for the conversion so established.

Opinion filed December 16, 1922. Rehearing denied January 16, 1923.

Bailments, 6 C. J. § 113 p. 1151 n. 60. Chattel Mortgages, 11 C. J. § 287 p. 592 n. 76 New. Interpleader, 33 C. J. § 25 p. 445 n. 96.

From a judgment of the District Court of Pierce County, *Burr*, J., defendant appeals.

Modified and affirmed.

Harold B. Nelson, for respondent.

"If the warehouseman is informed the goods are not the property of the principal, a delivery to the principal would be a conversion for which the true owner could hold the warehouseman bailee in trover." Crosswell v. Lehman, 54 Ala. 363, 25 Am. Rep. 684; Clegg v. Boston Storage Warehouse Co. 149 Mass. 454, 14 Am. St. Rep. 436.

To the same effect is the case of Cornell v. Mahoney, 76 N. E. 664, where the court sustained the defense that the bailee had delivered the property to an officer with process, even though a portion of the property so delivered was exempted. See also Mullins v. Chickering, 18 N. E. 377, 1 L.R.A. 463.

The delivery of goods by a warehouseman to the depositor after receiving notice of the adverse claim or title of a third person renders the warehousemen liable for conversion if such claim or title is good. 40 Cyc. 448, and cases cited in note 98, including Willard v. Monarch Elevator Co. 10 N. D. 400, 87 N. W. 996; Hudmon v. DuBose, 85 Ala. 446, 2 L.R.A. 475; Phillip Best Brewing Co. v. Pillsbury, etc. Elevator Co. 37 N. W. 763; Nichols v. Barnes, 14 N. W. 110.

CHRISTIANSON, J. Plaintiff brought this action to recover the value of certain wheat, rye, oats, and flax alleged to have been converted by the defendant, and upon which the plaintiff had a chattel mortgage. The material facts are not in dispute. They are as follows: The grain in controversy was grown by one Elayer in 1920. The plaintiff, Sand,

had a mortgage thereon executed by Elayer to secure a promissory note in the sum of $562 dated October 14th, 1919 and payable October 1st, 1920. When the grain was threshed, and on or about October 2nd, 1920, Elayer delivered a certain quantity of wheat, oats, rye, and flax to the defendant elevator company. On October 4, 1920, the elevator company issued storage tickets, for the grain in the form as prescribed by our statute, reciting that it had received grain described in the tickets from E. W. Elayer for storage. There is no dispute as to the quantity of grain so delivered to the elevator company and for which the storage tickets were issued, nor is there any dispute as to such grain being covered by plaintiff's mortgage. On October 4th, 1920, the plaintiff, Sand, served written notice upon the defendant elevator company that he held a chattel mortgage upon such grain. On January 19, 1921, the plaintiff, Sand, caused notice of chattel mortgage foreclosure sale to be published, which notice recited that the chattel mortgage would be foreclosed by a sale of the mortgaged property on January 29, 1921, at the St. Anthony and Dakota Elevator at Fero, North Dakota. Upon the trial of this action it was stipulated that at the time such foreclosure was advertised to be held, namely, on January 29th, 1921, plaintiff's agent, advertised to conduct such sale, appeared at the elevator of the defendant elevator company where the grain was stored and demanded the delivery of such grain or the proceeds thereof and that such demand was refused. On May 13, 1921, one Anderson instituted an action against said Elayer as defendant and also instituted a garnishment proceeding ancillary thereto wherein the defendant elevator company was made a garnishee. While the record does not establish the fact it is stated in the briefs of both plaintiff and defendant that Sand was interpleaded in said garnishment action. On June 18, 1921, the plaintiff instituted this action against the defendant. On July 29, 1921, the defendant elevator company served its answer in the garnishment action instituted by Anderson and attached thereto duplicates of the storage tickets issued to Elayer. In such answer it was stated that shortly after the grain described in the various storage tickets was placed in the custody of the defendant elevator company, the following parties made claims thereto: One Blessum, who claimed a thresher's lien thereon, one Sand, the plaintiff in this action, who claimed a chattel mortgage thereon, and one Anderson, the plaintiff in said garnishment action,

who claimed a right to have the grain sold and applied in payment of certain indebtedness owing to him by Elayer; that the defendant was unable to ascertain the respective rights of the parties; that it merely held the grain as bailee, and had no interest in the same except for its own protection. The answer further recited that the said Sand had instituted this action, and stated that the defendant made a deposit of all of the duplicate storage tickets described in the affidavit. Attached to said affidavit is a notice addressed to Anderson, plaintiff in said garnishment action, to Sand, plaintiff in this action, and their respective attorneys, and to said Blessum, the owner of the thresher's lien. The notice recites that the elevator company has deposited in the office of the clerk of the district court where said actions are both pending, "duplicates of all of the storage tickets representing all of the grain involved in each and both of said actions, and to which adverse claims are made, and that such deposit is made under § 7594, Comp. Laws, 1913." The trial court rendered judgment in favor of the plaintiff for the amount demanded and the defendant has appealed.

(1) Upon the record before us it stands undisputed that plaintiff's chattel mortgage constituted a valid first lien upon the grain in controversy. Under the express stipulations of the mortgage, the mortgagee was authorized, in case default was made in the payment of the debt secured by the mortgage, to take, remove, and sell the property described in the mortgage in the manner provided by statute. The mortgage further provided that it might "be foreclosed by a sale of such crop, when harvested, in any usual market thereof at any time in the usual manner, at the market price therefor in any such market without notice of foreclosure." At the time the grain was delivered to the defendant elevator company by the mortgagor, Elayer, a default existed and the plaintiff, Sand, was entitled to possession of the grain covered by the mortgage, upon making a demand therefor. Of course, the chattel mortgage was only a lien and defendant could receive the grain for storage or even purchase it, but the grain would be received and held subject to the lien of plaintiff's mortgage. Sanford v. Duluth & D. Elevator Co. 2 N. D. 6, 48 N. W. 434; Catlett v. Stokes, 21 S. D. 108, 110 N. W. 84; Citizens Nat. Bank v. Osborne-McMillan Elevator Co. 21 N. D. 335, 339, 131 N. W. 266. In this case it is stipulated that the agent of the plaintiff on January 29, 1921, demanded possession of the grain, and

that this demand was refused. Proof of such demand and refusal *prima facie* established a conversion. Towne v. St. Anthony & D. Elevator Co. 8 N. D. 200, 77 N. W. 608; Marshall v. Andrews, 8 N. D. 364, 79 N. W. 851; 38 Cyc. 2031. It is true that such demand and refusal merely constitutes prima facie evidence of conversion and the defendant might have offered evidence tending to rebut or explain the refusal. No such evidence, however was offered. So far as the record here shows there was an absolute refusal. For aught that appears, the refusal might have been based upon the ground that the defendant had issued storage tickets to Elayer and would deliver the grain only to the holder of the storage tickets. The record does not even show affirmatively when the different adverse claims were made. No witnesses were examined upon the trial, but all the evidence was stipulated. Defendant's counsel dictated into the record the following stipulation: "It is further stipulated that some time after the grain hereinbefore described and involved in this litigation was deposited at the defendant elevator at Fero, North Dakota, various persons made claim to the same and that their claims were adverse one to the other; that from an investigation by Mr. Grimsgard, superintendent of the defendant elevator company for said district, as to the nature and validity of said claims it was impossible for him or said defendant elevator company to determine as to which claimant or claimants were entitled to said grain or any part of the same and that thereafter on July 29, 1921," duplicate storage tickets representing the grain were deposited with the clerk of the district court of Pierce county, etc. It will be noted that his stipulation does not state at what time the various claims were presented. The record does show that defendant was actually notified of plaintiff's claim on the fourth day of October, 1920, —the same day the storage tickets were issued. Under this state of facts we believe that the evidence established a conversion by the elevator company. The rule seems well settled that the refusal of the bailee to surrender property held by it to one rightfully entitled thereto constitutes a conversion. See 16 C. J. 1151; 3 R. C. L. p. 131; Towne v. St. Anthony & D. Elevator Co, and Marshall v. Andrews, supra. The defendant, however, contends that inasmuch as it deposited the duplicate storage tickets, it is relieved from liability under § 7594, Comp. Laws 1913. That section reads as follows: "Whenever two or more persons make claim for the whole or any part of the same money, personal prop-

erty or effects in the possession or control of any other person as bailee or otherwise and the right of any such claimant is adverse to the right of any other claimant, or is disputed or doubtful, and the bailee, custodian, or person in control of any part of such property, money, or effects is unable to determine to whom the same rightfully belongs, or who is rightfully entitled to the possession thereof, or whenever such bailee, custodian, or person in control has notice or knowledge of any right or claim of right of any person in or to any part of such property, money, or effects adverse to the right of any other claimant therefor; or, whenever any debt, money, property, or effects owing by or in the possession or under the control of any person may be attached by garnishment or other process, and there is any dispute as to who is entitled to the same or any part thereof, in any such case the person in the possession or control of any such property, money, or effects, when an action in any form has been commenced for an account of or growing out of the same or in which the same has been attached as aforesaid, may pay such money or deliver such property or effects to the clerk of the court in which any such action having reference to said money, property, or effects, or the value thereof, may be pending, or out of which any garnishment or other process may issue with reference thereto; or if no such suit is commenced, he may apply to the district court of the district where such property, money, or effects may be situated, and upon showing to the satisfaction of the court the existence of facts bringing him within the operation of this section, said court shall make an order designating a depositary with whom said property, money, or effects may be deposited by the applicant for such order. In either case such person in the possession or control of such property, money, or effects shall at once notify personally or by registered mail all persons of whose claims he may have notice or knowledge, having or claiming any interest, property, lien, or right in, to or upon such property, money, or effects, of such deposit; and upon giving such notice the person so depositing the same shall thereupon be relieved from further liability to any person on account of such property, money, or effects, provided, that such depositor may be required upon the application of any party interested therein to appear and make disclosure before the court. in which any such action may be pending or by which any order designating a depositor may be made, concerning the said property, money, debts, or effects held, controlled

or owned by him. If the address of any persons having or making any claim as aforesaid cannot be ascertained, an affidavit to that effect shall be filed with the depositary, and the giving of such notice shall not be required in such case." This statute was enacted to enable a bailee to be relieved from the embarrassing situation in which he found himself when various parties made conflicting claims to moneys, or property in his custody. See 3 R. C. L. § 54, pp. 132, 133. When conflicting claims are made to moneys or property in his custody, or when it comes to his knowledge or notice that any person has or claims a right thereto adverse to the bailor, or whenever the money or property is attached by garnishment or other process the statute offers the bailee a remedy by which he may be relieved from liability. If any of these conditions exist and an action has been commenced in any form involving or having reference to the money or property, he may deposit it with the clerk of the district court where the action is pending. If the conditions prescribed by statute exist and no suit is commenced, the bailee may nevertheless be relieved by making application "to the district court of the district where such property, money or effects may be situated." And "upon showing to the satisfaction of the court existence of facts bringing him within operation of the section" the court is required to "make an order designating a depositary with whom such property, money or effects may be deposited by the applicant for such order."

In our opinion the defendant in this case has not brought himself within the statute. The grain in controversy was delivered to the defendant prior to October 4th, 1920. When it received this grain it had constructive notice that it was covered by plaintiff's mortgage and on October 4th, 1920, it received actual notice of this fact. On January 29, 1921, the plaintiff made formal demand upon the defendant for the possession of the grain. Defendant refused such demand. As already stated, such demand and refusal established *prima facie* a conversion of the grain on that date. Defendant took no action under § 7594, supra, until after this action had been brought, and it had been made garnishee in an action brought by one Anderson. Then in July 1921, it sought to invoke § 7594 by answer made in the garnishment action. In our opinion the findings of the trial court to the effect that the defendant converted the grain is in accord with the facts and evidence as stipulated upon the trial in this action.

The plaintiff offered evidence showing the market price of the grain at Fero, North Dakota, on January 29, 1921. The judgment appealed from is based upon the market value so established. This is the proper measure of damages. Comp. Laws, 1913, § 7168; Towne v. St. Anthony & D. Elevator Co. 8 N. D. 200, 208, 77 N. W. 608; Citizens Nat. Bank v. Osborne-McMillan Elevator Co. 21 N. D. 335, 131 N. W. 266; 38 Cyc. 2094. The trial court, however, awarded judgment for the costs and expenses of the foreclosure sale. In our opinion the plaintiff was not entitled to this allowance. It is undisputed that the plaintiff at no time had possession of the grain or the storage tickets representing it, and we do not believe that the expenses incident to the attempted foreclosure sale are properly allowable, either as an element of damages or as disbursements in this action. Hence the judgment will be modified by eliminating this item, and, as so modified, it is affirmed.

GRACE and ROBINSON, JJ., concur.

BIRDZELL, Ch. J. (specially concurring). I concur in the opinion of the court written by Judge Christianson. To me it seems obvious that the statute under consideration was never intended to apply, and does not by its terms apply, to a situation in which the plaintiff claims that the defendant, a bailee, is liable to him on account of a conversion of the subject of the bailment. The statute was construed by this court in McLaughlin v. Dodge Elevator Co. 43 N. D. 231, 174 N. W. 871, as not applicable to the instance of a wrongdoer who would seek to use it for the purpose of reducing his own liability for a wrongful act, such as a conversion. It was there said that:

"The statute is merely intended to relieve a person who is in a position analogous to that of a stakeholder. He is relieved by delivering up the stakes."

The similar statute in Minnesota was construed in the same way by the Minnesota court in Austin v. March, 86 Minn. 232, 235, 90 N. W. 384, where the court said:

"The design and intention of the legislature was to give in simplified form the relief granted by courts of equity at common law by the proceeding known as an interpleader, and the rules and principles of law

applicable to that proceeding must govern and control proceedings under the statute.

"The authorities are uniform that to entitle a party to maintain a bill of interpleader it must appear that he stands in a position of indifference between the rival claimants, making no claim to the property himself."

Obviously, one who is guilty of conversion cannot stand in the position of a stakeholder for he is charged with having asserted a dominion over the property inconsistent with the plaintiff's right, and it will be incumbent upon the plaintiff to establish that fact in order to recover in conversion. In other words, the plaintiff will recover only if he is able to prove that the defendant assumed a different attitude towards the property than that of a stakeholder.

No principle is better settled than that a wrongdoer may not invoke the remedy of interpleader. 15 R. C. L. pages 226 and 227, states the general doctrine as follows:

"It is of the essence of an interpleader suit that the plaintiff should be entirely indifferent between the conflicting claims, asserting no interest in himself in the fund in dispute. An attitude of perfect disinterestedness, excluding even an indirect interest, on the part of the plaintiff is indispensable to the maintenance of the bill, and his position must be one of 'continuous impartiality,' save that the thing in his possession be awarded to the right party. . . . So a bill of interpleader will not lie if the plaintiff has incurred some personal obligation to either of the defendants, independent of the title or the right to possession, because such defendant would in that event have a claim against him which could not be settled in litigation with the other defendant. A plaintiff cannot compel others to interplead when the relative rights of the latter depend upon the question of fact whether he has made himself legally liable to pay one of them, even though the plaintiff will not be pecuniarily affected by the decision of that question. He must be supposed to know whether he has obligated himself to one of the other parties and cannot cast upon them the burden of settling that question.

"One seeking the advantages of a bill of interpleader must show not only that he stands indifferent between the claimants and that he is without interest in the controversy to be waged between them, but that

he is in the position of a mere innocent stakeholder or depositary, and that no act on his part has caused the embarrassment of conflicting claims and the peril of double vexation. *When he stands to either of the parties in the relation of a wrongdoer he cannot have relief by bill of interpleader.* Thus, where a warehouseman, as agent, sells the property of his bailor stored with him to a purchaser who leaves the property in the warehouse, he is not entitled to file a bill of interpleader to prevent suits brought against him by the original bailor who denies the agency, and by the purchaser, both of whom claim title to the property. So, if a sheriff has seized goods on execution that were not subject to levy, he is as to the true owner a wrongdoer and cannot require him to interplead with the creditor to determine the validity of the levy." See also Tyus v. Rust, 37 Ga. 574, 95 Am. Dec. 365.

In the dissenting opinion herein, it is said that the statute may be invoked by one who has converted property. The statement is also made that it is apparent that the defendant is in the position of a mere stakeholder. This, it seems to me, involves a fundamental inconsistency. How can it be said that one is a mere stakeholder, or one claiming no right to the property, when the very basis of the liability for conversion, which is sought to be enforced against him, is that he has asserted a dominion inconsistent with the plaintiff's right, interest or title?

I am of the opinion that the statute evidences no intention whatsoever to change the fundamental principles applicable to interpleader, but that it merely intends to simplify the application of those principles by allowing a stakeholder to exonerate himself, either in advance of litigation begun, or after litigation has started, concerning which he is indifferent and uninterested as to the outcome,—adverse claims being asserted by others to property of which he is stakeholder. I am unable to see how he can occupy this position when an action is begun against him which is predicated on his own wrongful act.

Concerning the suggestion that the statute was intended to operate so as to shift the burden of market risks in shuttle-cock fashion between the injured party and the wrongdoer, and to balance differences on the basis of market changes during periods anterior and subsequent to the service of notice under the statute, I am impressed only by its novelty. It has never been considered a hardship on one who has converted property to hold him for the value of the interest converted. This is

merely taking him at his word. If he would deprive another of his property or an interest therein and claim it for his own, why should he not pay its value to the rightful owner? And by what right can he say to the injured party: "I repent, I am sick of my own deal, I have carried the risk as long as I wish, *you must* carry it henceforth?" Surely not by any right conferred by § 7594!

I concur in the majority opinion.

BRONSON, J. (dissenting). Elayer made to plaintiff a note for $562 dated October 14th, 1919, and due October 1st, 1920. To secure the same, Elayer executed a chattel mortgage upon the crops to be grown in 1920 on a half section of land owned by him. This mortgage was recorded in October, 1919. Elayer's share of the crops in 1920 was delivered to defendant at its elevator in Fero, North Dakota. The same consisted of wheat, oats, rye, and flax. On October 4th, 1920, defendant issued seven storage tickets in the name of Elayer to this grain. On this date plaintiff, by letter, notified defendant that he held a chattel mortgage upon the owner's share of the crops grown during 1920 on the premises affected. On January 19th, 1921, plaintiff, through the sheriff as his agent, issued a notice of foreclosure concerning his chattel mortgage upon the crops. Notice was therein given that plaintiff would sell such crops at defendant's elevator at Fero at 2 P. M. on January 29th, 1921. The affidavit for publication of this notice recites such notice was published once, viz.: January 20th, 1920. On January 29th, 1921, plaintiff, through his agent, offered and attempted to sell such amount of the grain covered by the mortgage and deposited with defendant as was necessary to satisfy plaintiff's claims and costs. Upon such foreclosure, defendant failed, refused, and neglected to deliver to plaintiff the grain covered by the mortgage, or the proceeds thereof, or any part thereof, and on such day the same was demanded by plaintiff's agent, the sheriff. Prior to such attempted foreclosure, no demand had been made for the possession of the grain by the mortgagee. On May 13th, 1921, one Anderson instituted an action against Elayer and a garnishment proceeding against defendant herein as garnishee in such action. Plaintiff herein was interpleaded as a defendant in such action. On June 18th, 1921, plaintiff instituted this action for conversion against defendant. Shortly after the grain in controversy

was placed in defendant's custody various and adverse claims were made to the same or to different parts thereof under claims, liens, and mortgages: One Obert Blessum of Rugby, North Dakota, claimed a thresher's lien upon the same in a large amount; plaintiff claimed a lien under his chattel mortgage; Anderson, who sued Elayer, made a claim of right to have the grain sold and applied to Elayer's indebtedness to him.

On July 26th, 1921, defendant herein served upon plaintiff its answer wherein it alleges that since the delivery of grain to its elevator and while the storage tickets were outstanding in Elayer's name, diverse and different persons have made claim to the grain, to some interests therein, or to the proceeds thereof, namely, the plaintiff, one Archie Anderson, Elayer, and Obert Blessum; that defendant, as bailee, has no interests other than to protect itself against loss of damage and see to it, as far as possible, that the person entitled to receive such grain or its proceeds obtain the same; that this defendant has been and is wholly unable to determine who is entitled to such grain or to any part thereof, or to the proceeds thereof; that because of such adverse claims and because of defendant's inability to determine as to whom said grain or proceeds should be delivered, it caused to be deposited the duplicate storage tickets representing such grain in the office of the clerk of the district court; that defendant makes no personal claim of any kind in the action other than to protect itself against loss or damage and to have determined the party or parties who are rightfully entitled to receive such grain or the proceeds thereof.

Pursuant to such allegations all the facts above stated, as well as the facts contained in such allegations of the answer, were stipulated at the trial. It was stipulated that notice of such deposit was duly given and served upon all of the known claimants as by law provided and that the grain and storage tickets representing same were still on file in the trial court. On July 29th, 1921, the defendant, as garnishee, in the action of Anderson v. Elayer made affidavit, reciting principally the facts above stated concerning the receipt and storage of the grain and the claims of adverse claimants and the deposits in court made by the defendant.

The trial court found, in addition to general findings upon the stipulated facts above stated, that plaintiff in the Anderson action in which

he was interpleaded necessarily expended, in protection of his interest, $9.30 sheriff's fees; $2.10 witness fees. That plaintiff necessarily incurred in making the foreclosure $3 printer's fees; $16.50 agent's fees, together with $44.50 foreclosure costs and $11.40 (above mentioned). That defendant has never paid to anyone the value of the grain and has refused at all times to deliver the same, or any part thereof, to plaintiff, that on July 29th, 1921, defendant attempted to deposit the grain with the clerk of the court and for that purpose executed duplicate storage tickets representing the grain received from Elayer and gave notice to parties interested of its intention to deposit the grain by a deposit of such duplicate storage tickets. The trial court made conclusions of law that plaintiff was entitled to recover $679.05 with interest thereon at 6 per cent since January 29th, 1921, together with $11.40, making a total amount of $739.34. That defendant on January 29th, 1921, converted the grain; that its value on such date was far in excess of amount due plaintiff; that, as to defendant, plaintiff made a valid foreclosure; that the chattel mortgage was a first lien upon the grain; that no proper deposit was made and as to plaintiff was void; that the debt due plaintiff is the same debt alleged by plaintiff in the Anderson action and that upon payment of the judgment herein, defendant will be entitled to be subrogated to plaintiff's rights to extent of amount due on January 29th, 1921, viz.: $679.08; that plaintiff was entitled to his costs and disbursements herein. Judgment was so entered, including $21.90 costs and disbursements herein.

Opinion.

It is apparent that the attempted foreclosure proceedings were invalid; the date of publication proved was January 20th, 1920; evidently intended for January 20th, 1921. But such proof afforded no authority for a valid foreclosure sale on January 29th, 1921. Comp. Laws, 1913, § 8125. Plaintiff elected to proceed by notice, and not without notice, under § 8127, Comp. Laws, 1913. This is technical but plaintiff seeks the enforcement of technical rights to make defendant pay his demand with costs of foreclosure and other expenses. Accordingly, the findings and conclusions of the trial court are at least erroneous in holding the foreclosure valid for any purposes herein and in permitting plaintiff to

recover the costs of such attempted foreclosure. Upon what theory the trial court allowed plaintiff to recover against the defendant in this action, his costs incurred in another action (the Anderson action), the record does not disclose; in fact, the record does not disclose what proceedings were taken in the Anderson action or how the plaintiff herein happened to be therein interpleaded. Again, the trial court erroneously allowed this item of costs.

The majority opinion of this court is based upon three general propositions: (1) That proof of the demand and refusal on January 29th, 1921, established a conversion for the reason that no evidence was offered to rebut or explain the refusal; (2) That the proper measure of damages was the market price of the grain on January 29th, 1921, and that the judgment is based upon such market value so established; (3) That no proper deposit was made because defendant has not brought itself within the statute, § 7594, Comp. Laws, 1913.

(1) It is true the record is abbreviated and the facts in some respects neither definite nor clear; practically all of the facts are established by stipulation but with such stipulation were introduced certain exhibits. One of such exhibits, together with the stipulation, contains the evidence that, shortly after the grain was received by defendant, adverse claims were made to the grain. Obert Blessum claimed the thresher's lien. Plaintiff claimed a lien; Anderson made a claim of right. What happened between the time these claims were made and the time of the demand on January 29th, 1921, the record fails to disclose. What reasons actuated the defendant in not complying with the demand on January 29th, 1921, also do not appear. However, when plaintiff made the demand upon defendant on January 29th, 1921, for purposes of foreclosure, he knew that defendant was not a wrongdoer in receiving the wheat and issuing a storage ticket therefor. Sanford v. Duluth & D. Elevator Co. 2 N. D. 6, 48 N. W. 434. He knew further that defendant was merely holding such grain as a bailee for the proper persons entitled thereto and that it claimed no rights of ownership therein; that the reception of the grain constituted a bailment and not a sale. § 3114; State ex rel. Ertelt v. Daniels, 35 N. D. 5, 9, 159 N. W. 17. I am not prepared to hold, directly or inferentially, that the defendant, as such bailee, was then bound on the moment of the demand to deliver the grain or its value, or be held liable for its conversion, without any

right to reasonably inquire or ascertain concerning the conflicting demands made.

(2) The proper measure of damages to which plaintiff was entitled was not the value of the grain on January 29th, 1921. The court did not award plaintiff judgment for such market value. The market value of the grain on January 29th, 1921, as proved, was slightly over $900. The court awarded to plaintiff the amount of his demand, with interest, due on January 29th, 1921, namely, $634.55, plus foreclosure costs, $44.50; total $679.05. The statute permits a recovery in damages for conversion for the value of the property at the time of the conversion, with interest; or the highest market value of the property at the time between conversion and the verdict, without interest, when the action has been prosecuted with reasonable diligence, and a fair compensation for the time and money expended in pursuit of the property. Comp. Laws 1913, § 7168. But, this rule for damages applicable in conversion does not mean that one may unjustly enrich himself at the expense of another. It does not mean that one holding a chattel mortgage for $100 upon grain held by a bailee, both at the time of conversion $1,000 is entitled to recover such $1,000 and thereby enrich himself to the extent of $900.

Plaintiff could recover only his special interest in the property converted. Only the extent of his actual loss. His compensation must be commensurate with the actual injury suffered. Lovejoy v. Merchants State Bank, 5 N. D. 623, 626, 67 N. W. 956; Hanson v. Skogman, 14 N. D. 445, 449, 105 N. W. 90; State Bank v. Hurley Farmers Elevator Co. 33 N. D. 272, 281, 156 N. W. 921. Plaintiff was not entitled, in any event, to recover an amount exceeding his demand. His demand was the amount of the note with interest up to the date of the judgment, together with whatever fair compensation he might have established in the evidence for the time and money properly expended in pursuit of the property. In this regard the trial court erred to the extent of fixing the amount of plaintiff's demand as of the date of January 29th, 1921, with legal rate of interest thereafter, instead of the total amount of plaintiff's demand up to the time of judgment in accordance with the terms of the note.

(3) The trial court held that no proper deposit was made. The majority opinion holds that defendant, in making the deposit, did not

bring itself within the terms of the statute. The question is, If a proper deposit was not made, how can it be made under § 7594, Comp. Laws, 1913, in a conversion action? The majority opinion assigns no reason why the deposit was not made pursuant to the terms of the statute. Upon this record and the stipulation made between the parties, the defendant, on July 19th, 1921, deposited with the clerk of the trial court the grain itself as well as the storage tickets therefor. The stipulation was that "on July 29th, 1921, the said grain was deposited with the clerk by depositing with the clerk duplicate storage tickets representing the same grain; that the defendant did not have possession of or control over the original storage tickets issued for said grain, and that, therefore, defendant made the best deposit that was possible under the physical conditions existing; that said grain and the storage tickets representing same still remain on file in this court as aforesaid." Plaintiff objected to such deposit for the reason that action was instituted June 18th and the attempted deposit was made on July 29th, 1921, and on the further ground that no actual grain was ever delivered to the clerk and that any delivery made was made by depositing duplicate storage tickets and on the further ground that, as to the plaintiff, such deposit came too late. For the purposes of this action, Was there a deposit made of the grain and of the duplicate storage tickets? No objection was specifically made because the actual grain physically was not transferred, in fact to, and within, the office of the clerk. The parties did stipulate that such grain and the storage ticket representing same were still on file with the court. If plaintiff desired not so to stipulate he should have so stated and not stipulated to a fact and thereafter object to the fact concerning which he has stipulated. But, in any event, the storage ticket is the evidence of or for the physical grain. Comp. Laws, 1913, §§ 3,112, 3,113. It was not necessary for plaintiff to demand the identical grain. A fiction of law interposed by which the bailee was entitled to offer in substitution grain of the same grade and quantity. In effect, the intent plainly was to surrender the grain and all evidences thereof into the hands of the depositary. The defendant did not even withhold the right to deduct storage charges. See State ex rel. Ertlet v. Daniels, 35 N. D. 5, 9, 159 N. W. 17.

In McLaughlin v. Dodge Elevator Co. 43 N. D. 231, 235, 174 N. W. 871, the court held that the property or a duplicate storage ticket rep-

resenting it was not deposited with the clerk of the court but that the deposit consisted of an amount of money which was the equivalent of the value of the grain less storage charges on the day the summons was served on the defendant. This also was an action for conversion. This court held that the statute did not authorize the deposit in court of the present value of the property alleged to have been converted at some prior time. I assume, therefore, that, properly, for the purposes of this action, a deposit of both the grain and the storage tickets were made with the clerk of the trial court. If it were so made and due notice thereof was given as has also been stipulated, what was the effect of such deposit in connection with this action?

The statute has been set forth in full in the majority opinion. The pertinent provisions of the statute provide that whenever a bailee, in possession of any personal property, has notice or knowledge of any right or claim of right, of any person in or to any part of such property adverse to the right of any other claimant therefor, he may deliver such property when an action in any form has been commenced for an account of or growing out of the same, to the clerk of the court in which any such action, having reference to such said property or the value thereof, may be pending or out of which any garnishment or other process may issue with reference thereto, and upon giving the notice described in the statute he is thereupon relieved from further liability to any person on account of such property.

I am of the opinion that the record fully discloses, pursuant to the stipulation, that the defendant, as bailee, did have notice and knowledge of rights and claims of rights of persons to such property adverse to the rights of other claimants therefor; that this action was an action commenced on account of such property, namely, the grain; that the defendant, for the purposes of this action, and pursuant to the stipulation, did deliver such property to the clerk of the trial court. In other words, that the terms of the statute were made available to defendant and it came within the terms thereof, pursuant to the facts stipulated.

In McKenzie v. Hopkins, 29 N. D. 180, 150 N. W. 881, an action was brought to determine the ownership of the proceeds of a certain crop. The rights of an owner, a tenant, and chattel mortgagees were involved. Certain crops were shipped to an elevator company. The elevator company sold the same and retained possession of the proceeds.

It then made an application to the district court stating the amount of money received; that there were adverse claims to such money, and requesting the court to designate a depositary. This proceeding was under the alternative provision in § 7594 permitting an application where no suit has been commenced. The court stated that if the elevator company had failed to make an application it probably would have become involved in expensive litigation with all parties to the action, it might have become liable for conversion or other forms of action; that the statute was intended to obviate this risk on the part of the elevator company; that by making this application for deposit the fund could be preserved intact and the elevator company relieved of liability to either of the claimants; that the statute appeared to be a very salutary provision and intended by the legislature to apply to claims of the nature therein concerned. In McLaughlin v. Dodge Elevator Co. supra, rye grown on Mrs. Kerr's farm was delivered to the elevator on August 28th, 1915, and a storage ticket issued to her. On September 1st, 1915, she assigned the same to plaintiff. About that time a thresher's lien was filed against the crop. On September 15th, 1915 and January 27th, 1916, plaintiff made written demand for the rye but the grain was not delivered, pursuant to the demand, because the agent was advised to hold the grain on account of disputes concerning the same. Plaintiff instituted an action of conversion on March 13th, 1916. On that day defendant deposited in court the market value of the grain as it was upon that day at Wolford, North Dakota. The court held that the statute did not authorize the deposit in court of the present value of property alleged to have been converted at some other time; that when the action involves either specific property or its value the statute authorizes *its* deposit in court; that the statute was merely intended to relieve a person who is in a position analogous to that of a stakeholder who is relieved by delivering up the stakes.

In Austin v. March, 86 Minn. 232, 90 N. W. 384, a statute, chap. 329 Minn. Laws, 1895, almost identical in language with quoted provisions of § 7594, Comp. Laws, 1913, was considered. In that case the defendants delivered wheat and flax into Barry's elevator for which storage tickets were issued. Barry gave to defendants some promissory notes as collateral security for payment of the storage tickets. Barry shipped the wheat to a commission firm in Minneapolis. Defendants

subsequently made claim to the wheat and the commission firm paid to them the value of the wheat. Defendants delivered to the commission firm the storage tickets. The commission firm did not know about the notes as collateral security. The makers of the notes, so held as collateral security, paid the amount thereof to defendants. Plaintiff, successor of the commission firm, brought this action to recover the amount paid by the commission house to defendants on principles of subrogation. During this time Barry was insolvent. The defendants answered contesting the right of plaintiff to any part of the proceeds of the collateral security. Barry's trustee appeared in the action and made claims to the money collected on the collateral security. The defendants, before the entry of judgment, paid into court the portion for which the court had ordered judgment in favor of plaintiff and moved for an order relieving them from further responsibility under the law above stated. The court held:

"This statute was intended to meet cases where a person occupies the position of bailee or custodian, unable to determine to whom the property or money held by him rightfully belongs, and to which he himself makes no claim of right or title. To protect such a person from a possible double liability, the statute provides that he may deposit the money or property in court, and thereupon be relieved from further liability to any of the claimants. It was not intended to apply to persons who make personal claim to the property in their possession, but only to those who are disinterested bailees or custodians, having no claim of their own, and not disputing the rights of the various claimants. The design and intention of the legislature was to give in simplified form the relief granted by courts of equity at common law by the proceeding known as an interpleader, and the rules and principles of law applicable to that proceeding must govern and control proceedings under the statute."

It is apparent that defendant is in the position of a mere stakeholder. It has claimed no rights in the grain. It has asserted nó defense against the validity of plaintiff's lien. It has surrendered and deposited in court the specific property and the evidences thereof. It has given notice to all parties interested. It stands in a position of indifference concerning the disposition of the property. It has done all that a stakeholder could do in order to relieve itself of further liability; for it

has surrendered the property and all right and control thereover. Accordingly, in my opinion, the defendant made a proper deposit under the terms of the statute, pursuant to the facts in this record. The statute was enacted for the very purpose of giving an opportunity to a stakeholder to thus relieve himself from further liability. Having made such proper deposit it was relieved from further liability to plaintiff on account of the bailment of such property. But this deposit did not serve to relieve defendant of his liability that had accrued prior to the time of making such deposit. Whatever loss plaintiff had suffered, up to the time of the deposit, was recoverable against defendant within the rule of compensation permitted a lien holder in an action for conversion. If it be asserted, and the proof should show, that the difference between the price or value of the grain on January 29th, 1921, and the price or value at the time when the deposit was made would occasion loss and damage to plaintiff, the answer is that the liability for such loss is not absolved by the statute or the terms thereof. But, if, on the contrary, after the deposit was made the value of the grain should lessen one half or should double in value, the contingent loss or profit as the case may be, is placed upon the parties claiming right thereto and not upon the stakeholder who by the deposit has released his bailment of such property. In other words, the statute fulfills the purpose of relieving a bailee from becoming a speculator in the market concerning the value of grain whereby he either may suffer gain or loss through the rise or depreciation in the price of grain after it has made a proper deposit. Erroneously, in my opinion, the majority opinion serves to emasculate the statute and its purposes by practically permitting no deposit to be made in any action for conversion; for, manifestly, plaintiff herein had no cause of action until a conversion occurred. In my opinion the trial court should have adjudicated the amount of plaintiff's demand to be the principal of the note with interest at 10 per cent up to the date of the judgment. It should have determined the same to be a first lien upon the grain, or the value thereof. It should have ordered a sale of the grain or the delivery thereof to plaintiff for purposes of foreclosure. It should have directed a personal judgment against defendant for the costs accrued up to the time of the deposit made and in case of deficiency in the proceeds of such grain or upon the sale thereof, a personal judgment against defendant for the

amount of loss sustained by reason of the depreciation, if any, existing and resulting between the value of the grain when demanded and the value when deposited. Thus, in my opinion, would the statute be given effect and the plaintiff be fully compensated within the rule of compensation allowable to him.

ANGELINE MALHEREK, Appellant, v. THE CITY OF FARGO, a Municipal Corporation, Respondent.

(191 N. W. 951.)

Appeal and error — procedure adopted by parties during trial cannot be attacked in appellate court as erroneous.

1. Where during the course of a trial the parties adopt a certain procedure, they cannot in the appellate court assert that such procedure was erroneous.

Municipal corporations — knowledge of police officer of condition of icy sidewalk held not notice thereof to municipality.

2. Chapter 70, Laws 1915, provides: "All municipalities in the state of North Dakota shall be absolutely exempt from all liability to any person for damages for injuries suffered or sustained by reason of accumulation of snow and ice upon sidewalks within such municipality, unless *actual knowledge* of the defective, unsafe, or dangerous condition of such sidewalk or crosswalk shall have been possessed by the mayor, board of city commissioners, police officer, or marshal of such municipality forty-eight hours previous to such damage or injury, and such actual knowledge shall in no case be presumed from the fact of the existence of such condition, but in all cases the same shall be proved as an independent fact." In the instant case it is held the trial court was correct in ruling that, as a matter of law, plaintiff had failed to show the *actual knowledge* required by the statute.

Opinion filed December 22, 1922. Rehearing denied January 16, 1923.

Appeal and Error, 4 C. J. § 2635 p. 718 n. 31; Municipal Corporations, 28 Cyc. p. 1389 n. 9; p. 1498 n. 5; p. 1507 n. 58.

From a judgment of the District Court of Cass County, *Cole*, J., plaintiff appeals.

Affirmed.

Taylor Crum, for appellant.

Spalding & Shure, for respondent.

Note.—On liability of municipal corporation for injuries from snow or ice on sidewalk, see note in 13 A.L.R. 17. See also 13 R. C. L. 412; 4 R. C. L. Supp. 815.

As to the liability of municipal corporations because of injuries sustained on icy sidewalks, see note in 47 Am. Rep. 746, 747.

CHRISTIANSON, J. This action was brought to recover damages for injuries which plaintiff claims she sustained on the evening of January 11, 1921, as a result of an accumulation of ice on a sidewalk in the city of Fargo, in this state. The case came on for trial in the district court of Cass county, before a jury empaneled to try the same. Certain witnesses were sworn in behalf of the plaintiff, and at a certain point of the trial, the question arose as to whether the plaintiff had, or had not, established such knowledge on the part of an officer of the city, as to charge it with liability under chapter 70, Laws 1915, which reads as follows:

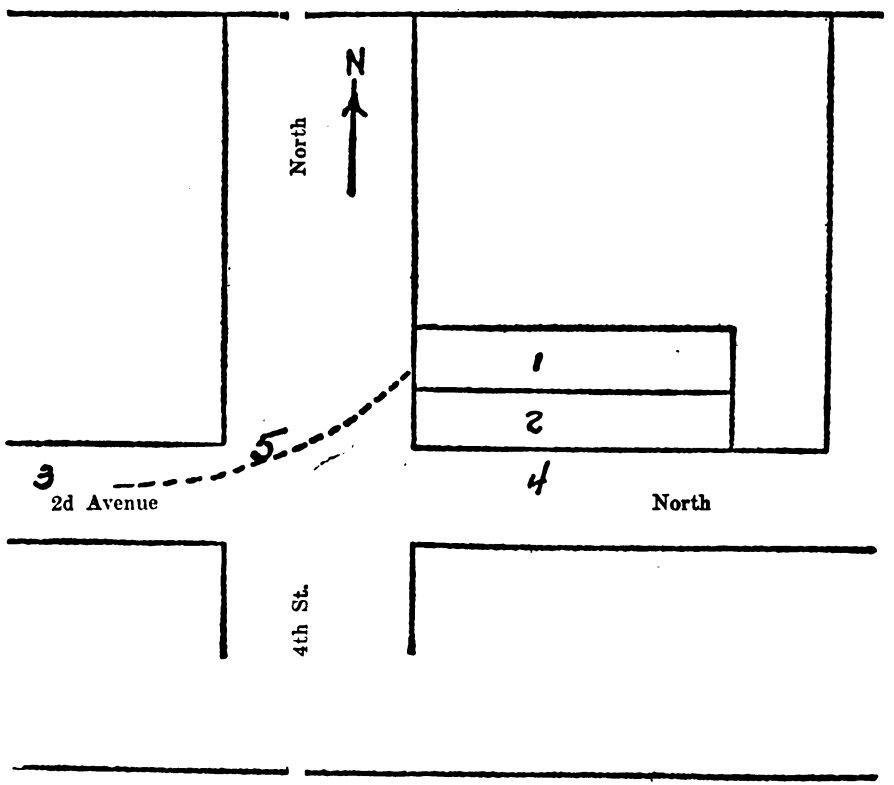
"All municipalities in the state of North Dakota shall be absolutely exempt from all liability to any person for damages for injuries suffered or sustained by reason of the accumulation of snow and ice upon sidewalks within such municipality, unless actual knowledge of the defective, unsafe, or dangerous condition of such sidewalk or crosswalk shall have been possessed by the mayor, board of city commissioners, police officer, or marshal, of such municipality forty-eight hours previous to such damage or injury, and such actual knowledge shall in no case be presumed from the fact of the existence of such condition, but in all cases the same shall be proved as an independent fact. In no event shall any municipality in this state be liable in damages for any injury occasioned through the mere slippery condition of such sidewalk or crosswalk due to the presence of frost or loose snow thereon."

The evidence adduced by the plaintiff on this point consisted of the testimony of one Keefe, who was a member of the police force of the city of Fargo, at the time the plaintiff claims to have been injured, and of one Loucks. According to the allegations in the complaint, the accident occurred on the "cement sidewalk on the north side of Second avenue north, in said defendant city at a point therein and thereon opposite to and south of that certain house known and designated as number 201, Fourth street north, in said city of Fargo, the said sidewalk being along the south side of the west 50 feet of lot numbered one in block numbered eleven of Keeney & Devitt's Addition to the said city of Fargo."

Keefe testified that he lived in the house immediately north of the house described in the complaint. That at the time of the accident and for some time prior thereto his hours of service on the police force

were from 4:00 o'clock in the afternoon until midnight. That in walking to and from his work he would walk in a westerly direction on the sidewalk on the north side of Second avenue, north, and that he generally took "a short cut" from his house to this sidewalk.

The following sketch visualizes the place of the alleged accident the house occupied by the policeman, and the route traveled by him in going to and from his work.



1—Keefe's Residence.
2—House in front of which accident occurred.
3—Sidewalk used by Keefe in going to his work.
4—Sidewalk on which accident occurred.
5—General course of route taken by Keefe as "short cut."

Keefe testified that he was familiar with the locality generally, and also familiar with the house in front of which the accident is said to have occurred. There is no evidence, however, that Keefe had any knowledge of the existence of any accumulation of snow and ice on the sidewalk, nor is there any evidence that there was any accumulation of ice and snow thereon. As has already been stated, Keefe testified that in going to and from his work, he generally took a short cut from his house to the sidewalk running in a westerly direction, on the north side of 2d avenue north. The evidence does not disclose the exact point at which he reached the sidewalk when taking such "short cut." The plaintiff introduced evidence tending to show that there was a heavy snow fall on the 31st day of December; the accident is said to have occurred on the 11th of January. There is no evidence to show that Keefe ever walked over the sidewalk in question, at any time intervening these dates. So far as the evidence here shows, Keefe walked from his house across 4th street to some point on the sidewalk running on the north side of Second avenue, south, and proceeded thereon in a westerly direction to his work; and, of course, in going to his work, his back would be toward the place where the accident is said to have occurred. It is true, that in returning from his work, he would be facing in that direction, but as already stated, the evidence shows that he returned from his work after midnight. The testimony of Loucks is to the effect that he slipped and fell on the sidewalk the same day that the plaintiff was injured, and that he reported this fact to the city authorities that same day.

During the examination of the plaintiff, when she was asked some questions with reference to, or leading up to, the alleged accident, the attorney for the defendant objected on the ground, that the plaintiff should first show actual knowledge on the part of the city, of the defective, or dangerous condition of the sidewalk, as required by the statute heretofore quoted. Upon this objection being made, the court clearly indicated that he did not believe this objection to be well taken; that the question of actual knowledge on the part of the city would not be material until the fact of the accident had been established. The city attorney, thereupon, reiterated his contention that the evidence relating to the accident or injury complained of, was immaterial until knowledge on the part of the city had been established. Plaintiff's

counsel thereupon stated: "I think there is something in what Mr. Shure, defendant's attorney, says, and *there is no need to take up time here.* It is all a matter of the order of proof, and I will withdraw this witness just for the present."

The plaintiff thereupon placed upon the stand, the witness Keefe, and next the witness Loucks. While the witness Loucks was upon the stand, the court said:

"Mr. Loucks has testified that he went down about 11 o'clock, I believe, the day she claimed the accident happened and notified the city; now, that disposes of that proposition; now have you anything further, Mr. Crum, by anyone else upon the knowledge within the statutory time of the city?"

Mr. Crum (plaintiff's attorney): "No."

Mr. Crum: "I state this, *the only evidence we have as to the knowledge of the city, or of the policeman, is that this policeman walked there every day; and Mr. Loucks went down and notified them; that is all the evidence we have got.*"

The court thereupon directed the jury to retire. After jury had retired, the court said:

"The court must, to the best of its understanding, apply the law and interpret it as it understands the law to be. In my view of the law of this case there is not a sufficient basis here for proceeding with this case. In other words, that under the statute of 1915, under the proof that has been put in on the part of the plaintiff, it is not sufficient to bring actual knowledge to the City of Fargo, through any of its officers from which it would have actual knowledge, and for that reason the court is of the opinion that there is no foundation for proceeding with the trial of the case further on its merits. What was your objection, Mr. Shure?"

Some further colloquy was had and the court made a further statement with respect to its interpretation of the statute under consideration, and adhered to the opinion already expressed, that the proof offered on the part of the plaintiff was insufficient to establish actual knowledge on the part of the city of the alleged defects, or dangerous condition, of the sidewalk within the time required by the statute. The defendant's counsel thereupon said:

"The effect of that ruling, as I understand it, is that the testimony

adduced from the witness Keefe is not sufficient to go to the jury as to his knowledge."

To this the court replied: "Yes; that is the position of the court."

Plaintiff's counsel thereupon said:

"We knew in the beginning that no policeman on the force would ever admit knowing anything; but we assumed that they would all be honest, without any reflections on them; and we further assumed that when we showed that a policeman was living right in the immediate locality and walked up and down there every day that that would be sufficient evidence of his knowledge to go to the jury as to whether he would have knowledge of it, of course, if that is not sufficient evidence to go to the jury there is no case here."

The court thereupon reiterated its former statement to the effect that the testimony of the witness Keefe did not establish actual knowledge as required by the statute. The jury was thereupon called in, and the court said: "Now, I suppose under the ruling of the court there is only one thing to do, that is dismiss the action."

The court thereupon proceeded to, and did, discharge the jury and ordered a dismissal of the action.

On this appeal, appellant urges that the court erred in ordering a dismissal of the case; that in any event he was entitled to have the cause submitted to the jury under provisions of chapter 133, Laws 1921.

In our opinion, the question of the propriety of the procedure is not involved. As has been noted, plaintiff's counsel specifically acquiesced in the suggestion made by defendant's counsel, that it was incumbent upon the plaintiff to prove knowledge on the part of some officer of the city, required by chapter 70, Laws 1915, before any evidence relating to the accident could be admitted. This acquiescence by plaintiff's counsel was after the trial court had clearly indicated its views to the contrary. Plaintiff's counsel, in his statement, indicated that this procedure was desirable as "there is no need to take up time here." It will also be noted that plaintiff's counsel specifically admitted that he had no further evidence of any kind to offer, which would tend to establish actual knowledge on the part of the city, within the purview of chapter 70, Laws 1915. Some time subsequent to the dismissal of the action, plaintiff moved the court in the alternative that the order of dismissal be vacated, or the question whether the evidence adduced

on the part of the plaintiff was a sufficient showing of actual knowledge on the part of the police officer Keefe, so as to make that question one of fact for the jury be certified to the supreme court for determination. That was the only question which plaintiff asked to have certified and was the only question purported to be certified to this court, for determination. No question was raised as to the regularity or propriety of the procedure adopted in the district court. See Malherek v. Fargo, 48 N. D. 1109, 189 N. W. 245. In our opinion the record as a whole clearly indicates that the plaintiff agreed that the question whether she had made sufficient proof of actual knowledge required under chapter 70, Laws 1915, should be determined, as an independent proposition, before the parties should be put to the trouble and expense of introducing evidence on the other questions involved, such as the extent of injuries, etc.,—evidence which would avail plaintiff nothing if she was unable to establish the actual knowledge on the part of some officer of the city as required by chapter 70, Laws 1915. Hence the question of the regularity or propriety of the practice adopted is not before us. The parties are controlled by the record which they made. It is a maxim of our jurisprudence that "acquiescence in error takes away the right of objecting to it." Comp. Laws, 1913, § 7250; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Dring v. St. Lawrence Twp. 23 S. D. 624, 122 N. W. 664; Farr v. Semmler, 24 S. D. 290, 123 N. W. 835; Whaley v. Vidal, 26 S. D. 300, 128 N. W. 381. Also that "he who consents to an act is not wronged by it." Comp. Laws, 1913, § 7249; State v. Hayes, 23 S. D. 596, 122 N. W. 652; Gorman v. Madden, 27 S. D. 319, 131 N. W. 290, Ann. Cas. 1916D, 842.

The sole question, therefore, presented on this appeal is whether the trial court was correct in ruling that the evidence adduced by the plaintiff was insufficient to show actual knowledge of the alleged dangerous or defective condition of the sidewalk by one of the officers of the city as required by chapter 70, Laws 1915. In our opinion, the trial court was correct in so holding. While we do not believe that the statute requires such knowledge to be established by direct evidence, it does require a party, who seeks to recover damages from a city, occasioned by an accident, due to ice and snow on a sidewalk, to establish *actual knowledge* of the defective, unsafe, or dangerous condition of the sidewalk, by the mayor, board of city commissioners, police officer, or mar-

shal of the municipality, forty-eight hours previous to the injury. The statute further expressly provides that such actual knowledge shall in no case be presumed from the fact of the existence of the condition, but that the same, in all cases, must be proved as an independent fact. It is the duty of the court to give effect to this statute. It is a matter of common knowledge that this statute was enacted to change the rule formerly existing, as declared by this court in Jackson v. Grand Forks, 24 N. D. 601, 45 L.R.A.(N.S.) 75, 140 N. W. 718. If the rule now in force is as contended for by plaintiff's counsel, then the rule has not been changed. In this case there is no testimony, direct or circumstantial, to the effect that the policeman Keefe knew of any accumulation of ice or snow upon the sidewalk. It follows, therefore, that the plaintiff failed to establish the essential fact required by chapter 70, Laws of 1915, in order to impose liability upon the city, and the trial court was correct in so ruling.

On the oral argument plaintiff's counsel suggested that he might, or would, have been able to supply any possible defect in the proof, provided the trial had been permitted to continue in the usual way. As has already been noted, his statement to the trial court was to the contrary. He informed the trial court that he had no more evidence tending to establish actual knowledge on the part of the city. The trial court did not even suggest, let alone compel, the adoption of the procedure of which plaintiff now complains. The trial court permitted the parties to formulate their own procedure, and ruled upon the questions they presented under it. No showing was made in the trial court either that the statement of plaintiff's counsel upon the trial was erroneous, and that he, plaintiff, in fact had (and through inadvertence failed to offer), other evidence tending to establish actual knowledge on the part of Keefe, or some other officer of the city; or that such evidence has been discovered subsequent to the trial.

Affirmed.

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

BRONSON, J. (specially concurring). I feel constrained to concur by reason of the position taken by plaintiff's counsel when questioned by the court concerning the extent of his evidence and its effect with

reference to actual knowledge. I do not commend the practice, however, of disposing a cause of action upon statements of counsel and not upon the evidence presented in an orderly and logical way.

On petition for rehearing.

CHRISTIANSON, J. Plaintiff has petitioned for a rehearing. Attention is called to certain allegations in the complaint, relating to the construction and location of the sidewalk where the accident occurred, and the condition of the roof and gutter on the house immediately adjacent thereto. In plaintiff's brief on this appeal it is said that these conditions "unquestionably caused large quantities of melted snow-water to be discharged upon the sidewalk in question, which, under the climatic conditions of Fargo, would necessarily result in covering said sidewalk with thawing and freezing snow and ice." And it is contended that the conditions thus alleged state a cause of action for actionable negligence, wholly outside of the scope of chapter 70, Laws 1915. In our opinion, this contention is not well founded. Chapter 70, Laws 1915, by its express terms, applies to all cases where injury has been sustained by reason of the accumulation of snow and ice upon a sidewalk. No distinction is made between a case where the accumulation is due to natural causes and where it is due to artificial conditions. The statute applies as well in the one case as in the other. According to the averments of the complaint, the accumulation of ice and snow was the primary and direct cause of whatever injury plaintiff may have sustained. Hence, the case falls within the provisions of chapter 70, Laws 1915.

It is also contended that the court erred in concluding that the plaintiff, in effect, consented to the peculiar procedure adopted upon the trial of the case. The facts upon which this conclusion is based were fully set forth in the former opinion and a reconsideration of the question has not altered our views.

Rehearing denied.

SARAH E. HELLSTROM, Respondent, v. FIRST GUARANTY BANK, a Corporation, Appellant.

(191 N. W. 963.)

Pleading — specific recitals as to ownership through chattel mortgages in complaint for conversion controls allegations of general ownership.

1. In a complaint for conversion, where there are allegations of general ownership and right of possession followed by specific recitals setting forth a special ownership through chattel mortgages, such specific recitals control in determining the sufficiency of the complaint in stating a cause of action.

Chattel mortgages — complaint alleging special interest through chattel mortgage, but failing to allege grounds entitling plaintiff to possession, held not to state a cause of action.

2. In this state, where a chattel mortgage is a mere lien, and as such transfers no title to the property mortgaged, a complaint, in an actionforconversion, which alleges a special interest and right of possession in plaintiff by reason of unpaid demand notes secured by chattel mortgages, and the wrongful conversion of the property by a defendant not the mortgagor, but which fails to allege any demand for payment, or breach of condition stipulated in the mortgage which entitles the mortgagee to possession of the property, fails to state a cause of action.

Opinion filed January 22, 1923.

Chattel Mortgages, 11 C. J. § 1 pp. 399 n. 3; § 316 p. 611 n. 80. Pleading, 31 Cyc. p. 85 n. 38.

Action for conversion in Burleigh County, *Nuessle*, J.

Defendant has appealed from an order overruling a demurrer.

Reversed.

E. T. Burke, for appellant.

Theodore Koffel, for respondent.

Statement.

BRONSON, Ch. J. In an action for conversion defendant has appealed from an order overruling a demurrer.

The allegations of the complaint, necessary to be stated, are substantially: That plaintiff, on November 22nd, 1921, was the owner of, and entitled to the possession of, certain personal property under, and by virtue of, two chattel mortgages made by the Rex Theatre Company to plaintiff; that one mortgage, dated May 3d, 1920, secured one note for

$803.12 dated March 27th, 1920, due and payable on demand, with interest at 10 per cent per annum, no part of which has been paid; that another chattel mortgage dated July 7th, 1920, secured one note, dated May 8th, 1920, for $128 and another note, dated June 28th, 1920, for $1,269.36 payable on demand with interest at 10 per cent per annum, no part of which has been paid; that there is now due and unpaid on such notes $2,588.29; that on November 22nd, 1921, the defendant, without knowledge or consent of plaintiff, seized the property mortgaged and sold and converted the same, to plaintiff's damage, through defendant's wrongful act, in the sum of $2,588.29.

Defendant demurred to the complaint upon the ground that it failed to state a cause of action.

Decision.

Upon the pleadings it may be conceded that the allegation that defendant converted the property was sufficient to permit plaintiff to introduce evidence to prove a conversion including a demand upon, and refusal by, defendant to deliver the property mortgaged to plaintiff. More v. Western Grain Co. 31 N. D. 369, 378, 153 N. W. 976. Further, that in order to state a cause of action in conversion it was only necessary for the complaint to show that the plaintiff was the owner of, or had a special interest in, the property and the value of such special interest; that plaintiff was entitled to its possession; and that defendant had wrongfully converted it. Miller v. National Elevator Co. 32 N. D. 352, 355, 155 N. W. 871.

However, where general allegations of ownership and right of possession are followed by recitals alleging a special interest or ownership by virtue of a chattel mortgage, the sufficiency of such allegations concerning ownership and right to possession are governed by the special recitals concerning the special interest and right to possession. Ibid.; First Nat. Bank v. St. Croix Boom Corp. 41 Minn. 141, 42 N. W. 861; Raymond Bros. v. Miller, 50 Neb. 506, 70 N. W. 22.

Tested by these principles the complaint is defective because it does not allege plaintiff's right of possession at the time of the alleged conversion. The only manner in which any right of possession in the plaintiff can be spelled out of the complaint is through the general

allegation of ownership; and that plaintiff was entitled to possession on November 28th, 1921. But the specific recitals concerning plaintiff's special interest control. They do not show that plaintiff was entitled to the possession of the mortgaged property at the time of the alleged conversion.

It may be conceded that the indebtedness, for which the chattel mortgages stood as security, was evidenced by demand notes; that these demand notes are deemed to be due and payable from the time of their delivery. Shuman v. Citizens State Bank, 27 N. D. 599, 604, L.R.A. 1915A, 728, 147 N. W. 388. But, the failure to pay such demand notes did not give, ipso facto, to the mortgagee the right of possession in the absence of an averment to that effect, so stipulated in the provisions of the mortgage. In this state the mere execution of the mortgage does not entitle the mortgagee to the possession of the property mortgaged. Comp. Laws, 1913, § 6740. It is a lien and as such transfers no title to the property subjected to the lien. Comp. Laws, 1913, §§ 6709, 6739. This court has heretofore held that in this state a chattel mortgage in the usual form does not transfer title; nor does it confer the absolute right of possession even after condition broken; that, until the right is definitely asserted and possession is demanded by the mortgagee, it is a mere lien. James v. Wilson, 8 N. D. 186, 189, 77 N. W. 603. See 11 C. J. 558. The complaint fails to allege a demand for payment or any breach of condition stipulated in the mortgage, which entitled the mortgagee to possession of the property at the time of the alleged conversion. This demand affects the right of possession and is not the demand which serves to establish proof of the act of conversion. This action is brought against a third party, not against the mortgagor. The demurrer should be sustained. The order is reversed with costs.

BIRDZELL and JOHNSON, JJ., and COOLEY and BERRY, Dist. JJ., concur.

CHRISTIANSON and NUESSLE, JJ., did not participate.

DORA BORDSON, Appellant, v. NORTH DAKOTA WORKMEN'S COMPENSATION BUREAU, Respondent.

(191 N. W. 839.)

Master and servant — rule of construction of forfeiture provisions of insurance contract applicable to workmen's compensation claims.

1. The primary object of all insurance contracts is to afford indemnity, and forfeiture provisions will be construed, if possible, so as to avoid forfeiture and afford indemnity. This rule is applicable to obligations created by the North Dakota Workmen's Compensation Act as regards claims for injury or death.

Master and servant — claim against workmen's compensation fund established.

2. For reasons stated in the opinion it is *held* that the plaintiff has established a valid claim against the Workmen's Compensation Fund.

Opinion filed December 30, 1922. Rehearing denied January 26, 1923.

Workmen's Compensation Acts, C. J. § 34 p. 40 n. 95; § 114 p. 115 n. 37. Insurance, 32 C. J. § 1 p. 975 n. 6; § 259 p. 1150 n. 66, 67; § 265 p. 1155 n. 2.

From a judgment of the District Court of Ramsey County, *Buttz*, J., plaintiff appeals.

Reversed.

H. A. Libby, for appellant.

S. W. Thompson, Philip Elliott, and *L. J. Wehe*, for respondents.

CHRISTIANSON, J. On September 9, 1920, plaintiff's husband (J. W. Bordson) was accidentally killed at Hampden, North Dakota. At the time of his death he was in the employ of the St. Anthony & Dakota Elevator Company, and he was killed while engaged in the performance of his work. The plaintiff duly presented a claim to the Workmen's Compensation Bureau. The claim was rejected on the ground that at the time the accident occurred, viz., on September 9, 1920, "the employer (the St. Anthony & Dakota Elevator Company) was not insured, the insurance having been duly canceled prior to" that date. Plaintiff thereupon appealed to the district court from the decision of the bureau. The district rendered judgment in favor of the bureau, and plaintiff has appealed to this court.

Note.—On rule of construction of forfeiture clause of insurance contract, see 14 R. C. L. 926; 3 R. C. L. Supp. 317; 4 R. C. L. Supp. 931; 5 R. C. L. Supp. 787.

Most of the facts in the case were stipulated upon the trial. It is admitted that the deceased, at the time of his death, was engaged in an occupation covered by the provisions of the Workmen's Compensation Act. It is also admitted that the deceased was covered by insurance in the Workmen's Compensation Bureau, from July 1, 1919, up to September 4, 1920. But, it is contended by the defendant Bureau, that the insurance covering the employees of the St. Anthony & Dakota Elevator Company, was canceled on that date, and was not reinstated until September 13, 1920, and that in the period intervening these two dates, there was no insurance covering the deceased, or any of the employees of the St. Anthony & Dakota Elevator Company.

The Workmen's Compensation Act was enacted by the legislative assembly in 1919. It became operative so as to afford insurance protection July 1, 1919. The St. Anthony & Dakota Elevator Company operates a number of grain elevators in this state, wherein it employs a number of employees. Sometime prior to July 1, 1919, the elevator company duly prepared and caused to be filed with the bureau pay-roll reports; it also paid the Bureau an advance premium upon an estimated pay roll, for the yearly period commencing July 1, 1919, and ending June 30, 1920, as based upon the rates adopted and published by the bureau. The bureau adopted certain rules to become effective July 1, 1920, among which were the following:

"Remittance of the premium of each and every employer should be in the hands of the bureau not later than ten days after the date which appears on the settlement sheet statement."

"Failure of any employer to have his premium payment in the hands of the bureau within sixty days after expiration date, shall automatically cancel his insurance, whereupon such employer be declared in default."

On or about June 18, 1920, the bureau sent the elevator company a blank pay-roll report with directions to fill them out and return them to the bureau. The purpose of these reports is to enable the bureau to estimate the premium for the next year, and, also, to compute the additional premium, if any, due for the past year. The elevator company caused the report to be prepared and returned to the bureau. The bureau returned it with request that the corporate seal be attached. The corrected report reached the bureau on or about August 16, 1920.

On August 24, 1920, the Bureau prepared and sent a settlement sheet to the elevator company. According to such settlement sheet there was a balance of $1,896.58 coming to the Bureau on premium for the insurance carried from July 1st, 1919 to June 30, 1920, inclusive; and the estimated premium for the year July 1, 1920 to June 30, 1921, was $4,112.50, making a total of $6,009.08.

The settlement sheet statement was divided into two parts. The first part dealt with the period beginning July 1, 1919, and ending June 30, 1920. The second part dealt with the period following, and reads as follows:

"*For period beginning July* 1, 1920, *ending June* 30, 1921.

Manual.	Advance Estimate Pay Roll.	Rate.	Advance Estimate Premium.
8304	$125,000.00	2.75	$3,437.50
8207	20,000.00	2.25	675.00
			$4,112.50

Amt. of Prem. due the State Ins. Fund, $6,009.08."

We do not have before us the original exhibits, but it appears that there appeared on the back of such settlement sheet certain "instructions," among which were, that the premium payment must reach the Bureau not later than ten days after the date appearing on the settlement sheet, and that failure to do so would cancel the insurance protection. It is the custom of the elevator company to pay its current bills about the 10th of each month, and on receipt of the settlement sheet it was placed with current bills, to be paid at the usual time according to its custom, which would be about September 10th. No employee of the company had any actual knowledge of the "instructions" purported to be given on the back of the settlement sheet, or of the rules which we have quoted above. The evidence further shows that on September 7, 1920, the Workmen's Compensation Bureau wrote a letter to the elevator company, stating that the protection afforded by the fund was canceled, also, that questions of rates or classifications did not permit delay in payment of renewal premium, and, further, that if the amount due was not paid immediately, the name and amount due would be certified to the office of the attorney general for collection as

provided in the regulations of the Bureau. It appears that this letter was received by the defendant on September 8th or 9th, and that the defendant at once prepared a check, or voucher, in payment of the premium, in accordance with the settlement sheet, which check was in the amount of $6,009.08, that is, it included the total amount of the additional premium from July 1, 1919 to June 30, 1920, inclusive; and the estimated premium from July 1, 1920 to June 30, 1921, inclusive, as per the settlement sheet. The voucher issued by the elevator company, on its face, specifically stated that it was payment, as per such statement. The check or voucher did not reach the Bureau until after the accident in controversy here. The check was cashed by the Bureau in due course. The employees of the Bureau, however, testify that the check was not received in payment of premium for the period intervening July 1, 1920, and September 13, 1920. They say that the insurance was reinstated or put in force as of, and to begin on, September 13, 1920, and to continue for a period of one year from that date. And it is said that this is the practice of the Bureau in dealing with cases where insurance is cancelled for failure on the part of the employer to pay premium.

After the accident had been reported, the Bureau, in a letter written by its director of claims, dated September 17th, 1920, forwarded claim forms to the superintendent of the elevator company. Special attention was called to the fact that "there must be information as to the day, month, and year, on which the dependents were born." On September 29th, the director of claims wrote the superintendent of the elevator company, as follows:

"We acknowledge receipt of certain reports in connection with the death of J. W. Bordson while in your employ at Hampden, North Dakota.

"We return herewith claim form 10, physician's certificate in proof of death, for the reason the affidavit of physicians at the bottom of the page has not been executed. Kindly give this matter your prompt attention and forward to us by return mail."

Plaintiff contends that under the facts established, she is entitled to recover, and in our opinion that contention must be sustained. While the provisions of the Workmen's Compensation Act are in many instances ambiguous and uncertain, one thing is certain,—the law-makers

intended the act to be compulsory. That is, the act makes it compulsory for all employers to come in under it, and to pay the required premium. It does not give an employer any option in the matter at all. He cannot choose whether he will pay the premium and get the benefit of the indemnity afforded by the compensation fund, or obtain the insurance protection elsewhere, or carry the risk himself. The act requires every employer to furnish the Bureau, upon request, the information required by it to carry out the purposes of the act (§ 5). It requires the Bureau to furnish to the employers, blanks upon which to furnish information relating to the estimated pay roll for twelve months next succeeding the date on which such employer is or becomes an employer within the meaning of the act. This information is for the purpose of enabling the Bureau to fix the premium. The statute says:

"Any employer who wilfully misrepresents to the Bureau the amount of pay roll upon which the premium under this act is based shall be liable to the state in ten times the amount of the difference between the premium paid and the amount the employer should have paid. The liability to the state under this section shall be enforced in a civil action in the name of the state, and all sums collected under this section shall be paid into the Workmen's Compensation Fund." (Sec. 5).

"*Every employer* subject to this act shall contribute to the North Dakota Workmen's Compensation Fund in proportion to the annual expenditure of money by such employer for the service of persons subject to the act, the amount of such payments and the method of making the same to be determined as hereinafter provided." (Sec. 6).

"*Every employer* subject to this act, *shall pay annually* into the Workmen's Compensation Fund the amount of premium determined and fixed by the Workmen's Compensation Bureau for the employment or occupation of such employer, the amount of which premium to be paid by such employer to be determined by the classification, rules and rates made and published by the Bureau." etc. (Sec. 7).

"If an employer shall default in any payment required to be made by him to the Workmen's Compensation Fund, the amount so due shall be collected by civil action in the name of the people of the State as plaintiff, and it shall be the duty of the Workmen's Compensation Bureau to certify to the attorney general of the state from time to time the names and places of business of all employers known to the Bureau to

be in default for such payments for a longer period than two weeks, and the amount due from each such employer, and it shall then be the duty of the attorney general forthwith to bring, or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due, and the same when collected, shall be paid into the Workmen's Compensation Fund, and such employer's compliance with the provisions of this act requiring payments to be made to the Workmen's Compensation Fund shall date from the time of the payment of said money so collected as aforesaid to the state treasurer for credit to the Workmen's Compensation Fund." (Sec. 8).

"No agreement by an employee to waive his rights to compensation under this act shall be valid." (Sec. 21).

It is clear that the legislature intended to compel every employer falling within the provisions of the act to come in under it and make the payments therein provided for. It is true the act provides that employers, who are subject to its provisions and fail to comply with §§ 6 and 7 thereof, shall not be entitled to its benefits during the period of such noncompliance, but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injury; and that in such action the employer shall not be permitted to invoke the fellow-servant rule, assumption of risk, or contributory negligence as a defense.

In construing the various sections of the Compensation Act, it is well to remember that this piece of legislation was intended to bring into being a new system. The legislature realized that in the first instance it would be necessary to bring the employers in, that is, make them as it were, members of the fund and compel them to furnish the Bureau with the necessary information to the end that the amount of premium required might be computed. The language utilized indicates that this matter,—that of putting the act into effect, and compelling, if necessary, by action all employers to come in and become contributors to the compensation fund,—was one of the things which the legislature deemed of great importance. The act by its terms indicates that it is not intended to afford automatic protection so far as employers are concerned. In order to be protected it is essential that an employer come in under the act and, as it were, become a member of the compensation

fund. Whether the act does or does not afford such protection as far as employees are concerned may be another question, which, however, needs no consideration here.

In this case we are not dealing with the situation where an employer had refused or failed to come in under the act. The employer had come in when the act became operative; had furnished the required information and made payment of the estimated premium, and as a result a contract had been created by operation of law between the employer and the Bureau precisely of the same nature that would have been created if the employer, in the absence of the statute, had entered into a contract with an insurance company under the same terms and provisions as embodied under the statute in consideration here. The beneficiary of such contract is in the first instance the employee rather than the employer. The relations created here, however, are at least as strong as those which would have existed in the case supposed. In the supposed case the contract could be terminated by the action of the parties; but here, by virtue of the statute, the relation between the insured, insurer and beneficiary is supposed to be continuous, and the employer cannot, whatever his desire may be, avoid liability for premiums. In this case, however, there is nothing to indicate that the employer had any intention to avoid the payment of premium. On the contrary, we believe that the only conclusion reasonably to be drawn from the facts and circumstances here is that the elevator company intended to continue to pay premiums to the compensation fund; and that the payment made by the check drawn September 9, 1919, would have been made at or about that time, without regard to whether the accident involved here had or had not occurred. It is true, as has been indicated, the statute imposes upon the employer as a penalty for violating the terms of the contract, a denial of the protection afforded, but it nowhere exempts him from obligation to pay the premiums. On the contrary it expressly recognizes that such obligation continues until discharged by payment. The purpose of all insurance is to afford indemnity, and all forfeiture provisions in insurance contracts will be construed, if possible, so as to avoid forfeiture and afford indemnity. Beauchamp v. Retail Merchants Asso. 38 N. D. 483, 165 N. W. 545. In our opinion, the Workmen's Compensation Act should be so construed. The very purpose of the act, according to the recital in § 1

thereof, is to afford "workmen injured in hazardous employments, and their families and dependents sure and certain relief . . . regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation."

If the case before us involved a policy issued by an insurance company,—a policy containing the same provisions which the Workmen's Compensation Act contains as regards the respective rights and obligations of the insurer, insured and beneficiary,—we are entirely satisfied that, under the facts here, the alleged noncompliance on the part of the insured would be deemed waived by the insurer, and the policy held effective. The suggestion that a different rule should be applied in this case, because the defendant is what is denominated a state fund, does not meet with our approval. The primary object of a Workmen's Compensation Act, remains the same, whether the indemnity is afforded by a fund operated under the direction of the state, or by a stock or mutual insurance company. The Workmen's Compensation Fund is not synonymous with the state of North Dakota. It is, it is true, an agency or fund organized in accordance with the directions at law, and supervised and administered by certain officers provided by law. But the claims against the Workmen's Compensation Fund, however, are not claims against the state, and the moneys in the fund are not state funds. State ex rel. Stearns v. Olson, 43 N. D. 619, 175 N. W. 714.

It follows from what has been said that the plaintiff is entitled to recover. The judgment appealed from is, therefore, reversed, and the cause remanded for further proceedings in conformity with this opinion.

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

GRACE, J. (specially concurring). It is clear to my mind that the result arrived at in the principal opinion is correct.

That the plaintiff is entitled to participate in the Workmen's Compensation Fund in view of the facts established by the record, seems to me not to admit of controversy. The premium of $6,009.08, remitted by the St. Anthony & Dakota Elevator Company, which was received by the Bureau was payment of the additional premium from July 1st, 1919, to June 30th, 1920, inclusive, and the estimated premium from July 1st, 1920, to June 30th, 1921, as per the settlement sheet.

The principal opinion discusses these and other points necessary to a decision of this case quite fully, and hence, it is needless for further discussion here.

AUGUST KRUEGER, Respondent, v. JOHN DULAS, and Magdalen A. Dulas, H. S. Posey, and THE STUTSMAN COUNTY BANK OF COURTENAY, NORTH DAKOTA, Appellant.

(191 N. W. 1014.)

Evidence — parol evidence to show status of notes and lien of security under mortgage in foreclosure action held admissible.

Where notes for the purchase price of lands due the vendor and for commission due a broker were secured by a mortgage made to the vendor, and where, thereafter, the notes representing the commission were transferred by the vendor to the broker by an indorsement thereupon without recourse pursuant to an extrinsic parol agreement that such commission notes and the lien of their security should be inferior to that of the vendor, it is *held*, for reasons stated in the opinion, that parol evidence was properly received concerning such extrinsic agreement and that the same did not serve to vary or contradict the contract of indorsement.

Opinion filed January 29, 1923.

Evidence, 22 C. J. § 1669 p. 1255 n. 52.

Action in District Court, Stutsman County, *Nuessle*, J., to foreclose a mortgage upon real estate.

Defendant bank has appealed from a judgment awarding a preference lien to plaintiff's notes.

Affirmed.

A. W. Aylmer and *A. L. Aylmer*, for appellants.

The broker is entitled to commission from landowner, when he furnishes purchaser. Young v. Ruhwedel (Kan.) 96 S. W. 228.

The person employing the broker is liable for the commission. 9 C. J. 581, 585, note 90; 3 L.R.A.(N.S.) 545–580.

Note.—On admissibility of parol evidence to contradict or vary the terms of a prior and contemporary parol agreement, see note in 17 A.L.R. 273; 10 R. C. L. 1036; 2 R. C. L. Supp. 1143; 4 R. C. L. Supp. 687; 5 R. C. L. Supp. 584.

On priority as between holders of different notes secured by the same mortgage, see notes in 24 L.R.A. 800, and 42 L.R.A.(N.S.) 183.

"Parol agreement to the effect that seller of land, receiving several notes, and giving some to brokers, should have a prior superior right to the proceeds realized on foreclosure sale of premises, could not be shown in a foreclosure proceeding, because evidence of it would in effect vary and contradict the notes and mortgage." Chaffee v. Clark, (Wis.) 177 N. W. 609.

Parol evidence is not admissible to show a verbal agreement made at the time of the assignment, giving the bond priority, when no such priority is included in, or inferable from, the terms expressed in the assignment. Hancock's Appeal, 34 Pa. 155, referred to in 42 L.R.A. (N.S.) 187.

The law will not tolerate the admission of parol testimony to show a contemporaneous agreement, to vary a writing. Bank v. Lang (N. D.) 49 N. W. 414; First Nat. Bank v. Prior (N. D.) 86 N. W. 362.

Neither the notes nor mortgage contain anything to indicate that the instalment notes did not have equal rights to the security. The legal effect of such a mortgage is to give such notes equal rights, and if the security is insufficient to pay all in case of foreclosure, then the notes pro rata. Lawson v. Warren, 42 L.R.A.(N.S.) 183; Borden v. McNamara (N. D.) 127 N. W. 104; (S. D.) 63 N. W. 548.

But as between the original holder of all the notes, and one of his transferees, the transferee has a superior lien. Lawson v. Warren, 42 L.R.A.(N.S.) 183; 27 Cyc. 1304, note 52.

The legal effect of a written instrument cannot be varied by parol. 2 Elliott, Contr. p. 938, § 1628, note 86; 22 C. J. 1075, note 51, 1077, note 66; Millard v. Millard (Mich.) 180 N. W. 429; Clendening v. Bank (N. D.) 94 N. W. 901.

Security follows note. 2 Jones, Mortg. pp. 291, 293, note 44; 27 Cyc. 1287, note 33, 1289, note 35; Comp. Laws 1913, § 6733; Goodwin v. Cunningham (Neb.) 74 N. W. 315; Brynjolfson v. Osthus (N. D.) 96 N. W. 261.

Mortgage passes by operation of law. 27 C. J. 230, note 45.

"The indorsement, being in writing, the contract implied must be treated in all its terms as a written contract invulnerable to attack by proof of a contemporaneous oral agreement of different tenor." Gate City Bank v. Schmidt, 152 S. W. 101; Schmitz v. Hawkeye Co. (S. D.) 67 N. W. 618; 3 Jones, Ev. p. 413, § 497.

Indorsement is a well-defined contract, 48 N. W. 327. Parol evidence is inadmissible to show that an indorsement is not to have its ordinary effect. Gilltner v. Quirk (Minn.) 155 N. W. 760; Ferger v. Sanitary Farm Dairies (Minn.) 178 N. W. 501; 22 C. J. 1294, note 90; Ugland v. Farmers Bank (N. D.) 137 N. W. 572; 3 Jones, Ev. p. 220, § 449, notes 5, 6; Blumer v. Schmidt (Ia.) 146 N. W. 751; Current v. Muir (Minn.) 108 N. W. 870; First Nat. Bank v. Kelley (N. D.) 152 N. W. 125; Schulz v. Plankington, 33 Am. Rep. 290.

While the true consideration may sometimes be shown, it cannot be done to contradict the express terms of a written instrument, or the legal effect thereof. 22 C. J. 1170, note 25; 2 Elliott, Contr. p. 937, note 85; Schulz v. Plankington Bank, 33 Am. St. Rep. 290.

Fowler, Green & Wattam, for respondent.

"No court has hesitated to modify, abandon, or wholly reverse the rule it has adopted, where intervening equities demand it." Lawson v. Warren (Okla.) 42 L.R.A.(N.S.) 183; Jones, Mortg. 7th ed. § 822-a; Grattan v. Wiggins, 23 Cal. 16; Bank of England v. Tarleton, 23 Miss. 173; Morgan v. Kline (Iowa) 42 N. W. 558; Noyes v. White, 9 Kan. 640; Savings Deposit Bank v. Ellingson, 27 N. D. 516; Preston v. Morsman, 75 Neb. 358, 106 N. W. 320; Romberg v. McCormick, 194 Ill. 265, 62 N. E. 539; Cullom v. Erwin, 4 Ala. 452.

"The simple assignment of the notes does not change the mortgage and make it any less security for any of the notes than it was before the assignment. The mortgage security in following the transfer of the notes does not pass by the assignment any farther than it was an incident at the time the transfer was made." Lawson v. Warren, supra. 22 C. J. 1212, 1665, § 1615; Erickson v. Wiper, 33 N. D. 195.

"Where a writing, although embodying an agreement is manifestly incomplete, and is not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive as far as it goes. But such parts of the actual contract, as are not embraced within its scope, may be established by parol." Jones, Ev. 2d ed. § 440.

"Where two mortgages are executed to different mortgagees, who agree among themselves as to which one should have priority, the agreement for priority is collateral to, and not merged in the mortgage; and nothing having been expressed in the mortgages as to their priority

parol evidence is properly received to establish the agreement." Collier v. Miller, 62 Hun, 99, 16 N. Y. Supp. 633, affirmed in 137 N. Y. 332.

"Where a mortgage and judgment are entered the same day, and hence presumed to be of equal rank, and therefore payable pro rata, an agreement between the parties changing this general rule and giving precedence to one or the other, may be proved by parol." Maze v. Burke, 12 Phila. (Pa.) 335.

"Where there was a collateral oral agreement between indorser and indorsee and the indorsed notes have passed to bona fide purchasers without notice, and the security is prorated between such holders and the payee to the latter's loss, he should be given a personal judgment as against his indorsee." Green v. Morris (Miss.) 78 So. 550.

Statement.

BRONSON, Ch. J. This is an action to foreclose a mortgage upon real estate. The defendant bank has appealed from the judgment and has demanded trial de novo. The facts are: The plaintiff was the owner of some 466 acres of farm land in Stutsman county, North Dakota. In August, 1919, he gave to defendant bank an exclusive contract to sell this land. This contract stipulated a price of $43 per acre to plaintiff and, as commission to defendant bank, the amount received over such price. Also, that, if the land were sold on time, $500 to be paid in cash; $1,500 to be paid on March 1st, 1920; $1,771.29 on November 15th, 1920; and, $1,800 or more, each year thereafter, for a period of ten years at 6 per cent. Further, that plaintiff wanted a chattel mortgage on crops to protect the payments.

In the fall of 1919, defendant bank sold to defendant Dulas the land for a consideration of about $48 per acre. $500 in cash was then paid. In the spring of 1920, a deed and mortgage of the lands was presented to plaintiff by the cashier of the defendant bank. Plaintiff objected to the inclusion of commission notes in the mortgage. The cashier explained that plaintiff would not have to pay them; that the purchaser would pay them. The parties went to a local bank in Buffalo. There, in accordance with the testimony of plaintiff and the cashier of that bank, an understanding was had that no chattel mortgage should be

given, but that defendant bank would guarantee a note for $1,771.29; that plaintiff, upon inclusion of the commission notes in the mortgage, should receive his money first and, if after he were paid and the bank desired an assignment of such mortgage, plaintiff would make such assignment; that the notes of the bank for commission should be subrogated to the rights of plaintiff and that if plaintiff's notes were not paid defendant bank would not receive any commission. Accordingly, plaintiff made a deed to defendant Dulas, and defendant Dulas and his wife made to plaintiff a mortgage upon the land securing fifteen notes payable to plaintiff. Five of the notes were commission notes, viz.: One note for $450 due November 15th, 1920; three notes for $421.29 due, respectively, November 15th, 1921, November 15th, 1922, and November 15th, 1923; one note for $117.58 due November 15th, 1924. One note for $1,771.29 was made payable November 15th, 1920. The balance of the purchase price was represented by payments of notes of $1,800 or approximately that amount, falling due in consecutive years commencing November 15th, 1921, and ending November 15th, 1929. Total amount of the mortgage was $19,881.92. Plaintiff received in cash $1,500 additional; defendant bank, $500 in cash upon its commission. Defendant bank indorsed upon the note for $1,771.29 a guaranty of payment. Plaintiff then, without recourse, indorsed the commission notes to defendant bank. This mortgage to plaintiff was recorded in April, 1920. Later, defendant bank collected one commission note for $450. It collected from defendant Dulas $467.23 which was credited on the guaranteed note. It took up this guaranteed note from plaintiff and issued to him a certificate of deposit therefor. With the exception of some interest these are the only payments made to plaintiff on the mortgaged indebtedness. Some correspondence was had between the parties concerning an assignment of the mortgage. On May 15th, 1920, the cashier of defendant bank wrote plaintiff requesting him to sign an agreement which plaintiff stated he would give in regard to the notes which he had signed over to the bank. This agreement provided that plaintiff should assign the mortgage to defendant bank upon the payment of the notes and interest, provided that the bank still held unpaid notes which were also secured by such mortgage and which had been assigned and delivered to it without recourse by plaintiff. Plaintiff made objection to this agreement and never signed it.

This action was instituted in January, 1922, by plaintiff to foreclose the mortgage for the sum of $16,279.18 with interest. Service by publication was secured against defendant Dulas and his wife. They made no appearance. Defendant bank answered alleging the transfer of the notes by plaintiff to it, and the equitable assignment of the mortgage thereby and demanding that the lien of defendant bank be made prior and superior to plaintiff's lien in the mortgage. The trial court found, among other things, that plaintiff, as consideration for the transfer of the notes to defendant bank, made an oral agreement that the commission notes should be deferred in payment and as to security until the amounts due to plaintiff should have been fully discharged; that defendant bank duly transferred one of the commission notes to a third party; that when the sale was consummated plaintiff waived a crop mortgage provision upon securing indorsement and guaranty of the note for $1,771.29 by defendant bank and upon the understanding that defendant's rights upon such note should be subsequent and inferior to plaintiff's rights; that, when said note matured, defendant bank, through its agreement, took up said note and paid plaintiff the amount due thereon. Accordingly, the court ordered judgment of foreclosure, awarding a preference lien to plaintiff for the amount of the indebtedness, including interest and taxes paid, subject only to a prior lien for the commission notes sold to a third party. Pursuant to such findings judgment was entered.

It is the principal contention of the defendant bank that the oral agreement, if made to defer the lien of its security, was without consideration and inadmissible because it served to vary the terms and the legal effect of a written instrument; that, as a matter of law, the indorsement of the commission notes by plaintiff to defendant bank carried as an incident thereto a pro rata assignment which granted to the transferee a superior lien.

Decision.

The issue upon this appeal concerns alone the commission notes held by defendant bank. No questions are presented concerning the priority of the commission note transferred to an innocent purchaser, or the inferiority of the note guaranteed by defendant bank.

We are of the opinion that the findings of the trial court, concerning the actual contract made between the parties, should be sustained.

Accordingly, the whole transaction between the parties consisted of an agreement that plaintiff should receive the purchase moneys owing to him and should have a preference lien through the mortgage to secure the same. This agreement was consummated and evidenced through commission notes payable to plaintiff, secured by the mortgage, and transferred by plaintiff to defendant bank, to whom they were due, and secured by lien of the mortgage running to plaintiff. The oral agreement and the letter of the defendant bank further evidenced this agreement, that plaintiff should have a preference lien for his purchase money notes.

Did this oral agreement serve to vary the terms of the contract of endorsement upon the commission notes as made by plaintiff and thus violate the rule against the admission of parol evidence for such purpose?

It is evident that negotiable instruments were executed in this case for purposes of negotiability. That plaintiff made his indorsement to defendant bank for purposes of negotiability. It has been said that a negotiable note is a courier without luggage. Overton v. Tyler, 3 Pa. St. 346, 45 Am. Dec. 645. Its contract obligations, through the language of negotiability, attach by legal prescription, impliedly. It *must* contain certain indicia to establish its status and, equally, *must not* contain certain other things. 4 Wigmore, Ev. § 2443. It is well established that by a special agreement, even by parol, the parties to a negotiable instrument may alter or change the application or effect of certain implied obligations contained in a note so far as the same affects themselves. 4 Wigmore, Ev. § 2444; 1 Dan. Neg. Inst. 5th ed. § 6717. Thus, the expressed terms of the obligation in a document, such as the mode, the time, or the amount of payment, etc., may not be varied by an extrinsic agreement to avoid their enforcement. But, concerning the implied terms, an extrinsic agreement can be used where the transaction in hand, as a whole, preserves, for one purpose, the form of negotiability and, for another or separate part of the transaction, presents a different contract, feasible and consistent. 4 Wigmore, Ev. § 2444. See 8 C. J. 1033; 22 C. J. 1089.

Plaintiff made a qualified indorsement upon the commission notes.

Thereupon certain implied obligations were annexed by law. He became a mere assignor of the title to the notes. Comp. Laws, 1913, § 6923. Thereupon he impliedly warranted that the instrument was genuine and in all respects what it purported to be; that he had good title; and all prior parties had capacity to contract; that he had no knowledge of any fact which would impair the validity of the instrument or render it valueless. Comp. Laws, 1913, § 6950. See note in Ann. Cas. 1912A, 923.

Furthermore, by operation of law, in the absence of any agreement to the contrary, the transfer of the commission notes carried with them their security. Comp. Laws, 1913, § 6733. See note in 2 L.R.A. (N.S.) 183. No formal assignment of the mortgage was necessary so to do. Brynjolfson v. Osthus, 12 N. D. 42, 49, 96 N. W. 261.

However, it was competent for the parties, by an extrinsic agreement, to assign this mortgage security and to define the relation that would exist between them by virtue thereof. 27 Cyc. 1304. 1 Jones, Mortg. §§ 817, 821.

The extrinsic agreement between the parties in the instant case served that purpose. There is no question that an assignment of the security took place. The question is, Did it take place, pursuant to the rule applicable where an assignment of the debt occurs, or pursuant to the extrinsic agreement of the parties in connection with the transfer of the notes?

An antecedent agreement was made between the parties pursuant to which the commission notes were indorsed in order to effectuate this agreement, transfer title to the commission notes to the defendant bank, and, otherwise, fix the rights between the parties pursuant thereto. In our opinion proof was properly received concerning this extrinsic agreement. Such proof did not violate nor vary any of the implied obligations of plaintiff's contract of qualified indorsement. The enforcement of this extrinsic agreement is consistent with plaintiff's qualified indorsement. If defendant's contention should be sustained, plaintiff's indorsement might be given the effect of a general indorsement. Gumbel v. Boyer, 46 La. Ann. 1499, 16 So. 466. Further, under the circumstances, the exclusion of such extrinsic agreement might well serve purposes of an attempt to enforce a fraud upon plaintiff's rights pursuant to the equities arising out of an antecedent transaction. See Dick-

inson v. Burke, 8 N. D. 118, 120, 77 N. W. 279. The judgment is affirmed with costs.

BIRDZELL, JOHNSON, and CHRISTIANSON, JJ., and COOLEY, Dist. J., concur.

Mr. Justice NUESSLE, disqualified, did not participate, Honorable CHAS. M. COOLEY, District Judge, sitting in his stead.

ANNA IVERSON, Respondent, v. MARY E. C. McDONALD, Appellant.

(191 N. W. 1013.)

Vendor and purchaser — evidence held sufficient to sustain judgment of recovery of purchase price for the lot on the ground of misrepresentation.

In an action to recover back money advanced toward the purchase of a certain lot and to impress a lien therefor, the evidence is examined and it is *held:*

Plaintiff has sustained the burden of proving misrepresentation or concealment of fact in regard to what was included in the legal description of the lot.

Opinion filed February 1, 1923.

Vendor and Purchaser, 39 Cyc. p. 2067 n. 94.

Appeal from the District Court of Pierce County, North Dakota, *Buttz,* J.

Affirmed.

Funke, Campbell & Eide, for appellant.

The apparent mutual assent of the parties essential to the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intentions. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of mind on the subject. 13 C. J.

265, 369, 373, 611, ¶¶ 49, 248, 255, 656. See Comp. Laws, §§ 5853, 5854, 5857.

Harold B. Nelson, for respondent.

Misrepresentation as to the location and boundary of land entitles a person relying on statements with reference thereto to recover the price. Wilson v. Robinson, 155 Pac. 732; George v. Kurdy, 158 Pac. 965; Crane v. Reutschaler, 98 Atl. 671; Cody v. Rainwater, 196 S. W. 125; James v. Olive Street, 196 S. W. 81; Tracy v. Smith, 165 Pac. 535; Schlanderaff v. Wortham, 167 N. W. 118; Ellison v. Stockton, 170 N. W. 435; Kramer v. Lewis, 163 N. W. 732.

"If minds of parties executing option contract fail to meet upon question of amount of land to be conveyed, plaintiff could recover from defendant amount paid thereunder." Tyng v. Constant Lorraine Invest. Co. 165 Pac. 509.

Vendors and their agents are held guilty of misrepresentation, if, without literal misstatement of fact, they knowingly created false impressions. Twin Lake etc. v. Dahner, 155 C. C. A. 175, 242 Fed. 399; Cornish v. Suitor, 189 Pac. 487; Bell v. Kyle, 192 Pac. 512.

One who is induced to purchase land by fraud is entitled to recover money paid thereon not only from the persons to whom it was paid, but from others who receive it and into whose hands it can be traced. Valley Bank v. Jasten, 161 Pac. 876; Burton v. Ryther, 161 N. W. 350; McMahon v. Plumb, 96 Atl. 958; Becthold v. King, 158 N. W. 910.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff in an action to recover a certain payment made by the plaintiff to apply on the purchase price of a house and lot. The contract is alleged to have been rescinded on account of certain misrepresentations inducing it. The defendant Mary E. C. McDonald was the owner of lot 12 in block 4, Sikes second addition to the city of Rugby. Upon this lot there was a small house facing south. About 11 inches from the east side of the house a narrow walk leads to the back door. This walk joined the main walk leading from the street to the front door of the house. Immediately east of this walk leading to the back door was a row of shade trees and east of the shade trees a driveway leading to a garage situated at the rear of the adjoining premises. The adjoining premises were likewise owned by the defendant. She had listed this

small property for sale with one Ole Berdahl, and in the early part of October 1920, he interested the plaintiff in the purchase. The plaintiff was a widow and relied somewhat for advice upon her cousin, one Oscar Bakke, who had lived with her a portion of the time since the death of her husband. When the plaintiff became interested in the purchase Bakke, in company with Berdahl, went to view the premises and upon this visit gained the impression that the trees and the sidewalk to the east of the house were upon the lot in question. In fact, he testified that the trees and the walk were pointed out to him as part of the premises. Following Bakke's visit to the premises with Berdahl, the plaintiff and Bakke went to view the premises, and following her visit the McDonalds called on her to talk over the deal.

On October 11th, 1920, plaintiff and defendant executed an agreement whereby in consideration of a $200 check, dated October 16th, the defendant gave to the plaintiff an option to purchase the property described as "Lots numbered 12 in block numbered 4 in Sikes second addition to the city of Rugby," the option to expire on November 11th, the plaintiff agreeing to pay $1,050 additional cash as full payment of the purchase price. Plaintiff later, upon learning that the eastern boundary of the lot did not include the walk and trees, refused to exercise her option or to carry out her contract, and subsequently this action was brought for the recovery of the money previously paid and to impress the premises with a lien therefor.

Upon this appeal the only question presented is as to the correctness of the findings of fact. Various arguments are adduced from the record tending to show that the defendant was not aware of any misrepresentations as to description of the property, if any were made by Berdahl; that Berdahl, in fact, did not misrepresent the description or condition of the property; that the purchaser was content to buy according to the description set forth in the option contract without taking any pains to apply it to the premises viewed in order to determine where the east line ran. From such arguments the conclusion is sought to be drawn that nothing more than a unilateral mistake was shown—one which would not entitle the plaintiff to rescind. Upon a careful examination of the record, however, we are of the opinion that the plaintiff has sustained the burden of showing that the contract was induced by actual misrepresentation or concealment of fact as to what was included in the

description. The physical appearance of the premises, with the walk branching off the main approach and leading to the back door of the house along the east side thereof, would naturally induce one to believe that it belonged to the premises. The defendant's husband so testified in substance. The house was so situated in fact with reference to the lot, that access to the rear door could not be attained without trespassing upon the adjoining property. In the light of this physical appearance any direct statement whatsoever concerning sidewalk and trees would naturally tend to induce the belief that they belonged to the premises in question. Not only does it appear in this record that the plaintiff was so induced to believe, but it also appears that the defendant's husband and agent was solicitous lest she should have such an impression; for upon more than one occasion it was suggested that she go again to the premises so that the lines might be pointed out to her. But neither the defendant, nor any agent representing her suggested at any time that the east line cut off the approach to the rear door. The plaintiff discovered this from extraneous sources. Upon this record the judgment appears to us to be right and it is affirmed.

BRONSON, Ch. J., and CHRISTIANSON, JOHNSON, and NUESSLE, JJ., concur.

BALBINA M. KRANZ, Respondent, v. HERMAN J. TAVIS, Executor of the Last Will and Testament of Martin Kranz, Deceased, and O. M. J. DeMoully, Defendants. O. M. J. DEMOULLY, Appellant.

(192 N. W. 176.)

Provisions of statute.

1. Section 8809, Comp. Laws 1913, reads: "No action for the recovery of any estate, sold by an executor or administrator or otherwise disposed of under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent unless it is commenced within three years next

Note.—Time within which action must be brought against executor and administrator, see 11 R. C. L. 213; 17 R. C. L. 718.

after the sale. An action to set aside a decree directing or confirming a sale or otherwise disposing of such property may be instituted and maintained at any time within three years from the discovery of the fraud or other ground upon which the action is based."

Executors and administrators — law providing limitation within which to bring actions for recovery of real estate sold by executor or administrator and to set aside decree confirming such sale, merely recognizes rule that judgment may be vacated within limitation.

2. It is *held*, that this section does not create a new remedy, or confer a new right of action, but merely recognizes the existing rule that a judgment may be vacated by an equitable action upon certain grounds, and limits the time in which such action may be brought.

Executors and administrators — evidence held insufficient to justify interference with final decree of distribution.

3. For reasons stated in the opinion, it is further *held*, that the evidence in this case does not establish facts justifying interference with a decree of distribution.

Opinion filed December 30, 1922. Rehearing denied February 20, 1923.

Executions and Administrations, 24 C. J. § 1396 p. 527 n. 93 New; § 1653 p. 663 n. 88; § 1673 p. 676 n. 33 New.

From a judgment of the District Court of Morton County, *Berry*, J., defendant, O. M. J. DeMoully, appeals.

Reversed.

Norton & Kelsch, for appellant.

"It is elementary that the proper way to correct an erroneous judgment of an inferior court is either by an appeal or upon a proper showing made by a proceeding to open or vacate the judgment." Fisher v. Dolwig, 166 N. W. 797.

Extrinsic or parol evidence is inadmissible to aid the court in the construction and interpretation of a will where the language and the meaning of the terms employed is clear, certain, and definite. Kahoutek's Estate, 166 N. W. 817.

Appellant's contention is sustained by the accepted meaning and significance of the term "instrument." Webster defines the term "instrument." "That by means of which any work is performed or result is effected, or that which is made a means or is caused to serve a purpose; a medium, means or agent," and gives as synonyms therefor, the following: "tools, implements, utensils, machine, apparatus, medium."

This definition has been accepted by the United States and state courts in the following cases: Magnon v. United States, 66 Fed. 151; Lee v. State (Tex.) 40 L.R.A.(N.S.) 1135; Faverham v. Davenport, 34 N. W. 767.

"A party asserting error has the burden of proving it and must present a record affirmatively showing such error." Erickson v. Wiper, 33 N. D. 193.

The construction of a will where it is to be gathered from the will alone or from the will and surrounding circumstances about which there is no dispute is a question of law for the court to determine and is reviewable only by a superior court by the exercise of appellate jurisdiction. 40 Cyc. 1427; Re Peterson, 22 N. D. 460.

"While § 8809 of the Compiled Laws 1913, authorizes an action in the district court to set aside a final decree of the county court for fraud or other equitable ground, it manifestly does not authorize such action to review errors properly reviewable on appeal from the final decree." Fisher v. Dolwig, 166 N. W. 793.

L. H. Connolly, for respondent.

In the trial to recover for injuries caused by the use of the X-ray apparatus a person skilled in the use of the apparatus may testify as to the proper mode of its use and the probabilities and possibilities of injury from its improper use. 3 Med. Jur. p. 782; Stewart, Legal Medicine, art. 19, p. 38.

In the case of Henslin v. Wheaton (Minn.) 97 N. W. 882, in defining an X-ray machine the court said: "The so-called X-rays, discovered by Roentgen, have been recognized and known to scientists, both in and out of the medical profession, for some eight years. During this time the apparatus for the generation of the X-rays, together with the fluoroscope, has been used very generally by electricians, professors of physics, skiagraphers, physicians, and others for experimental and demonstrative purposes. *It is a scientific and mechanical appliance,* the operation of which is the same in the hands of the college professors or the physician of the allopathic, homeopathic, or any other school of medicine. It may be applied by any person possessing the requisite scientific knowledge of its properties, and there would seem to be no reason why its application to the human body may not be ex-

plained by any person who understands it." Stewart, Legal Medicine, art. 19, p. 38.

CHRISTIANSON, J. This is an action to set aside the final decree of distribution made and entered by the county court of Morton county, in the estate of Martin Kranz, deceased. The plaintiff is the surviving wife of said deceased. Said Martin Kranz died testate on or about September 27, 1919. His last will and testament, which was admitted to probate by the county court of Morton county, on November 18, 1919, contained the following provision:

"I give and bequeath to my wife, Balbina M. Kranz, all of my possessions, real estate, personal property, life and accident insurance, except medical books and instruments and office equipment which I give and bequeath to my nephew, O. M. J. DeMoully."

At the time of his death said Martin Kranz owned a half interest in an X-ray machine. The final decree of distribution adjudged that such interest be assigned to, and vested in, said O. M. J. DeMoully. The object of this action is to have this part of the final decree of distribution annulled, and to have judgment entered assigning said half interest in said X-ray machine to the surviving wife of said Martin Kranz, deceased. The only oral evidence adduced consisted of the testimony of certain doctors, bearing on the question whether an X-ray machine is, or is not, included within the term office equipment. There is no charge of fraud, and upon the trial it was stipulated, as a fact, that the attorney for the plaintiff in this action "was retained by plaintiff as her attorney in the probate proceedings, and that as such attorney he prepared and filed," various papers, including the final decree of distribution. The following facts are established by the undisputed evidence: Martin Kranz died testate on or about September 27, 1919; his last will and testament contained the provision above set forth; such will and testament was duly admitted to probate on November 18, 1919, and letters testamentary issued to the defendant, Tavis. At the time of his death, Martin Kranz owned a half interest in an X-ray machine. The other half interest was owned by another physician in Mandan. Kranz acquired such interest after his will and testament had been executed. The X-ray machine was not in Kranz's office, but was kept in the Mandan Hospital. On September 13, 1920, the county court

of Morton county duly made and entered its final decree of distribution in the probate proceeding then pending, wherein it adjudged and decreed that the half interest of the said Martin Kranz, deceased, in and to said X-ray machine be assigned to, and vested in, said O. M. J. DeMoully. All the other property was assigned to, and vested in, the plaintiff. On April 25, 1921, the plaintiff made an application to the county court to set aside, and modify the final decree of distribution, so as to provide that the half interest, in said X-ray machine be assigned to, and vested in, the plaintiff, and not in the said DeMoully. The application was denied. No appeal was taken. On August 15, 1921, the plaintiff brought this action. The trial court rendered judgment in favor of the plaintiff, and defendant has appealed.

The question presented is whether the facts stated establish a cause of action, or rather whether these undisputed facts establish as a matter of law that plaintiff has no cause of action here. Plaintiff contends that under the facts stated, she is entitled to challenge the correctness of the provision in the final decree of distribution, which assigned the one-half interest in the X-ray machine, to the defendant, DeMoully. In support of this contention, plaintiff invokes § 8809, Comp. Laws, 1913, and the decision of this court, in Moore v. Palmer, 43 N. D. 99, 174 N. W. 93.

Section 8809, Comp. Laws, reads as follows:

"No action for the recovery of any estate, sold by an executor or administrator or otherwise disposed of under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent unless it is commenced within three years next after the sale. An action to set aside a decree directing and confirming a sale or otherwise disposing of such property may be instituted and maintained at any time within three years from the discovery of the fraud or other ground upon which the action is based."

This section was considered by this court in Moore v. Palmer, supra, and it appears that the trial court was of the opinion that that decision was controlling in this cause. In a memorandum opinion filed in this case, the trial court said:

"Sec. 8809 of the Comp. Laws of 1913 . . . is the controlling statute on this matter. This section has been construed by our supreme court in the case of Moore v. Palmer, supra. We have carefully ex-

amined this decision and have reached the conclusion that the construction placed upon the said section of the statute in effect amounts to an extension of the period of appeal from a determination of the county court for a period of three years after, especially, the final decree is entered. . . . The decision of this court is based entirely upon the construction placed upon said statute by the majority of the supreme court in the case of Moore v. Palmer."

The writer disagreed with the majority in Moore v. Palmer. He was of the belief that the complaint in that case failed to state facts sufficient to constitute a cause of action for vacating the final decree of distribution. In other words, the writer was of the opinion that the complaint in that case set forth no equitable grounds for avoiding the decree of distribution; but, alleged merely that the county court had made a mistake in determining a question of law properly before it. A majority of the court, however, were of the opinion that the complaint stated a cause of action for the annulment of the decree of distribution. In the decision of the court as promulgated by the majority in that case it was said: "This case is not predicated upon fraud, and for this reason the decree may not be set aside on that ground. We will confine our discussion to the other part of said section, which provides, 'or other ground upon which the action is based.' What, then, are the other grounds? We can reach but one conclusion with reference to the meaning of such words, and that is: They mean any other ground which would appeal to the conscience of a court of equity, as where there has been manifest injustice done by entering of said decree, or a manifest material mistake therein, etc."

Whatever differences of opinion there may be as to the actual effect of the holding in Moore v. Palmer, supra, as applied to that particular case, the language quoted does not indicate any intention on the part of the court to hold that § 8809, extended the time for appeal from a final decree entered by the county court, for a period of three years after the discovery of any error of law on the part of the county court. In other words, the language quoted indicates that the court was of the opinion that there must exist some equitable ground before the final decree could be disturbed. And in Fischer v. Dolwig, 39 N. D. 161, 166 N. W. 793, this court expressly ruled that an action to set aside the decree of distribution was not a substitute for an appeal.

In the principal opinion, written by Chief Justice Bruce, it was said: "While § 8809 of the Compiled Laws of 1913 authorizes an action to set aside a final decree of distribution of the county court for fraud or other equitable ground, it manifestly does not authorize such action to review errors properly reviewable on appeal from the final decree." 39 N. D. 175, 166 N. W. 797. In a concurring opinion, Mr. Justice Birdzell said: "The remedy open to a suitor to impeach a judgment for fraud within the time prescribed by § 8809, Comp. Laws, 1913, cannot be considered as a mere substitute for an appeal, nor can the statute be given an interpretation which would have the effect of extending the time for appeal." 39 N. D. 177, 166 N. W. 798. The correctness of this rule was not denied in either of the dissenting opinions filed in that case.

Section 8809, supra, is a statute of limitations. It does not purport to create a new remedy, or to confer a right of action, where one did not formerly exist. It merely fixes the period in which a right of action (which the statute assumes to exist) must be invoked. In other words, it is a statute of limitations. The county court is vested with exclusive original jurisdiction in probate and testamentary matters. N. D. Const. § 111. A decree of distribution is a final determination of the rights of the parties to the proceeding; Sjoli v. Hogenson, 19 N. D. 92, 122 N. W. 1008, and is of equal rank with a judgment entered in any other court of record in this state; Fischer v. Dolwig, 29 N. D. 564, 151 N. W. 431. The district court is vested with original jurisdiction "of all cases both at law and in equity," except as otherwise provided in the Constitution; N. D. Const. § 103.

Section 8809 merely recognizes the general jurisdiction of the district court, and limits the time in which an equitable action may be maintained in that court to set aside a decree of the county court, directing or confirming the sale, or otherwise disposing of property. Clearly there was no intention on the part of the legislature to say that a final decree of the county court might be assailed by direct action merely on the ground that, in the proceedings before it, the county court committed certain errors of law. When the section refers to "other grounds" (grounds other than fraud) on which an action to vacate a decree of the county court may be based, it manifestly refers to other recognized grounds for equitable interference, such as mistake or accident. It is

well settled that equity will not grant relief for mere errors of law committed by a court in determining matters set before it, nor will it grant relief where the matter might have been litigated there, by the exercise of due diligence. Hayne, New Tr. & App. (Rev. ed.) § 304. Cyc. says: "A suit in equity for relief against a judgment at law cannot be made to serve the purpose of an appeal, so as to review the judgment with reference to alleged errors; nor will a court of equity undertake to revise, correct, or reform a judgment at law, unless there be some special grounds for equitable interference, or to vacate or annul it or set it aside." 23 Cyc. 977.

In his work on Probate Law & Practice, Ross says:

"A decree of final distribution, while ordinarily conclusive upon the parties in interest unless appealed from, may nevertheless be vacated or modified on motion in the lower court, at any time within the six months allowed by statute therefor, upon a proper showing of mistake, surprise, inadvertence, excusable neglect, or the like. But after the expiration of six months the probate court has no power to grant relief. Thereafter, the only remedy of the aggrieved party is by an independent suit in equity. The law is settled that the remedy by motion is merely cumulative, and does not displace the jurisdiction of a court of equity to review a decree of distribution, upon a showing that it was procured by extrinsic fraud or mistake, whereby the court and the losing party were imposed upon or misled, and to enforce an involuntary trust against those who have thereby gained an inequitable advantage. But equity will not grant relief for . . . mere error." Ross, Prob. L. & Pr. § 544.

We are all agreed under the facts in this case, no cause of action has been established which would justify interference with the decree of the county court. The judgment is reversed and the cause remanded with directions to dismiss the action.

ROBINSON, J., concurs.

BIRDZELL, Ch. J. (specially concurring). I agree in the reversal, and in the opinion as prepared by Mr. Justice Christianson. However, I deem it proper to say that I regard the decision as involving the principle discussed in Moore v. Palmer, 43 N. D. 100, 174 N. W. 93, and

as deciding contrary thereto. It, in fact, overrules Moore v. Palmer, and, in my opinion, that case should be overruled.

GRACE, J. (specially concurring). I concur in the reversal and dismissal of the action. The conclusion arrived at in the majority opinion, with respect to the questions involved, harmonizes with my view.

I concur in the principles of law stated in the syllabus.

BRONSON, J. (specially concurring). I concur in a reversal and dismissal of the action. I concur in the principles of law stated in the syllabus. See Reichert v. Reichert, 41 N. D. 253, 257, 170 N. W. 622; Knight v. Harrison, 43 N. D. 76, 174 N. W. 636. Upon the facts, the case of Moore v. Palmer, 43 N. D. 100, 174 N. W. 93, does not apply.

On petition for rehearing.

CHRISTIANSON, J. Plaintiff has petitioned for a rehearing. Attention is called to §§ 8595 and 8596, Comp. Laws, 1913, which provide that an application to a county court for a rehearing on the ground of mistake, inadvertence, surprise, or excusable neglect of the party making the application must be made within thirty days from the date of the order or decree, which is sought to be set aside. And it is pointed out that the application made to the county court in the case at bar was made more than thirty days after the date of the final decree and that consequently the decision of the county court in denying the application was correct, and an appeal therefrom would have been ineffectual. This observation is probably correct. This, however, does not affect either the conclusions reached or anything said in the former opinion. As was said there, the plaintiff did make an application to the county court to have the final decree of distribution set aside. The application was made some seven months and twelve days after the date of the rendition of such final decree. But the record does not show affirmatively when the plaintiff acquired knowledge of the alleged erroneous provisions in the decree of distribution. For all the record shows, the plaintiff might have acquired full knowledge of the alleged error within a few days after the final decree was entered, and she might have had ample time in which to make application for rehearing within the thirty day period.

The decision of this court, however, was not based upon the proposition that the plaintiff was foreclosed by the application for a rehearing, made in the county court or by the failure to appeal from the decision denying such application.

The former decision was based on the principle that § 8809, Comp. Laws, 1913, did not create a new remedy or right of action, but merely recognized an existing right of action and limited the time within which such action might be brought. This principle was announced in the syllabus as the controlling question in the case, and met with the approval of all of the then members of the court. It also meets with the approval of the court as now constituted.

We are agreed that § 8809, supra, is a statute of limitations, passed in recognition of the rule that an equitable action may be brought in the district court to set aside a final decree of the county court, where proper grounds for equitable interference exist; and that the section was not intended to, and did not, create a new remedy or confer a new right of action, but limited the time in which an equitable action, based on proper grounds, might be brought. We are also agreed that an action does not lie, under § 8809, supra, for the purpose of reviewing mere errors of law, properly reviewable on appeal from the final decree of distribution. We are further agreed that, under the facts in this case, no ground justifying equitable interference with the final decree of distribution has been established.

A rehearing is denied.

NUESSLE and JOHNSON, JJ., concur.

JOSEPH KELLER, Respondent, v. CITY OF FARGO, a Municipal Corporation, Appellant.

(192 N. W. 313.)

Indemnity — city required to pay damage, where not wrongdoer, has remedy against third person at fault.

1. Appellant, a municipal corporation, licensed respondent as a master plumber. As such he dug a trench in appellant's street, and, on refilling the same, left the excess of dirt piled on each side of the sidewalk. A pedestrian,

passing along the walk at the place where the dirt was piled, fell and was injured. She sued the appellant city, alleging negligence by reason of the dirt piles, and had a verdict, the jury finding that by reason of mud on the walk the same was not reasonably safe. Prior to the trial, appellant notified respondent of the pending suit and requested him to defend. This he refused to do, but he consulted with the appellant's attorneys, was present during the trial, and was himself sworn as a witness.

On a suit by appellant city to recover over from respondent licensee for damages paid, it is *held:*

A municipal corporation required to pay damages to a person injured on its streets has, unless it is also a wrongdoer, a remedy over against a third person who is at fault and has so used the streets as to produce the injury.

Indemnity — where seasonable notice given wrongdoer against whom municipality claims right of action to recover over, judgment against defendant conclusive against him.

2. Where seasonable notice of the pendency of the action is given and an opportunity to defend afforded to a third party against whom a defendant claims a right of action to recover over, the judgment therein entered against such defendant is conclusive as against such third party as to all matters material to and necessarily determined by such judgment.

Indemnity — question of physical responsibility of third party for accident on streets not material or necessary to determination of action.

3. Where, in a suit against a defendant municipal corporation by a person injured, the physical cause of the injury is established, but the question of the responsibility for the creation of such physical cause by a third party is not material or necessary to a determination of the action, such third party in a suit against it by the defendant to answer over, is not concluded as to the matter of negligence on his part, and such defendant corporation must establish that such physical cause was created through his negligence.

Indemnity — liability of third party for negligence in causing injury on streets not enlarged by bond of indemnity.

4. Under such circumstances, §§ 6641 et seq., Comp. Laws 1913, do not enlarge the liability of a third party who has given a bond of indemnity against any negligence on his part or any unfaithful or inadequate work done by him.

Opinion filed February 2, 1923. Rehearing denied March 3, 1923.

Indemnity, 31 C. J. § 48 p. 448 n. 99; § 60 p. 460 n. 37, p. 461 n. 40, 41; § 61 p. 463 n. 51.

Note.—For authorities holding that the right of a municipal corporation which has been compelled to pay damages resulting from a defect or obstruction in a highway to recover over against a third person whose negligence or wrongful act was the cause of the injury, see notes in 40 L.R.A.(N.S.) 1165, and L.R.A.1916F, 86, 13 R. C. L. 527, 3 R. C. L. Supp. 60, on right of municipality to recover indemnity or contribution from one for whose tort it has been held liable.

On right of city required to pay damages, where not wrongdoer, to indemnity against third person at fault, see note in 16 Am. St. Rep. 255.

Appeal from District Court, Cass County, *Englert*, J.

Action by Joseph Keller against the city of Fargo, a municipal corporation. Issue on the counterclaim.

Judgment for plaintiff.

Defendant appeals from the judgment and from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

Judgment reversed and a new trial ordered.

W. H. Shure (*B. F. Spalding* of counsel), for appellant.

A party who for his own benefit or convenience or under license from a city is permitted to place upon a public street a structure which from its nature or from a failure to guard it, or keep it in repair is or may become dangerous, is held to be under an implied contract with the city that in doing so, he will exercise ordinary care to protect the public from danger and the city from loss so that in case of injury to one using the street and consequent loss to the city resulting from such structure or the manner in which it is kept, the city may be regarded as in nominal fault only while the party who rendered the street unsafe will be held to be the real wrongdoer and an indemnitor of the city against loss. Grand Forks v. Paulsness, 19 N. D. 293.

It is predicated upon the negligent character of the act which caused the injury and the general principle of law which makes a party responsible for the consequences of his wrongful conduct. Port Jervis v. Bank, 96 N. Y. 550; Glassey v. St. R. Co. 185 Mass. 315, 70 N. E. 199; Lincoln v. First Nat. Bank (Neb.) 108 Am. St. Rep. 690, 93 N. W. 698; Mooney v. Edison Elec. Illuminating Co. (Mass.) 70 N. E. 933; City of Independence v. Missouri P. R. Co. 86 Mo. App. 585; Southwest Teleph. & Teleg. Co. v. Krauser (Tex.) 92 S. W. 431.

A town, though liable for a defect in a highway is not in pari delicto with a person whose acts caused the defects, and, if compelled to pay damages to a third person injured by the defect, may recover over against the wrongdoer. Lowell v. Boston (Mass.) 34 Am. Dec. 33; Milford v. Holbrook, 85 Am. Dec. 735; Woburn v. Henshaw (Mass.) 3 Am. St. Rep. 333. See also Ft. Worth Street R. Co. v. Allen (Tex.) 39 S. W. 125.

Pierce, Tenneson, Cupler & Stambaugh, for respondent.

The rule applicable to tort-feasors generally does not apply to munic-

ipalities under such facts as we have to deal with in this case. Robinson v. Paducah, 146 Ky. 188, 40 L.R.A.(N.S.) 1153, 142 S. W. 370.

"The estoppel created by the first judgment cannot be extended beyond the issues necessarily determined by it. Thus a judgment recovered by a third person against a city for injuries sustained, by reason of a defective highway, is conclusive on the persons bound to keep the same in repair and who had notice of the pendency of the action, on the points that the highway was defective, that the person suffered injury while exercising due care, and that he suffered damage to the amount of the judgment; but it is not conclusive against them that they were bound to keep the highway safe; that they were guilty of negligence; nor on the question that the damage was caused by their sole fault." 14 R. C. L. 62.

The judgment recovered by Southwick against the plaintiffs is conclusive against these defendants on three points: That the highway in Congress Square was defective; that Southwick was injured there while using due care; and that he suffered damage to the amount of $12,000. But it is not conclusive against the defendants on the question whether they were bound to keep the highway safe, or if they were, that they were guilty of such negligence as would charge them if Southwick had brought an action against them; nor on the question whether Southwick's damage was caused by their sole fault.

On a new trial of this action, which must be ordered, the defendants may be permitted to show that they were not bound to make the highway safe, or if they were, that Southwick's injury was not caused solely, if at all, by their default. If it was caused by the joint fault of the plaintiffs and defendants, the plaintiffs cannot recover. One of two joint wrongdoers cannot have either indemnity or contribution from the other, although he may have been compelled to pay the whole amount of the damage caused by their joint wrong. Boston v. Worthington, 10 Gray, 496, 71 Am. Dec. 678, cited in note in 14 R. C. L. page 62.

"A judgment against a city in an action against it for personal injury of which a city lot owner has notice is conclusive upon him as to the fact, cause and extent of such injury, but not as to his responsibility for such cause of injury." Lincoln v. First Nat. Bank, 108 Am. St. Rep. 690, 93 N. W. 698.

"Oral evidence is admissible to prove which act of negligence alleged

is the primary cause of the injury, or whether both contributed thereto." M. K. & T. Ry. Co. v. Ellis, 189 Pac. 363.

It will thus be seen that the negligence as to the condition of the street light, which was a part of the general lighting system of the city, was charged in the complaint; that evidence was submitted thereon; and that the trial judge covered the issue in his instructions to the jury. This issue was determined against the defendant city by a general verdict of the jury, and, a priori established an independent act of negligence on the part of the city. That there may have been concurring negligence on the part of the contractor is immaterial. The rule governing is to be found in Tacoma v. Bonnell, 65 Wash. 505, 36 L.R.A. (N.S.) 582, 118 Pac. 642, Ann. Cas. 1913B, 934.

"If a public street is maintained by the city in an unsafe or dangerous condition, and the negligence of a third party combines with that of the city to cause an injury to such third party and such injury would or might not have occurred but for the combined negligence of the city and the second party, no recovery by either of the joint wrongdoers may be had against the other. Denison v. Sanford, 2 Tex. Civ. App. 662, 21 S. W. 784; Consolidated Kansas City Smelting & Ref. Co. v. Binkley, 45 Tex. Civ. App. 100, 99 S. W. 181; Atlanta Consol. St. R. Co. v. Southern Bell Teleph. & Teleg. Co. (C. C.) 107 Fed. 874; Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355; Geneva v. Brush Elec. Co. 50 Hun, 581, 3 N. Y. Supp. 595, 2 Ann. Cas. 529 and note; 9 Cyc. 807." Puyallup v. Vergowe, 163 Pac. 779.

"Where the nuisance consists merely in the location, and not in the use, guarding, or proper maintenance of the obstruction to which the municipality has consented, the parties are deemed to be in pari delicto within the rule against recourse between joint wrongdoers." 40 L.R.A. (N.S.) 1172; Geneva v. Brush Elec. Co. 50 Hun, 581, 3 N. Y. Supp. 595.

"Of course, it is essential, in order that the present question may arise, that the former verdict or judgment against the plaintiff in the present suit for contribution or indemnity shall have been predicated solely on his constructive liability." Scott v. Curtis (N. Y.) 88 N. E. 794, 40 L.R.A.(N.S.) 1147; New York v. Brady, 70 Hun, 250, 24 N. Y. Supp. 296, second appeal in 77 Hun, 241, 28 N. Y. Supp. 324;

Lexington v. Ætna Indemnity Co. 155 N. C. 219, 71 S. E. 214; Richmond v. Sitterding (Va.) 65 L.R.A. 449, 99 Am. St. Rep. 879.

It is believed no case can be found wherein a recovery back has been allowed if both wrongdoers were only passively negligent, or where both wrongdoers were actively and affirmatively negligent. To otherwise hold puts a premium on indolence or inefficiency of city officers. In the case at bar the city had actual notice of the defect, because it notified the asphalt company of such defect. The officers of each trifled with the situation, trusting no one would be hurt, and then each gambled with the proposition as to who would pay the damages if a person did get hurt. There is no equity in favor of either of the wrongdoers as against the other. It is merely a question, not of state law, but of the common law, as was held in the Robbins Case, 2 Black, 418, 17 L. ed. 298.

"In the United States the question whether a defendant's negligent act or omission was the proximate cause of the injury for which redress is sought is ordinarily a question for the jury."

"Where it is claimed that the defendant's act was not the proximate cause of the injury because the result could not reasonably have been foreseen, it is ordinarily a question for the jury whether the result should reasonably have been foreseen."

"The general rule that the question of proximate cause is for the jury has been applied where the injury was the result of concurring causes." Ann. Cas. 1913B, pp. 351, 354, 355.

NUESSLE, J. Respondent is a master-plumber, licensed as such by this appellant, the city of Fargo. His license was issued in accordance with the terms and conditions of the city ordinance, No. 440, and, in compliance with the provisions thereof, he gave an indemnity bond to the city. He procured a permit to connect a residence, at 622 Tenth street south, Fargo, with a sewer in the street. This he did by digging a trench from the house to the sidewalk and from the sidewalk to the sewer. He completed it late in December, 1918. The ground was frozen and the trench would not contain all the dirt removed in the digging, so he left piles of dirt heaped over the filled trench on each side of the walk. These were left in that condition until about the middle of the winter when the appellant's commissioner of streets, pass-

ing by, noticed the piles and the condition that they were in and notified the respondent that they must be levelled off. Respondent sent a man to do this. Later and about the 1st day of February, the commissioner passed while the work was in progress, but gave no directions as to what should be done. There was at that time no dirt on the walk. Subsequently the respondent notified the commissioner that the condition complained of had been remedied. The commissioner relied on this report and did not again see the place until after the accident hereinafter mentioned had occurred. On Easter Sunday evening, March 16th, one Mrs. Porter, on her way to church, slipped and fell as she passed along the sidewalk between the piles of dirt. She was severely injured.

Mrs. Porter thereafter served notice on the city, claiming damages on account of the injury that she had thus received. In her notice of claim served on the city, she alleged the digging of the trenches and the filling of the same, and that "in filling said excavations dirt was piled up or caused to be piled on both sides of said sidewalk and was allowed to so remain until and after the said 16th day of March, 1919, and thereby snow and water was caused to accumulate at said point between such obstructions which prevented the water from running off the sidewalk in its natural course; that portions of dirt from time to time rolled from said piles to the sidewalk and mixed with the snow and water; that during cold weather said snow and water would freeze and cause said sidewalk to be in a slippery, unsafe, and dangerous condition especially when the ice and the mud contained therein began to thaw," and alleged further "that at this particular time the ice and mud contained therein had begun to thaw and that the said sidewalk was in a slippery, unsafe, and dangerous condition; that said condition of the sidewalk was due solely and wholly to the negligence of the city authorities of the city of Fargo, North Dakota, and in causing and allowing dirt to be piled up on both sides of the sidewalk at said point, and in permitting and allowing said dirt to so remain for several weeks prior to said accident, and that had said dirt been removed such condition would not have existed and said accident would not and could not have happened," and she further alleged that by reason of these facts the accident happened and she was thereby injured.

This claim was not allowed by the city and thereafter she brought an action against appellant to recover damages on account of such accident.

In her complaint she alleged the fact of the accident and that the same was caused by reason of the negligence of the city in not properly caring for the sidewalk at the place in question and alleged that "the sidewalk in question was in a dangerous and unsafe condition for foot travel by reason of the snow, water, and ice having been negligently accumulated upon the sidewalk at the place mentioned; that . . an excavation had been dug with the consent and permission of the defendant city on both sides of the said sidewalk at said point, and for several weeks previous to said date and on and after said date, piles of dirt were allowed by the said defendant to be left on both sides of the sidewalk which prevented the water from running off in its natural course and formed a basin in which water and snow accumulated, and that portions of dirt rolled from time to time on said sidewalk and mixed with the snow and water; that during cold weather ice would form in rough lumps and in smooth patches and cause the said sidewalk to be in a slippery, unsafe condition especially when the ice and mud therein began to thaw; that this condition extended all the way across the walk and the same constituted a nuisance."

She alleged further that the city had due notice and knowledge of all of these facts and conditions and of the defective and unsafe condition of the sidewalk for a long time prior to the date of the accident. Seasonably prior to the trial in the case of Porter v. Fargo, appellant city notified Keller and the surety on his bond of the claim of Porter and of the pendency of the action and requested them to defend. This they refused to do, but thereafter Keller consulted with appellant's attorneys regarding the matter, procured witnesses for use at the trial, was himself sworn as a witness, and was present throughout the trial of the case. The case was duly tried to a jury and the trial court, after instructing as to the matters of negligence and particularly as to the duty of the city with reference to its sidewalks and the use of the same by the public, charged that there would be no neglect of duty unless the jury should find that the officers of the city knew of the defects complained of or with the exercise of reasonable diligence should have known of them long enough before the accident occurred to have had the same remedied. The court further charged that the matters required to be established by the plaintiff in that case before she was entitled to a verdict were: "First, that at the time and place of the accident there

was mud on the sidewalk to such an extent as to render the sidewalk dangerous and unsafe for public travel thereon. Second, that such condition of said sidewalk was due to the negligence of the defendant city. Third, that the defendant city knew of the alleged defective condition of the sidewalk or by the exercise of reasonable care might have known of such condition at a sufficient length of time prior to the accident to have had the same remedied. Fourth, that on the evening of March 16th, 1919, the plaintiff slipped and fell on said sidewalk and was injured, and fifth, that the negligence of the defendant city was the proximate cause of the injury sustained."

The court further charged that if the jury should find that there was mud on the sidewalk in question to such an extent as to render the same dangerous and unsafe for public travel thereon, and that such condition was due to the negligence of the city and that the city knew or by the exercise of reasonable care might have known of the said condition a sufficient length of time prior to the accident to have had the same remedied; that the plaintiff slipped and fell and was injured and that the negligence of the city in permitting the mud to accumulate and remain on the sidewalk was the proximate cause of the injuries sustained by the plaintiff; that they should find a verdict for the plaintiff unless there was contributory negligence on her part. The court further charged that on the question of notice the jury should inquire "whether under the testimony the city authorities either had notice of the existence of the alleged unsafe condition of the sidewalk or that such condition existed in the sidewalk for such a length of time before the accident that knowledge of the existence of such condition by the city authorities must be presumed."

The court further charged "that *under the allegations and proof in this case the plaintiff cannot recover from any defective condition of the sidewalk due to anything other than the mud upon the sidewalk.* If you should find that the plaintiff slipped and fell because of the icy condition of the sidewalk and not otherwise, or if you should not find that the sidewalk in question at the time and place of the accident was in a dangerous condition because of an accumulation thereon of slippery mud, then your verdict should be for the defendant." The jury returned a verdict for the plaintiff, finding for her in the amount of $2,000 and interest. Judgment was entered on said verdict against the city in the

amount of $2,169.20. The city subsequently paid the judgment and seeks in the present action to recover over from respondent on account of such payment.

In the instant case, the city, in stating its cause of action as against the respondent, pleaded the issuance of the license to respondent; that he dug the trench; his negligence in refilling the same; the injury to Mrs. Porter caused thereby; her suit; the notice and demand by the city on respondent to defend; and Mrs. Porter's recovery. Respondent answering, admitted the issuance of the license to him; that he dug and filled the trench; denied lack of care or negligence on his part; alleged that what he did in respect thereto was done in a proper and workman-like manner; admitted recovery of the Porter judgment; alleged that the same was recovered because of the city's negligence and lack of care in keeping the sidewalk in a reasonably safe condition and in allowing water, ice, and mud to accumulate thereon and in failing to properly light said sidewalk. Answering further, the respondent Keller alleged that the negligence and carelessness on the part of the city in failing to keep the sidewalk cleaned and in a reasonably safe condition and in failing to properly light the same caused and contributed to the injury. On the issues as thus made the case was tried to a jury. The jury found for the respondent Keller and against the defendant city. The city thereafter moved in the alternative for judgment notwithstanding the verdict or for a new trial, which motions were denied. An appeal was duly perfected and is here for disposition. The appellant complains of error in the admission of evidence during the course of the trial; that the evidence is insufficient to sustain the verdict; that the court erred in its instructions to the jury; and that the court erred in denying appellant's motion for judgment notwithstanding the verdict or for a new trial. There are various other assignments of error, but, in our view of the matter, they need not be considered. We believe that this appeal can be properly disposed of by considering the merits of the appellant's motion for judgment notwithstanding the verdict or for a new trial.

Should the motion for judgment notwithstanding the verdict have been granted?

The answer depends upon the effect of the judgment in the Porter case. If that judgment is conclusive upon the respondent here not

only as to the effect, cause, and extent of the injury for which recovery therein was had, but also as to appellant's responsibility therefor, or if the facts conclusively established in the record in this case, taking into consideration that judgment, are such that it must be said, as a matter of law, that the respondent's negligence was the proximate cause of the accident to Mrs. Porter, then the motion should have been granted.

Appellant was a licensee. He had no right to place obstructions on or excavations in the street except as such, and, where as such he did so, he assumed responsibility for the consequences of any negligence on his part with respect thereto. Ordinance 440 of the city of Fargo, under which he was licensed, provides:

"No person, company or corporation shall construct, extend or repair any plumbing or house drainage or connect any house drain or house sewer with the sewer system of the city of Fargo until such person, company or corporation shall have received a master plumber's license from the board of commissioners of the city of Fargo.

"All trenches shall be refilled and tamped solid. Wherever a house sewer is laid through a lawn or boulevard, the sod shall be replaced and all rubbish removed.

"Any person to whom a master plumber's license has been granted shall before receiving such license . . . execute . . . bond . . . conditioned that he shall indemnify and keep harmless the city of Fargo of and from all accidents and damages caused by any negligence on the part of himself or any person in his employ in protecting such work; or by any unfaithful or inadequate work done by virtue of his license and that he will also replace and restore to as good and safe condition as when he found it any street or alley in which he may have made or caused to be made any excavation or opening for any purpose whatsoever, and that he will keep and maintain the same in good order to the satisfaction of the city engineer for the period of one year next thereafter and will in all things strictly comply with the provisions of this ordinance or with the conditions of any permit issued to him thereunder."

The fact that pursuant to the ordinance Keller gave a bond cannot affect the matter of his legal responsibility. That bond was required and was furnished so that the city might be able to realize on account of any claim that there might be by reason of any default on Keller's

part. Regardless of his bond, Keller was an indemnitor, but he was not an absolute indemnitor. He was responsible not for the consequences of anything that he might do under the terms of his license, but only for the consequences *of his negligence* with respect to that which he might do. See Grand Forks v. Paulsness, 40 L.R.A.(N.S.) 1158 and note 19 N. D. 293, 123 N. W. 878; 1 Cooley, Torts, 254; 14 R. C. L. 53; 22 Cyc. 99.

The ordinance did not affect or vary this rule. True the ordinance required "that all trenches shall be filled and tamped solid and wherever a house sewer is laid through a lawn or boulevard the sod shall be replaced and all rubbish removed," but whether or not these requirements were complied with were questions of fact to be determined by the jury from such evidence as might be offered.

When Mrs. Porter began her action against the city, Keller was seasonably notified of the fact and requested to defend. This he did not do but he did consult with the city's attorneys. He suggested witnesses, was himself a witness at the trial, and was present during the course of the trial. He is therefore concluded as to all matters that were material to and that were necessarily determined by the judgment entered in that case. Grand Forks v. Paulsness, supra. Sections 6641 et seq. 1913 Comp. Laws, do not change the rule therein laid down. So far as Keller is concerned, the judgment in the Porter case established the fact of the injury, the *physical cause of the injury* and the effect of the injury. Necessarily that case determined that the city's negligence —that is, the breach of the city's duty to keep the sidewalk reasonably safe—was the proximate cause of the injury, and that judgment determined in what respect the city was thus negligent—allowing mud to accumulate and be on the sidewalk—but that judgment did not determine the cause or source of that mud. Whence or how the mud came was only an incidental matter. Whether it was there as a result of the use of the walk by the public, the action of the elements, or the negligence of Keller, was immaterial in that case. The material question was, "Was the mud there?" and that was conclusively determined.

Now the question of Keller's negligence has become material. From the record as made in the instant case, is it possible to say, as a matter of law, that he was negligent? We do not think so. He may have been, and by reason of such negligence the mud deposited on the sidewalk and

the accident caused, but, on the other hand, so far as the record establishes, the mud may have been carried there by the feet of passersby, or swept there by the wind, or have come there in other ways on account of, or without, negligence on the part of Keller. The appellant city has the burden of establishing that it was there by reason of the negligence of Keller, and since on the record there is room for a reasonable difference of opinion in that respect, the jury must pass upon and determine the matter. Therefore, the motion for judgment notwithstanding the verdict was properly denied.

Should the motion for a new trial have been granted?

During the course of the trial and over the strenuous objections of the appellant, evidence was offered by various witnesses tending to show the condition before, at the time of, and after the accident, as to ice and snow at the immediate place of the accident and at other places more or less remote therefrom. This might have been properly admissible for the purpose of enabling the jury to determine whose the responsibility was for the mud being on the walk, but for no other purpose. The trial court in instructing the jury charged "At the outset I wish to say to you that the gist of this controversy here centers around the question of whether the leaving of the piles of dirt by Mr. Keller on the sides of this walk where the injury happened was negligence on the part of the plaintiff Mr. Keller, and whether such negligence was the proximate cause of the injury."

The trial court further charged "Under the circumstances of this case and the view that the court takes of this case, you determine the question here as to whether or not the manner of placing these piles of dirt on either side of the walk by Mr. Keller was negligence, and if so, whether the injury that resulted here was the proximate result of Mr. Keller's negligence in connection with those piles of dirt and the manner and way that they were left," and further "I will ask you to bear in mind the law as I have stated it to you and then apply it to the facts in this case, and determine whether from the evidence in the case Mr. Keller was negligent in leaving those piles of dirt in the manner and way that they were left and whether such negligence was the proximate cause of the injury to Mrs. Porter. That is the question for you to determine, Gentlemen."

These portions of the instructions of the trial court were duly excepted to. We think that the effect of these instructions, taking the instructions as a whole, in view of the testimony admitted over the objection of the appellant's counsel as to the snow and ice on the walk, was to unduly broaden the scope of the jury's inquiry, and that the necessary result of such instructions was to impress upon the jury that they were to determine not only as to whether the mud was upon the walk by reason of the negligence of the respondent with respect to the filling of the trenches and the heaping of the dirt, but also as to whether or not such negligence, if what was done by the respondent constituted negligence, was the proximate cause of the injury to Mrs. Porter, taking into consideration the question of whether or not the snow and ice might not in themselves have been the proximate cause of such injury. Under these instructions and the record as made, the jury may have determined that the snow and ice upon the walk and not the mud thereon was the proximate cause. In our view of the record, the inquiry in the instant case was narrowed, by reason of the findings of the jury in the Porter case, to the question of whether or not the mud accumulated and was on the sidewalk by reason of the negligence of Keller. The question as to the effect of such mud being upon the sidewalk was conclusively determined in the Porter case, for in that case it was determined that the mud was the cause of the injury.

Chapter 70 of the Laws of 1915 provides:

"All municipalities in the state of North Dakota shall be absolutely exempt from all liability to any person for damages for injuries suffered or sustained by reason of the accumulation of snow and ice upon sidewalks within such municipality, unless actual knowledge of the defective, unsafe or dangerous condition of such sidewalk or crosswalk shall have been possessed by the mayor, board of city commissioners, police officer or marshal of such municipality forty-eight hours previous to such damage or injury, and such actual knowledge shall in no case be presumed from the fact of the existence of such condition, but in all cases the same shall be proved as an independent fact. In no event shall any municipality in this state be liable in damages for any injury occasioned through the mere slippery condition of such sidewalk or crosswalk due to the presence of frost or loose snow thereon."

The record in the Porter case is not in evidence. But the notice of

claim filed by Mrs. Porter, the pleadings in the Porter action, and the instructions of the trial judge to the jury are in evidence, and from all of these it appears in the light of said chapter 70, above set out, that the basis of the claim as against the city was the unsafe condition of the walk by reason of the mud thereon. In other words, that case was tried on the theory that the negligence of the city was occasioned by reason of its failure to remove the mud and that the walk was not reasonably safe on account of the fact that the mud had accumulated and was thereon. Viewing the effect of the Porter judgment in this way, it would seem clear that the issues in the instant case are narrowed down to the single question of whether or not the mud was there by reason of Keller's negligence with respect to the excavations he had made and the filling of the same.

As we view it, the respondent cannot be permitted to raise any issue of contributory negligence on the part of the city by reason of its failure to remove any snow and ice that might have accumulated on the walk. As we have indicated, the trial in the Porter case was had on the theory that there was no actual notice as to any snow or ice as required by chapter 70 of the Laws of 1915. If there was no actual notice, there was no duty on the part of the city to remove the snow and ice. If there was no duty on the part of the city to remove the snow and ice, then there was no breach of duty and no negligence on the part of the city when it failed to remove the snow and ice, and therefore, no concurring or contributory negligence by reason of such failure on the part of the city. The city owed no duty as to Keller to remove the snow and ice. It owed no duty to the public to do so without actual notice. See Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564.

The appellant's motion for a new trial should have been granted.

Judgment reversed and a new trial ordered.

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

JESSE FRENCH & SONS PIANO COMPANY, a Corporation, Respondent, v. GEO. W. GETTS (Sometimes Doing Business under the Name and Style of Geo. W. Getts Piano Company), Appellant.

(192 N. W. 765.)

Judgment — no affidavit of merits necessary in motion to vacate default judgment where verified answer filed before default discloses defense on merits.

1. Where a motion is made by the defendant to vacate a default judgment upon the ground of excusable neglect, and where at the time the judgment was entered, an answer, verified by the attorney for the defendant on information and belief, was on file, and the case was at issue, and such answer disclosed a defense on the merits, it is *held* that no affidavit of merits is necessary, following Harris v. Hessin, 32 N. D. 25; and Peterson v. Finnegan, 45 N. D. 101.

Appeal and error — trial court not reversed for refusing motion to vacate judgment except for manifest abuse of discretion; discretion of trial court held not abused in refusing to grant motion to vacate judgment.

2. The action of the trial court in refusing to grant a motion to vacate a judgment under § 7483, Comp. Laws 1913, will not be reversed by this court except for manifest abuse of discretion. For reasons stated in the opinion, it is held that the trial court did not abuse its discretion in refusing to grant the motion of the defendant to vacate the judgment.

Opinion filed March 3, 1923.

Appeal and Error, 4 C. J. § 2824 p. 839 n. 27; Judgments, 34 C. J. § 553 p. 340 n. 21; § 580 p. 365 n. 67.

Appeal from an order of the District Court of Grand Forks County, denying defendant's motion to vacate the judgment entered against him, *Englert*, J.

Affirmed.

H. A. Libby, for appellant.

The power to act upon such motions and to give relief rests in the discretion of the court. Griswold Oil Co. v. Lee, 1 S. D. 531, 36 Am. St. Rep. 761, 47 N. W. 955; Bucknell v. Archer, 29 S. D. 22, 135 N. W. 675.

Note.—As to necessity of affidavit of merit in motion to vacate default judgment, see 15 R. C. L. 719; 4 R. C. L. Supp. 1017; 5 R. C. L. Supp. 848. Refusal of trial court to grant motion to vacate judgment not reversed except for abuse of discretion, see 2 R. C. L. 215; 1 R. C. L. Supp. 451.

A case on the question of excusable neglect is Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Braseth v. Bottineau County, 13 N. D. 344, 100 N. W. 1082; Keeney v. Fargo, 14 N. D. 419, 105 N. W. 92; Cline v. Duffy, 20 N. D. 525, 122 N. W. 75; Bank v. Krenelka, 23 N. D. 568, 137 N. W. 824; Citizens Nat. Bank v. Braden, 19 N. D. 489, 126 N. W. 102; Bismarck Groc. Co. v. Yeager, 21 N. D. 541; First State Bank v. Kreuelke, 23 N. D. 568; Westbrook v. Rice, 148 N. W. 827.

Geo. A. Bangs, for respondent.

The discretion of the trial court exercised in the granting of the order appealed from will be reversed only for an abuse thereof.

The moving party must show diligence; negligence will defeat the right; negligence is inconsistent with "excusable neglect."

There must be a meritorious cause of action or defense. Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252; Racine-Sattley Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; Getchell v. G. N. R. Co. 24 N. D. 487, 140 N. W. 109; Herrmann v. State Bank, 34 N. D. 313, 158 N. W. 986; Wakeland v. Hanson, 36 N. D. 129, 161 N. W. 1011; State Bank v. O'Laughlin, 37 N. D. 532, 164 N. W. 135; Mougey v. Miller, 41 N. D. 81, 169 N. W. 735; State v. Casey, 9 S. D. 436, 69 N. W. 585; McDonald v. Egan, 43 S. D. 147, 178 N. W. 296; Walton v. Hurst (Mo. App.) 199 S. W. 1043; Kahoon v. Brinkley, 176 N. C. 5, 96 S. E. 650; Baker v. Hunt, 66 Okla. 32, 166 Pac. 891.

JOHNSON, J. This is an appeal from an order denying defendant's and appellant's motion to vacate and set aside a judgment entered in the action on July 14, 1922.

The plaintiff served a summons and complaint upon the defendant on or about the 23d day of March, 1922. The suit was brought upon several promissory notes. Answer was in due time interposed by the defendant, verified on information and belief by the attorney for the defendant. The defendant admitted the execution of the notes upon which the action was brought and interposed a counterclaim in an aggregate amount exceeding the face value of the notes.

The case was on the calendar for the June, 1922 term in Grand Forks county. This term convened on June 6 and it is undisputed that of this fact attorneys for both parties had full knowledge. The

case was set for trial for June 23. On June 23, the defendant not being present, and at the request of defendant's counsel, the case was put over for trial to July 1, and on July 1 the trial was further postponed at the request of defendant's counsel. Thereafter, and from day to day the case was postponed until the end of the term on July 12, at which time a jury was impanelled. Plaintiff submitted his testimony and verdict was rendered for the plaintiff and judgment entered thereon. The defendant failed to appear in person at any time and no testimony was offered in his behalf at the trial.

On the 27th day of September, 1922, a motion to vacate and set aside this judgment was made by the attorney for the defendant, and on October 14 thereafter, this motion was in all things denied. The motion was made upon the ground of excusable neglect and the appellant seeks to bring himself within the provisions of § 7483, Comp. Laws, 1913, providing for the vacating of judgments in certain contingencies. The motion was supported by the affidavits of C. A. Robbins, a physician who attended the defendant, Ralph Eaton, H. B. Johnson, Geo. W. Getts, defendant, and H. A. Libby, the last named being the attorney of record for the defendant. No affidavit of merits was filed in support of the application, and respondent contends that such an affidavit is essential, although the case was at issue when the default occurred.

The necessity for, and the sufficiency of, affidavits of merits in support of motions to vacate judgments under § 7483, Comp. Laws, 1913, have been many times before this court. In Gauthier v. Rusicka, 3 N. D. 1, 53 N. W. 80, it was held that the moving party must disclose merits; that the court will relieve him only in furtherance of justice; and that the defenses must be meritorious, not merely of a technical character. It is there said that the defendant must present an affidavit of merits with the motion, and that an unverified answer in the file, although accepted by the attorney for the plaintiff is insufficient and cannot be considered in lieu of an affidavit of merits. It is further stated by way of dictum in the opinion that it is doubtful if a verified answer would obviate the necessity of an affidavit of merits and that there is much persuasive authority in support of the view that a verified answer is not sufficient.

In Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151, this matter was

again considered by the court, but two opinions were written, one by Justice Bartholomew and the other by Justice Corliss, while Chief Justice Wallin did not participate in the decision. The trial court was reversed, but the grounds of decision are differently stated in the two opinions. Justice Corliss states as his view that, inasmuch as the defendant failed to present an affidavit of merits in support of the motion to vacate the judgment, the motion should have been denied, notwithstanding the fact that the defendant had served a verified answer which was on file in the case. Justice Corliss again refers to the case of Gauthier v. Rusicka, supra, as intimating that an affidavit of merits was necessary, notwithstanding the fact that a verified answer was on file, and further reiterates the position taken in that case that the defendant who moves for a vacation of the judgment should not be permitted to obtain relief on terms less strict because a verified answer has been filed than one who is asking for such relief before an answer has been served. In Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252, this court, in an opinion written by Justice Bartholomew, Justices Corliss and Wallin concurring, states it to be the law in this jurisdiction that the defendant who moves to vacate a judgment on the ground of mistake, inadvertence, or excusable neglect, must file an affidavit of merits in which he says, if he does not set out the specific facts, that he has fully and fairly stated all the facts in the case to his counsel and that, upon such statement, his counsel has advised him that he has a good defense on the merits. The court says that this is the least that is required. The court further says that an attorney may make the affidavit only when an excuse is shown for the failure of the party himself to make it. If the attorney makes it, he must make the affidavit from his own knowledge of the facts. The court further in this opinion says, in speaking of the sufficiency of the affidavit of merits: "The law upon that point is clearly stated by Corliss, J., in his concurring opinion in Sargent v. Kindred, 5 N. D. 8, 19, 63 N. W. 151." It would seem that the court in the Kirschner Case adopted the concurring opinion of Corliss, J., in Sargent v. Kindred, supra, as the law of the case on this point, in which Justice Corliss emphatically states it to be his opinion that an affidavit of merits should accompany the application, notwithstanding the fact that a verified answer has been served and is on file.

In Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581, this court says that the defendant, on a motion to vacate a judgment, pursued the proper practice in supporting his motion by a duly verified answer, stating a defense on the merits to the plaintiff's cause of action, and also by using affidavits excusing his neglect to answer the complaint. In Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381, this matter was again before this court and, in an opinion written by Chief Justice Wallin, which was concurred in by all his associates, it is held that the trial court, upon a motion to vacate, may, in lieu of an answer, in its discretion, accept an affidavit of merits which shows that the defendant has a valid defense on the merits to the action. The court holds that such an affidavit is a substantial compliance with the rule requiring defenses on the merits to be shown. In Marin v. Potter, 15 N. D. 284, 107 N. W. 970, this court held that a mere general statement in the affidavit that the summons and complaint were not personally served on him is not sufficient to overcome the proof of service afforded by an affidavit of service in legal form. In other words, the affidavit must state facts rather than conclusions. In Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228, this matter was again before this court upon an appeal from Stark county. In that case the former decisions of the court are reviewed by Justice Goss and it is stated that the proper procedure under § 7483 is by motion to vacate the judgment based on an affidavit of merits and a proposed verified answer; it is further held that on such an application the affidavit of merits cannot be controverted except as to matters therein stated other than those which constitute the merits of the proposed defense; and that the judgment of the trial court upon application to vacate will not be reversed except in case of manifest abuse of discretion. In Bismarck Grocery Co. v. Yeager, 21 N. D. 547, 131 N. W. 517, this court again considered procedure under § 7483. It was there held, in substance, in an opinion written by Justice Burke, that where the affidavit of merits disclosed all of the facts constituting the defendant's defense, it was not necessary in addition thereto that the defendant should allege that these facts had been submitted to an attorney who had advised the affiant that they constituted a meritorious defense. The court expressly holds that there are two forms of affidavits of merits recognized by the courts—one where all the facts are set out for the inspection of the court,

and the other where the affiant states that he has submitted all the facts to his attorney and has been advised by him that his defense is meritorious. Either form of affidavit is held to be sufficient in North Dakota.

In Getchell v. Great Northern R. Co. 24 N. D. 487, 140 N. W. 109, this court had under consideration the sufficiency of an affidavit of merits made by the attorney for the defendant. In that case the affidavit of merits stated that the defendant had submitted to the attorney who had made the affidavit the claim papers and investigation of the claim department in reference to this action, and that he, the affiant, had advised the defendant that it was not liable for the damages demanded in the complaint. The court held this affidavit insufficient as not based on the personal knowledge of the attorney and merely hearsay.

This brings us to a consideration of the case of Harris v. Hessin, 32 N. D. 25, 155 N. W. 41. In this case application was made to the county court of Ward county to open a judgment entered against the appellant by default. The defendant had answered, and when the application to vacate was made, this answer was on file and the case was at issue. It was contended that, inasmuch as the defendant did not support his motion to vacate the judgment with an affidavit of merits, the trial court correctly refused to grant the motion. Speaking on this point, this court, in reversing the trial court, says:

"There is no question of sufficiency of an affidavit of merits involved. The case was previously at issue on the merits and no affidavit of merits was therefore necessary. All that was incumbent upon the defendant was to excuse by affidavit or otherwise the default, if any, in appearance at the trial."

No authorities are cited in support of this conclusion. It would seem to be contrary to the dictum of Justice Corliss in Sargent v. Kindred, supra, which dictum was approved and accepted in general terms as the law in this jurisdiction, in Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252. This case, therefore, settles the law in this state to be that, when a verified answer is on file, which, on its face discloses a defense on the merits, and the case is at issue, no affidavit of merits is necessary, and the answer may be accepted in lieu thereof. In Wheeler v. Castor, supra, it wil be noted that the converse of this proposition had been held, to wit: That the court, in lieu of an answer, might accept an affidavit of merits.

This question was again before the court in Peterson v. Finnegan, 45 N. D. 101, 176 N. W. 734, where an answer, verified on information and belief by the attorney, but not accompanied by an affidavit of merits, was used in support of the motion to vacate a judgment. The case had been at issue before the default. The court held in this case, in an opinion written by Justice Grace, that no affidavit of merits was necessary. In a specially concurring opinion, Chief Justice Christianson calls attention to the case of Harris v. Hessin, supra, in support of this holding. The supreme court of California in Reher v. Reed, 166 Cal. 525, 137 Pac. 263, Ann. Cas. 1915C, 737, and in Savage v. Smith, 170 Cal. 472, 150 Pac. 353, arrives at the same conclusion and holds that an affidavit of merits in support of a motion to vacate is not necessary where at the time a verified answer stating a good defense on the merits is on file.

It follows, therefore, in the case at bar, a verified answer having been interposed before the default occurred, and the case having been at issue upon an answer which set up matter which, if proved, would have resulted in a judgment for the defendant, an affidavit of merits was not necessary in support of the motion to vacate the judgment. This brings us to a consideration of the only remaining question in the case, namely, whether, on the merits, the trial court abused its discretion in refusing to grant the motion to vacate the judgment. The affidavit of C. A. Robbins is brief and alleges, in substance, that he supplied medicines and treatment for George W. Getts between the 8th and 15th days of July, both dates inclusive. The affiant does not state the nature of defendant's illness. The affidavit of H. B. Johnson alleges that he is the foreman of the company of which George W. Getts was manager and that from July 8th to July 15th George W. Getts was sick and under treatment and unable to leave the camp. The nature of the sickness is not given. The affidavit of Ralph Eaton alleges that he is foreman and general superintendent of the company managed by George W. Getts, and is in other respects the same as the affidavit of H. B. Johnson as to the sickness of Mr. Getts. The affidavit of Mr. Libby alleges, in general, attempts to reach the defendant and to produce him at the trial, and further states that the defendant Getts gave affiant a statement of the facts relating to and connected with the defendant's transaction with the plaintiff, and that from the statement thus given, the affiant

prepared the answer which was interposed in the action. The affidavit of Mr. Getts is also in the record, in which he alleges that from July 8 to July 16 he was ill and under treatment of a physician and was unable to travel. He further alleges that he could not be reached by telegraph and that the telegram sent by his attorney, regarding the trial of his case was not delivered, but was held at the nearest railroad station, at Tekoa, Washington, and was not received by the affiant until after he had recovered from his illness and came to town, too late to permit his attendance at the trial. It appears from the affidavits that the defendant Getts was in a lumber camp in the state of Idaho and that this camp was 20 miles from a town. Mr. Getts does not state the nature of his illness.

The record shows that the calendar was called on or about June 6 and the case was set for trial for June 23, 1922. There is nothing in the record to show that the defendant Getts was not informed of the date of trial in time to reach Grand Forks on June 23, nor, if he was not so informed, is there any excuse or explanation offered why he was not so informed; there is nothing in the record to show that he was not so informed before his illness on July 8, unless it be his own affidavit, in which he says, as heretofore indicated in substance, that the telegram sent by his attorney regarding the trial of the case was not delivered in time. The affidavit of Mr. Libby, with reference to the telegram, shows that one telegram was sent on July 11 and it would seem from the affidavit of Mr. Getts that this is the telegram to which he refers as having been received by him after his sickness, and when he came to town. Whether or not he received any letters or telegrams with reference to the date of the trial, sent him in June, he does not say, and if such telegrams or letters were sent him and received by him, no explanation, whatever, is made why he was not on hand on June 23 or at a subsequent date prior to July 8. Neither does his counsel say that he notified defendant in June, or, if such notice was given, why defendant failed to appear before July 1, 1922. These omissions are very significant.

The defendant and appellant contends that the court erred in making an order denying his motion to vacate and set aside the judgment in this case. Such applications are addressed largely to the discretion of the trial court, and nothing but palpable abuse of discretion in granting or

refusing such an application would justify this court in interfering with the action of the court below. In the case at bar, the undisputed facts, as they appear in the affidavits of the appellant, tend rather to negative than affirm the claim of the appellant that his neglect in suffering judgment to be entered against him was the result of excusable neglect. We find nothing in the record that would justify this court in holding as a matter of law that the trial court abused its discretion in refusing to vacate and set aside the judgment in this case.

The judgment of the trial court is affirmed.

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

SECURITY STATE BANK OF CROSBY, NORTH DAKOTA, a Corporation, Appellant, v. EDWIN PETERSON, Respondent.

(192 N. W. 491.)

Bills and notes — answer alleging lack of consideration in suit on promissory note held sufficient.

1. Where an answer alleges that defendant received no consideration whatsoever for a promissory note, it is *held*, upon demurrer, to sufficiently aver an ultimate fact presenting an issue upon consideration.

Bills and notes — answer alleging facts concerning fraud and misrepresentation and failure of consideration of note held sufficient.

2. Where an answer has alleged facts concerning fraud and misrepresentation whereby no consideration existed in the making of a promissory note, it is *held*, upon demurrer, that a defense is asserted.

Bills and notes — answer, in suit on note alleging agreement not to enforce payment, held sufficient.

3. Where an answer has alleged an oral agreement not to enforce a note and not to hold the maker personally liable and, where such allegations, in connection with averments of fraud and misrepresentation, may establish a note of accommodation without consideration, it is *held*, for reasons stated in the opinion, that a defense is asserted.

Opinion filed February 27, 1923. Rehearing denied March 13, 1923.

Bills and Notes, 8 C. J. § 1204 p. 916 n. 10, p. 918 n. 18; § 1216 p. 931 n. 63.

In District Court, Divide County, *Moellring*, J.

Action upon a promissory note.

Plaintiff has appealed from an order overruling a demurrer to three separate defenses alleged in the answer.

Affirmed.

R. H. Points and *Leighton & Brace*, for appellant.

The want or failure of consideration is an affirmative defense which must be pleaded expressly in code states and by statute in some other states, although at common law evidence thereof was admissible under the general issue. 8 C. J. 916; Sharpless v. Giffen, 47 Neb. 146, 66 N. W. 285; Welles v. Colorado Nat. Life Assur. Asso. 49 Colo. 508, 113 Pac. 524.

In defense to an action on a promissory note, it is not sufficient to plead in general terms want of consideration and that the note was obtained by fraud. The answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud. Gushes v. Leavitt, 5 Cal. 160.

It is a universal rule that facts not legal conclusions must be pleaded. The statement that a note was given without consideration is a mere conclusion. Sac County v. Hobbes, 72 Iowa, 69, 33 N. W. 368.

Ordinarily, fraud must be alleged not only specially but specifically. It is not sufficient to allege fraud in general terms, such an allegation being considered to be of a mere conclusion which the pleader is not permitted to draw, but which, so far as concerns the pleading, is a matter for the court to determine from the facts alleged. 12 R. C. L. 416; 8 C. J. 930.

"Since a fraud must relate to facts then existing or which have previously existed, the general rule is that fraud cannot be predicated upon statements promissory in their nature and relating to future actions. 12 R. C. L. 254."

As a rule, in order that false representations may be ground for an action of deceit for rescission of a contract entered into in reliance thereon, they must be such as are calculated to impose upon and deceive a person of ordinary prudence, and of such a character that a reasonably prudent person would have relied upon them. 12 R. C. L. 371; Peterson v. Hoffitzer, 35 S. D. 101, 150 N. W. 934; Pom. Eq. 3d ed. § 891; Pigott v. Graham, 48 Wash. 348, 93 Pac. 435; Mamlock v. Fairbanks,

46 Wis. 415, 1 N. W. 167; Bell v. Byerson, 11 Iowa, 233; Boulden v. Stillwell (Md.) 60 Atl. 609; State Bank v. Gates, 114 Iowa, 323, 86 N. W. 311; Kiser v. Richardson, 91 Kan. 812, 139 Pac. 373, Ann. Cas. 1915D, 539.

The rule as to written contracts not being subject to change by contemporaneous oral agreements is of such importance that it should not be departed from unless such departure is brought within well-settled exceptions to the rule. The right of parties to put their conclusions into writing, and thereby avoid any question of veracity as to what such conclusions were, is of the greatest public and private convenience. The circumstances surrounding the case at bar did not warrant the departure from the rule, and, for the reason that it was departed from by the trial court, the judgment must be reversed, and the cause remanded, with instructions to enter judgment in favor of plaintiff in accordance with the prayer of his complaint. Bryan v. Duff, 12 Wash. 233, 50 Am. St. Rep. 889, 40 Pac. 936.

"Parol evidence of a contemporaneous agreement that a note should not be paid, in whole or in part, is not admissible." Middleton v. Griffith, 57 N. J. L. 442, 51 Am. St. Rep. 617, 31 Atl. 405.

"The conditional delivery of a written instrument necessarily implied that the delivery may become absolute and the contract obligatory according to its terms, in case the condition precedent is performed or broken." Schine v. Johnson, 92 Conn. 590, 4 A.L.R. 744, 103 Atl. 974.

Where a contract is full and complete as to all of the terms of the contract, and the terms of such contract are plain and specific and set forth fully the subject-matter of the contract, and such written contract covers the subject-matter of the contract fully so as to be a complete contract, oral testimony is inadmissible to show a prior parol agreement entered into between the parties at or prior to the time of the execution of the contract. Gilbert Mfg. Co. v. Bryan, 39 N. D. 13, 166 N. W. 805.

To the same effect see: 10 R. C. L. 1041; Stiles v. Vandewater, 48 N. J. L. 67, 4 Atl. 658; Specht v. Howard, 16 Wall. 546, 21 L. ed. 348; Cummings v. Kent, 44 Ohio St. 98, 58 Am. Rep. 799, 4 N. E. 713; Kulenkamp v. Groof, 71 Mich. 675, 1 L.R.A. 594, 40 N. W. 57; Duleny v. Burke, 2 Idaho, 619, 23 Pac. 916; 22 C. J. 1148, § 1540.

The rule, in regard to inconsistent defenses, is that defenses are not inconsistent when they may all be true, that they are only inconsistent when some of them must necessarily be false, if others of them are true; in such a case they cannot be united. McDonald v. Mfg. Co. 17 Or. 633, 21 Pac. 886; Susznik v. Alger Logging Co. 76 Or. 189, 147 Pac. 992, Ann. Cas. 1917C, 700; Johnson v. Butte Co. 41 Mont. 158, 48 L.R.A.(N.S.) 938, 108 Pac. 1056.

Braatelien & McIlraith, for respondent.

"The rule is firmly established that a complaint, when attacked by demurrer upon the ground that it fails to state facts sufficient to constitute a cause of action, will be liberally construed in favor of such pleading, and the same will be upheld when it contains allegations of fact sufficient *to reasonably and fairly apprise the defendant of the nature of the claim against him.*" Weber v. Lewis, 19 N. D. 476.

"Whether such evidence is admissible under the general issue or the general denial of code pleadings is a question upon which the courts are not entirely harmonious. There is some authority for the proposition that it must be specially pleaded, but the better rule appears to be that of permitting the evidence to be introduced although the defense is not specially pleaded. Allegations in this respect should meet with a liberal interpretation, and it seems that an averment that the party received no consideration for the instrument is a sufficient plea." 3 R. C. L. 925, § 121.

"The mere general averment of want of consideration, without stating the facts, is sufficient (except for cases of failure of consideration)." 2 Bates, Pl. & Pr., p. 1289.

"A general averment is sufficient in pleading want of consideration, without alleging or stating the facts. It is to be observed, however, that even in jurisdictions which adhere to the general rule, its effect may be defeated in a particular case by a qualification of the general averment." Zebold v. Hurst, L.R.A.1917F, 580.

The burden of proof upon the whole of the evidence is upon the plaintiff to prove that the note in question was given for a good consideration. 8 C. J. 997; 2 Horwitz's Jones, Ev. § 179 (177); Security State Bank v. Krach, 36 N. D. 114.

"The general rule that an instrument absolute on its face cannot be shown by parol to be conditional, though not without exceptions, is well

settled. But it is generally held that between the immediate parties and those taking with notice, it can be shown by parol that such an instrument was not to operate as a valid obligation until the happening of a certain event, since such evidence does not vary or alter the instrument, but tends merely to show that it never became a valid undertaking." Case note in 18 L.R.A.(N.S.) 288.

The question of the inconsistency of defenses cannot be raised by demurrer—a demurrer only questions the legal sufficiency of the allegations of the pleading. 8 N. D. 111, 77 N. W. 281.

"It is a universal rule that a demurrer is an admission of the truth of all facts properly averred in the pleading demurred to, and the rule sometimes prevails that where several grounds of defense are inconsistent the defect cannot be taken advantage of by demurrer, the method being to compel the party to elect on which of the inconsistent grounds he will rely."

Inconsistent defenses may be pleaded in the same answer. 21 R. C. L. 506, 513, 518.

Statement.

BRONSON, Ch. J. Plaintiff bank, in its complaint, has alleged the making of a promissory note by defendant to plaintiff. In an answer, defendant alleges, for a first defense, that he did not receive any consideration whatsoever for the promissory note; for a third defense, that the note was obtained by fraud and misrepresentation that it was necessary for plaintiff to secure such note from defendant before the plaintiff would extend credit to the United Consumers Stores Company in which defendant was interested; that defendant relied upon such false representations and thereby made the note; that, in fact, the loan to the Stores Company had been made several weeks prior to the time of the making of said defendant's note; that nothing was furnished by plaintiff in reliance upon defendant's note; that such note did not create any obligation at the time it was given or at any time and was wholly lacking in any consideration whatsoever; for a fourth defense, that the note was made upon the understanding that it was never to be effective or to be enforced; that plaintiff had previously made a loan of $18,000 to the Stores Company and represented to defendant that

such loan was an excess loan not permitted by law; that in order to satisfy the Bank Examiner and the law it was necessary to secure notes from individuals in an amount equal to and, to substitute for, such excessive loan, all for purposes of examination of the bank; that it was amply secured by other notes and security; that defendant relied upon these assurances and so executed the note; that such note was given for such special purposes only and its delivery was induced by fraud, deceit, and false representations for plaintiff's benefit; that, in addition to obtaining such note as an asset of the bank, plaintiff obtained such note partially to gain favor with, and secure the patronage of, the Stores Company which was then operating its store in a large mercantile business at Crosby, North Dakota; that such store had bank accounts and made extensive bank deposits at banks at Crosby, North Dakota, where plaintiff was engaged in the banking business, but such Stores Company had not, prior to the procurement of such note, extensive deposits with plaintiff bank; that, partly to secure such business and patronage of the Stores Company, plaintiff, conspiring with the Stores Company, through fraud, deceit, fraudulent concealment, and false pretenses as alleged, procured such note. The pleadings are not set forth in full; only the salient ultimate facts have been stated.

Plaintiff separately demurred to each of the three defenses upon the ground that each failed to state grounds sufficient to constitute a defense. It has appealed from an order overruling its demurrers.

Plaintiff contends that want of consideration must be specially pleaded as a defense in an action upon a promissory note and that the first defense is insufficient in that regard; concerning the third defense, it is maintained that the acts of fraud and deceit pleaded are insufficient, through lack of specific averment and of representations not within the knowledge of defendant, to constitute a defense; concerning the fourth defense, it is further contended that the alleged oral agreement for nonliability and nonenforcement expressly contradicts the terms of a valid written contract and therefore is invalid.

Decision.

First defense: The rule of liberal construction applies to allegations admitted by a demurrer. In such case allegations of fact sufficient to

reasonably and fairly apprize the opposite party of the nature of the claim against him will be upheld. Weber v. Lewis, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105. Under such circumstances the allegations that defendant received no consideration whatsoever for the note may be considered sufficient as an allegation of the ultimate fact that there was no consideration for such note. Grimes v. Ericson, 94 Minn. 461, 463, 103 N. W. 334. See McCarty v. Kepreta, 24 N. D. 400, 48 L.R.A.(N.S.) 65, 139 N. W. 992, Ann. Cas. 1915A, 834.

Third defense: This alleges fraud and deceit as well as lack of consideration. If it constitutes a defense upon any ground as alleged it will be upheld as such. Kautzman v. National Union F. Ins. Co. 48 N. D. 1229, 189 N. W. 325.

If, however, the fraud and deceit alleged are to be considered as forming the basis for the lack of consideration alleged we are nevertheless of the opinion that if the note was so secured, pursuant to the allegations made, without the extension of any credit or the parting by plaintiff with anything of value, a valid defense is asserted. See Collins v. Townsend, 58 Cal. 608, 616; 8 C. J. 930.

Fourth defense: It is unnecessary, to express any opinion upon the validity of the oral agreement concerning nonliability and nonenforcement in connection with the express written terms of the note and the obligations that would flow therefrom. Further, upon the question whether the oral agreement made to deceive the bank examiner, as alleged, constitutes a defense, we express no opinion. It is sufficient to state that otherwise a defense is asserted, if, through fraudulent representations and false pretenses the note was secured without any consideration whatsoever therefor and as a pure accommodation to the bank. See Kautzman v. National Union F. Ins. Co. supra.

The order of the trial court overruling the demurrer is affirmed.

CHRISTIANSON, JOHNSON, NUESSLE, and BIRDZELL, JJ., concur.

JOHN W. MAHER, Respondent, v. HERMAN BOEHMER and Minnekota Elevator Company, a Corporation, Appellant.

(192 N. W. 723.)

Landlord and tenant — lease on shares held effective without filing as chattel mortgage.

1. Following Merchants' State Bank v. Sawyer Farmers' Co-op. Asso. 47 N. D. 375, it is *held* that the provision, in a farm lease on the share plan, reserving title to all crops in the owner of the land is effective without filing the farm lease as a chattel mortgage.

Landlord and tenant — instructions as to reservation of title by farm lease on share plan held erroneous.

2. For reasons stated in the opinion, it is *held* that the instructions to the jury in the instant case were contrary to the rule stated in the preceding paragraph, and that the trial court was correct in ordering a new trial on account of such erroneous instructions.

Opinion filed March 13, 1923.

Landlord and Tenant, 36 C. J. § 1954 p. 710 n. 26.

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

Defendant, Minnekota Elevator Company, appeals from an order granting a new trial.

Affirmed.

F. B. Lambert, for appellant.

Sinness, Duffy & Wheeler, for respondent.

CHRISTIANSON, J. This is an action for the conversion of certain grain. The case was tried to a jury and resulted in a verdict in favor of the plaintiff and against the defendant Boehmer in the sum of $180, with interest, and in favor of the defendant Minnekota Elevator Company for a dismissal of the action. Thereafter plaintiff moved in the alternative for judgment notwithstanding the verdict against the defendant Minnekota Elevator Company, or for a new trial in event the motion for judgment notwithstanding the verdict was denied. The

Note.—For cases holding that a provision in a lease of a farm on shares, to the effect that title to, and possession of all crops should be in the lessor until the conditions of the lease are complied with by the lessee, was effective without filing the lease as a chattel mortgage, see note in 14 A.L.R. 1362, on necessity of filing lease or contract which reserves title to crops in lessor; 16 R. C. L. 981; 4 R. C. L. Supp. 1091.

trial court ordered a new trial on the ground of errors of law occurring at the trial and excepted to by the plaintiff. The defendant elevator company has appealed from such order.

Plaintiff is the owner of a certain tract of land in Ramsey county in this state. During the years 1918 and 1919, this land was occupied by the defendant, Boehmer, under written contract. The contract under which the 1919 crops were produced contained the following stipulations: "The party of the first part (Boehmer) also agrees . . . not to sell or remove, or suffer to be sold or removed any of the products of said farm . . . until the division thereof, without the written consent of (Maher) the party of the first part; and until all the covenants and agreements to be performed by (Boehmer) the party of the first part shall have been fulfilled the title and possession of all hay, grain, crops, produce, stock, increase, income and products raised, grown or produced on said premises shall be and remain in (Maher) the party of the second part; and (Maher) party of the second part has the right to take and hold enough of the crops, stock, increase, income and products that would on the division of the same belong to said (Boehmer) party of the first part, to repay any and all advances made to him by (Maher) the party of the second part and interest thereon at 10 per cent per annum, and also to pay all indebtedness due said (Maher) party of the second part by said (Boehmer) party of the first part, if any exist. . . .

"And it is further agreed, that as soon as such threshing is finished the said first party (Boehmer) shall at once and at his own cost and expense deliver the whole of said grain to said second party (Maher) at one of the grain elevators, or on board cars, as the second party (Maher) may elect, at Southam or Lawton, North Dakota, railroad station, and take storage tickets therefor in the name of said (Maher) second party and deliver the same to him on demand, and that nothing which may be done by said (Boehmer) first party or any other person contrary to the provisions of this contract shall constitute a division of the said grain or a delivery to said first party (Boehmer) but the title, ownership and possession of such grain and all produce of said farm shall be and remain in said (Maher) party of the second part."

In his complaint the plaintiff alleges that he leased the SW¼ of section 33, township 156, range 61, to the defendant Boehmer for the

year 1919 under the written contract above referred to; that the defendant Boehmer during that year, raised 407½ bushels of wheat and 887 bushels of rye and other grain on said premises; that during the fall of 1919 he hauled and delivered the same to the defendant elevator company at its elevator at Southam; that the plaintiff has received only 48⅓ bushels of wheat and 195½ bushels of rye and that the defendants have converted all of the remainder of the grain produced on said premises, during the year 1919, to their own use and benefit; that no division of the crop had been made at the time the grain was so hauled and delivered to the defendant elevator company; that the highest market price for the grain between the date of the delivery thereof to the elevator company and the date of the commencement of this action was $2.13 per bushel for rye and $3 per bushel for wheat; that the plaintiff made advances to the defendant Boehmer and that the defendant Boehmer was indebted to the plaintiff therefor in the sum of $209.78, with interest at the rate of 10 per cent per annum from October 10th, 1918; that the plaintiff has duly demanded that the elevator company deliver the grain to him, but that such demand has been refused.

The plaintiff demands judgment for the amount of Boehmer's indebtedness to him with interest thereon and also for the value of the grain coming to him as his share, under the terms of the contract.

The defendants answered separately, but the answers are for all purposes and intents identical. It is admitted that the defendant, Boehmer, farmed the land under the written contract; all other allegations in the complaint, except the one relating to the corporate existence of the elevator company, are denied.

It is further alleged that the grain in controversy was mixed with other grains, with the consent of the plaintiff and that plaintiff specifically agreed and consented to the sale. It is further alleged that whatever interest the plaintiff had in the grain was subject to certain liens, to wit: A thresher's lien in the sum of $1,009.88; a seed lien in the sum of $235, and a farm laborer's lien in the sum of $37.50. And it is alleged that said grain was sold and applied in payment of said liens.

The trial court, among others, gave the following instructions to the jury:

"The burden of proof is upon the plaintiff to prove the amount of his advances made under his contract, the amount of grain raised under

the contract, the highest market value of the same, the amount delivered to the elevator company, *the claim that the elevator company knew of his claims* and the amount still due him. This he must do by the preponderance of the evidence,—that is, the greater weight of the evidence.

"So far as the relations between plaintiff and the defendant elevator company are concerned, *I charge you plaintiff must show the defendant had knowledge of his claims before it bought the grain. Unless this is done there is no claim against the elevator company.*"

These instructions were clearly contrary to the principle announced by this court in Merchants' State Bank v. Sawyer Farmers' Co-op. Asso. 47 N. D. 375, 14 A.L.R. 1353, 182 N. W. 263, wherein we ruled that the provision in a farm contract reserving title to all crops in the owner of the land is effective, without filing the contract as a chattel mortgage. And upon the oral argument, it was conceded that the principal, if not the sole, reason which actuated the trial court in ordering a new trial in this case was that the instructions given were contrary to the rule announced in Merchants' State Bank v. Sawyer Farmers' Co-op. Asso., supra.

Appellant's counsel contends that the instructions given were correct; that the rule announced in the case last cited is erroneous, and that that decision should be overruled. The contention advanced does not meet with our approval. The question whether a farm contract must be filed as a chattel mortgage in order to render effective a provision reserving title to all grain produced thereunder in the owner of the land was carefully considered, and the view of the court with respect thereto fully stated, in the Merchants' State Bank Case. Further reflection has in no manner altered, but has rather confirmed, the views of the members of the court who participated in that decision; and the rule announced in that case meets with the approval of all the members of the court as now constituted, and is hereby reaffirmed.

Appellant's counsel further contends that, in any event, the error in the instructions was error without prejudice. He says, the plaintiff introduced evidence tending to show that the elevator company had actual notice and knowledge of plaintiff's claim under the contract prior to the time Boehmer delivered the grain; and that the elevator company admitted that it had such actual notice and knowledge of plaintiff's claim. In our opinion the record does not substantiate the contention

thus advanced. And it is apparent that the trial court was of the view that there was a conflict in the evidence as to whether the elevator company had actual knowledge of plaintiff's claim under the contract, as it submitted that question to the jury as one of fact. As we read the record, there was no admission on the part of the elevator company that it had actual notice or knowledge of plaintiff's claim, but its contention upon the trial was to the contrary.

Appellant's counsel also asserts that the evidence was insufficient to establish the amount or the value of the grain claimed to have been converted. He further asserts that the evidence did not establish that any of the grain delivered to the elevator company was produced on plaintiff's land and subject to the provisions of the contract.

In our opinion these contentions are not well founded. While it may be true that on some features of the case the evidence is not as strong as might be desired, nevertheless, when the evidence is considered as a whole, there is substantial evidence to show that the greater portion of the grain produced by the defendant Boehmer on the plaintiff's land during the year 1919 was delivered to the defendant elevator company; and that such grain has not been returned to the plaintiff, although demand therefor has been made upon the elevator company. There is also evidence tending to show both the minimum and maximum market price of wheat and rye during the entire period intervening the date of delivery of the grain and the commencement of the action.

It seems that if a verdict had been returned in favor of the plaintiff and against the defendant elevator company for the same amount as the verdict returned against the defendant, Boehmer, that it could not have been said that such verdict was contrary to or unsupported by substantial evidence. We are not concerned here, however, with whether the evidence introduced was in all particulars as specific as might be desired, or even whether the evidence as to the amount of grain or value thereof was such as to enable the jury to determine the amount of plaintiff's damages. These are defects in the proof which may be supplied upon another trial, and do not go to the existence of the cause of action itself. In other words, the defects in the proof, if any, are not of such nature as would have entitled the elevator company to judgment notwithstanding the verdict, if a verdict had been returned against it. First

State Bank v. Kelly, 30 N. D. 84, 98, 99, 152 N. W. 125, Ann. Cas. 1917D, 1044.

It is clear, we think, that it cannot be said that the jury would have reached the same verdict as between the plaintiff and the elevator company as it did, if the erroneous instructions had not been given. Hence, the trial court was correct in ordering a new trial.

Order affirmed.

BRONSON, Ch. J., and BIRDZELL, NUESSLE, and JOHNSON, JJ., concur.

VILLAGE OF NORTH FARGO, a Municipal Corporation, George F. Clark, Gordon W. Randlett and F. B. Starkenberg as Board of Trustees of the Village of North Fargo, and George F. Clark, Gordon W. Randlett, F. B. Starkenberg, Gust Kruger, Harry Hannes and Knut Johnson, for Themselves as Individuals, and all other Persons Similarly Interested, Appellants, v. CITY OF FARGO, a Municipal Corporation, H. W. Gearey, August Hanson, Alex Bruce, J. E. Hogan and K. M. Wilder, City Commissioners of the City of Fargo, Respondents.

(192 N. W. 977.)

Municipal corporations — cities and villages municipal corporations possessing only statutory powers; doubtful claims of power or ambiguity in terms of statute resolved against municipality.

1. Cities and villages in North Dakota are municipal corporations and possess only such powers as are conferred on them by statute. Doubtful claims of power, or doubt or ambiguity in the terms used by the legislature, are resolved against the corporation.

Statutes — construed with reference to other statutes concerning same subject-matter or part of same general legislative system.

2. Statutes must be construed with reference to other statutes concerning the same subject-matter or a part of the same general system of legislation.

Note.—On construction of statutes with reference to earlier statutes concerning same subject matter, 25 R. C. L. 1063; 3 R. C. L. Supp. 1440; 4 R. C. L. Supp. 1619; 5 R. C. L. Supp. 1363. On legislative control over boundaries of municipal corporations, 19 R. C. L. 732; 3 R. C. L. Supp. 969; 4 R. C. L. Supp. 1287; 5 R. C. L. Supp. 1044.

Evidence — courts may take judicial notice of history of times when statutes enacted.

3. In construing statutes, the courts may take judicial notice of the history of the times when they were enacted.

Statutes — that legislature did not intend absurd or unjust consequences or great public inconvenience in enacting statute presumed.

4. It is presumed that the legislature, in enacting a statute, did not intend absurd or unjust consequences, or great public inconvenience.

Municipal corporations — city may not annex adjoining territory within limits of incorporated village "land."

5. Construing § 3753, Comp. Laws 1913, as amended by chapter 68 of the Session Laws of 1915, with reference to the annexation of territory by cities, it is held that a city may not annex a portion of the territory within the limits of an incorporated village, although a part of the boundaries of the village border upon and adjoin the boundaries of the city.

Municipal corporations — territorial extent can be modified, taken away, or altered only in manner provided by legislature.

6. A municipal corporation is a creature of the legislature. Its rights, powers, duties, and territorial extent are fixed by the legislature and can be abridged, modified, taken away, or altered only in the manner provided by the legislature.

Opinion filed March 23, 1923.

Evidence, 23 C. J. § 1934 p. 122 n. 95; Municipal Corporations, 28 Cyc. p. 132 n. 19; p. 180 n. 4; p. 183 n. 34; p. 88 n. 60; p. 190 n. 73; p. 258 n. 38; p. 259 n. 39; p. 265 n. 11; Statutes, 36 Cyc. p. 1136 n. 25, 26; p. 1137 n. 41; p. 1147 n. 28, 30.

Appeal from order, District Court of Cass County, North Dakota, sustaining demurrer to the complaint, *Englert*, J.

Reversed.

Barnett & Richardson, for appellants.

The consent of persons living in territory to be annexed is not a prerequisite to a valid annexation. Waslien v. Hillsboro, 188 N. W. 738.

"This statute ought not to receive a construction which confers a power on one municipality to absorb another, or any part of it, and it confers no such power." Taylor v. Ft. Wayne, 147 Ind. 280; Independent Dist. v. Sioux City (Iowa) 2 N. W. 591; People v. Morrow (Ill.) 54 N. E. 839; People v. City, 181 Pac. 825; State v. Clark, 21 N. D. 517.

"It will not be presumed that the legislature intended to repeal an existing statute, unless it has clearly manifested its intention to do so, so it should not be presumed that the legislature intended summarily

to destroy, in whole or in part, an existing public corporation, unless its intention to do so is clear and unmistakable." State v. Nichols, 166 N. W. 813.

In the first place, townships and counties are commonly placed in a different class of municipal corporations than are cities and villages. Townships and counties are commonly called public quasi corporations. 1 Dill., Mun. Corp. 5th ed. §§ 35, 36; Dolese v. Pierce (Ill.) 16 N. E. 218; Abbott, Mun. Corp. § 8.

W. H. Shure, for respondents.

A municipal corporation is a public corporation created by government for political purposes and has subordinate and local powers of legislation, and a county is strictly a political corporation, a granted power to a designated portion of the people to aid and arrange the machinery of government. It is not designed for pecuniary profit, nor has it any powers but such as pertain to its strict municipal and public character. Treadway v. Schnauber, 1 Dak. 236, 46 N. W. 464.

A municipal corporation is the agent of the state to discharge some of the functions of the government. People v. Coler, 59 N. E. 716, 52 L.R.A. 814, 82 Am. St. Rep. 605.

A municipal corporation is the legislative grant of local self-government to the inhabitants within certain designated territory which is known as a city, town, or village and the corporate powers granted are exercised by its inhabitants in its corporate name. State v. McAllister, 18 S. E. 770; Wolverington v. Albany, 52 N. W. 455; State ex rel. Johnson v. Clark, 21 N. D. 526.

In the absence of express constitution, prohibition territory may be lawfully detached from one municipality and added to another. Metcalf v. State, 49 Ohio St. 586; Milwaukee v. Milwaukee, 12 Wis. 96; State ex rel. Richards v. Cincinnati, 27 L.R.A. 737.

"That the legislature not only has authority to determine the territory and boundaries of a municipal corporation but also to change or alter them by annexation or disconnecting territory therefrom either with or without the consent of the corporate authorities of the municipality or the inhabitants of the territory affected." People v. Rock Island, 111 N. E. 291; Laramie County v. Albany County, 92 U. S. 307; School Soc. v. School Soc. 14 Conn. 469; Bridge Co. v. E. Hartford, 16 Conn. 172; Hampshire v. Franklyn, 16 Mass. 76; Still v. Corning, 15 N. Y.

197; Granby v. Thurston, 23 Conn. 419; Yarmouth v. Skillings, 45 Me. 142; Langworth v. Dubuque, 16 Iowa, 273; Russel v. Reed, 27 Pa. 170; Washburn Waterworks Co. v. Washburn, 108 N. W. 194.

The power to divide a municipality is strictly a legislative power. Washburn Waterworks Co. v. Washburn, supra.

It is a general rule that where the legislature has made no exceptions to the positive terms of a statute, the presumption is that it intended to make none and it is not the province of a court to introduce an exception by construction. Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152; Wabash R. Co. v. United States, 178 Fed. 5, 21 Ann. Cas. 819; Lewis v. Pawnee Bill's Wild West Co. 6 Penn. (Del.) 316, 16 Ann. Cas. 903; Ayers v. State (Ind.) 99 N. E. 730; Van Steenwyck v. Washburn, 17 N. W. 289; Mpls. St. P. S. S. M. Ry. Co. v. Industrial Commission, 141 N. W. 1119; Box v. Stanford, 51 Am. Dec. 142; Mellen Lumber Co. v. Industrial Commission, 154 Wis. 114, 142 N. W. 187; Kendall v. United States, 107 U. S. 123; Ballard v. Mississippi Cotton Oil Co. 62 L.R.A. 407; St. John v. Andrew Institute for Girls, 191 N. Y. 254, 83 N. E. 981; Schillenberger v. Ransom, 41 Neb. 631, 59 N. W. 1935; Hoke v. Henderson, 15 N. C. 1, 25 Am. Dec. 677; State v. Taylor, 33 N. D. 76.

JOHNSON, J. This is an appeal from an order of the district court of Cass county, sustaining a demurrer to the plaintiffs' complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

The facts alleged in the complaint, so far as material, are as follows: The city of Fargo is a municipal corporation. The village of North Fargo was organized as a village about twelve years ago, under the general laws of the state governing the incorporation of villages. The south line of the village abuts on the north line of the city of Fargo. Proceedings were initiated by the city of Fargo, under the provisions of chapter 68 of the Session Laws of 1915 and acts amendatory thereof, for the annexation of territory, a portion of which lies within the boundaries of the village of North Fargo. It is further alleged that the village of North Fargo has taken steps to install an individual water and sewer system for its inhabitants and that all of the village has been included and designated as a water and sewer district according to the laws of the state; that subsequent to the initiation of those

proceedings, as aforesaid, the defendants initiated proceedings to annex a portion of the territory embraced within the village of North Fargo. That water was furnished the residents of the village by respondents, but that since the trouble over annexation commenced, the respondents have publicly announced that water would no longer be furnished. That there is located in the village of North Fargo an educational institution known as the Sacred Heart Academy affording satisfactory educational advantages to the patrons thereof; that the village has funds on hand with which to construct a building for school purposes; that all of the village of North Fargo is embraced within a single school district and that the separation therefrom of the territory described in the annexation proceedings instituted by the defendants will materially hinder, obstruct, and impede the school district in providing educational advantages for the inhabitants. It is further alleged that the annexation proceedings against which the injunction is sought, if perfected, will irreparably damage the village in connection with the operation of schools, the levy of taxes in support of municipal and school undertakings, the installation of water and sewage systems and the maintenance thereof, and will hamper the village in the issuing of warrants and bonds for defraying necessary and proper municipal indebtedness. It is also alleged that the annexation, if completed, will interfere with the enforcement of laws within such territory and will cause an unseemly conflict between the village and the city. The complaint concludes with a prayer for an injunction against the defendants perpetually restraining the city of Fargo from procuring or claiming any rights by virtue of such annexation proceedings as are described in the complaint.

No question is raised as to the procedure or the details of the attempted annexation. The only question is whether the city of Fargo, a municipal corporation, may, under the statutes of this state, annex a portion of the territory embraced within the corporate limits of the village of North Fargo, also a municipal corporation.

Cities and villages in North Dakota are municipal corporations. State ex rel. Johnson v. Clark, 21 N. D. 517, 131 N. W. 715. Municipal corporations possess only such powers as are conferred on them by statute. Treadway v. Schnauber, 1 Dak. 236, 46 N. W. 464; Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403. Dill.

Mun Corp. § 33. In the case of Treadway v. Schnauber, supra, the territorial court said:

"Municipal corporations possess and can exercise the following powers and none others; first, those granted in express words; second, those necessarily implied incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; and any fair doubt as to the existence of a power is resolved by the courts, against the corporation and the existence of the power."

In the case of Stern v. Fargo, supra, this court restated the law substantially as laid down in the Treadway Case, supra. In the Stern Case the court says:

"That doubtful claims of power, or doubt or ambiguity in the terms used by the legislature are resolved against the corporation."

There is a dearth of authority on the only question in this case. Appellants cite many cases holding that "when there exist two tribunals possessing concurrent and complete jurisdiction of a subject matter, the jurisdiction becomes exclusive in the one before which proceedings are first instituted, and which thus acquires jurisdiction of the subject." State ex rel. Johnson v. Clark, supra. This principle manifestly has no application in this case. This is not a contest between two public corporations over the right to appropriate territory *outside the limits of both*. It is a question of the power of one municipal corporation to detach territory from another municipal corporation and to annex the same.

The decision of the case turns upon the construction of § 1 of chapter 68 of the Session Laws of 1915, which is an amendment to § 3753 of Comp. Laws, 1913. This section reads as follows:

"Sec. 1. Amendment. That § 3753 of the Compiled Laws of 1913, be and the same is hereby amended to read as follows:

"Sec. 3753. Any city in this state may so extend its boundaries as to increase the territory within the corporate limits thereof not to exceed one fourth of its area, by a resolution of the city council passed by two thirds of the entire members-elect, particularly describing the land proposed to be incorporated within the city limits, setting forth the boundaries and describing the land, platted by blocks and lots; Provided, that at least two thirds in area of the territory described in

such resolution and proposed to be incorporated within such limits shall have previously been platted into blocks and lots."

The statute authorizes a city to increase its territory by annexing "land." It further requires that this "land" must have been previously platted into blocks and lots. This last provision was added at the Session of 1915. It was a part of the statute many years ago. Did the legislature use the word "land" in this section in the sense of territory already within the limits of an incorporated village divided into lots and blocks and subject to village government? Or, on the other hand, was it the intention of the legislature that only "land" or territory lying outside of incorporated cities or villages be annexed, provided the same were first platted into lots and blocks?

It is a settled rule of statutory construction that a statute must be construed with reference to other statutes concerning the same subject-matter, or a part of the same general system of legislation, 36 Cyc. 1147: with reference to the history of the times when enacted, 36 Cyc. 1137: and it is presumed that the legislature did not intend absurd or unjust consequences, or great public inconvenience, 36 Cyc. 1135, 1136; 25 R. C. L. 1017 ff.

Section 3753, Comp. Laws, 1913 (Session Laws, 1915, § 1, chap. 68), appears as § 1 of article 17 of chap. 73 of the Session Laws of 1887. Again, a similar purpose is expressed in somewhat more elaborate form in § 1, chapter 32 of the Session Laws of 1889, limiting, however, the right of annexation to cities of 3,000 population or more. This section appears again as § 185 of chapter 62 of the Session Laws of 1905, and in § 2825 of the Revised Codes of 1905. In the Revised Codes of Dakota 1877, §§ 47–50 of chapter 24 relating to the incorporation or towns and cities provide for the extension of the corporate limits of towns. Villages in this state have powers of annexation given in terms substantially as broad as the language of § 3753, supra. See §§ 3898–3901, Comp. Laws, 1913, §§ 3968–3973.

In the statutes passed by the territorial legislatures relating to the incorporation of places other than cities, the term "town" is used instead of "village." The "town," or as we now call it, the "village" antedates and is the antecedent of the city in the history of Dakota Territory and of North Dakota. The territorial legislature made provision for the annexation of territory to and the detachment of territory from towns

and cities. The earliest enactment which we have been able to find upon the subject of detaching territory from the town or city is chapter 104 of the Session Laws of 1887. Here the town and the city are given the same powers in this regard. Section 2 of this chapter provides that a portion of the territory of any incorporated city or town may be withdrawn and disconnected therefrom, but only in the event that the portion sought to be disconnected has *not been laid out into city or town lots and blocks.* This section appears as 2438 Revised Codes of 1895; as § 3969 of the Compiled Laws of 1913; and as chapter 32 of the Session Laws of 1921. It is significant against respondents' position that the annexation statutes now require the territory to be annexed to have been *previously* platted; on the other hand, the only statutory provision for detaching territory from villages requires that the territory to be detached shall *not* have been platted into lots and blocks. It is, nevertheless, claimed that a city may detach platted portions of a village, though the general statute on detaching territory expressly provides that platted territory may not be detached.

If respondents' contention be sound, a city might, as early as 1887, have annexed a portion of a town, or a town a portion of a city, if one had been contiguous to the other. It is clear, however, that since the town was created by special charter, a city could not abridge the rights and privileges of the town under the special charter, or abrogate them altogether, by virtue of the general provisions of chapter 104 of the Session Laws of 1887. 36 Cyc. 1151. Were it otherwise, the town would have the same right against the city, also organized, in 1887, under special charter. Section 2 of this chapter provided the only mode whereby territory could be disconnected from a city or town and puts both classes of municipal corporations in the same class as to this right and does not expressly, or by implication, give the power to the one to absorb a portion or all of the territory of the other. If respondents' contention be sustained, the early statutes and the existing law on the detaching and annexing of territory by cities and villages are rendered contradictory and conflicting.

Section 51 of chapter 24, Revised Codes of 1877 of Dakota Territory provides for the dissolution of incorporated towns; this section was, in substance, carried into the Revised Codes of 1895 as § 2398 and is § 3903 of the Compiled Laws of 1913. The term "village" in the later

revisions was substituted for "town," as used in the original territorial statute, and disincorporation permitted upon the initiative of the voters in the village if approved by the electors at an election held for the purpose. No other method of disincorporation or dissolution is provided.

From the foregoing very brief outline of legislation with reference to the annexation and detaching of territory by cities and villages, it will be seen that the legislature has several times dealt quite fully with the subject. In the first place, it made provision for the incorporation of the town early in the history of the territory. It made provisions for the annexation of territory to the town and later to the village; and it made provision for detaching territory from the town or village. In the second place, it made provision for the annexation of territory to an incorporated city and the detachment of territory therefrom. Thirdly, it made provision for disincorporation and dissolution of villages. Both cities and villages are municipal corporations; under the statutes of the territory and later of the state, both are given quite comprehensive powers of a police and legislative character. Originally the city was the creature of a special statute as was also the town, the antecedent of the village; later, general incorporation acts were passed governing the incorporation of both cities and villages. See chap. 73, Sess. Laws 1887; chap. 62, Sess. Laws 1905. Whether the town or village was created by a special law or came into existence under the general incorporation act, it had definite boundaries, a record of which was made in the office of the register of deeds of the county. Having come into existence as a municipal corporation, the town, the village, or the city could change its boundaries only in the manner provided by statute. Control over the boundaries of municipal corporations is in the legislature and the territorial limits thereof may be enlarged or restricted only in the manner prescribed by statute. Waslien v. Hillsboro, 48 N. D. 1113, 188 N. W. 739. McQuillin, Mun. Corp. § 265. The corporation charter was a grant from the legislature. The municipal corporation virtually became a public agent and existed largely for the performance of acts for the public benefit as an agency of the State Government. Its charter might be amended or repealed; it might be devested of its corporate character when the legislature so decreed. It is the creature of the legislature and its rights, powers, duties, and territorial extent are fixed by the will of its creator. Waslien v. Hillsboro,

supra. The statutory method provided for detaching territory is exclusive of all others. The laws of this state make no provision for detaching territory from an incorporated city, village, or town, except as found in § 3969, Comp. Laws, 1913, as amended by chapter 32, Sess. Laws, 1921. It seems clear, therefore, that no authority exists in the statutes or can be read into chapter 68 of the Session Laws of 1915, giving the city of Fargo the right to annex any portion of the territory within the corporate limits of the village of North Fargo and thus detach territory therefrom. The construction contended for by respondent would introduce conflict into the statutes governing the annexation of territory to cities and the detaching of territory from cities and villages.

"Courts may appeal to the historical facts contemporaneous with the enactment of legislation by Congress or state legislature to aid them in arriving at the true meaning, scope and effect of such legislation. The history of the times during which a law was enacted tends strongly to disclose reasons for the act, and therefore, the evils sought to be remedied. . . . Whenever light can be derived from such sources, the courts will take judicial notice of the facts of contemporaneous history, the prior state of the law, the particular abuse or defect which the act was meant to remedy, and will then apply the language of the act to such state affairs." Chicago, R. I. & P. R. Co. v. Gist, 79 Okla. 8, 190 Pac. 884; 36 Cyc. 1137.

When the territorial legislature passed the various laws, to which reference has been made, providing for the annexation of territory by cities and towns and the detaching of territory therefrom, no conditions existed similar to or identical with the situation in this case. Cities were then the creatures of special charters and they were small; towns and villages were few and far between; and no village in the state bordered upon a city. The conditions known to the law making body were such as characterized pioneer communities in this part of the Middle West in the first stages of development in the late 70's and early 80's. The population of the territory was small; according to the census of 1890, only 5.6 per cent of the population of North Dakota was urban as distinguished from rural, according to the mode of classification then used. The law making body had in mind a growing community with towns that would require the addition of territory from time to

time, as population increased. The purpose of this legislation always has been to enable incorporated towns, later known as villages, to expand by taking in adjacent or contiguous unincorporated land or territory, to meet conditions of development, known or anticipated. The territorial legislature had primarily in mind the need of cities and villages for land to accommodate a population about to overflow the existing corporate boundaries.

As urban communities have developed and multiplied, and population increased, the legislatures of the various states have found it necessary to provide for the consolidation of villages with cities. We have found no case where, in the absence of statute expressly authorizing such consolidation or annexation, the courts have held that cities had the implied power to encroach upon the territory of another incorporated city or village. To hold otherwise would do violence to fundamental principles in the law of municipal corporations.

No conditions having existed identical with or analogous to the situation in the case at bar, the legislature will not be presumed to have intended to cover such a situation under the circumstances in this case, unless the language is clear and unequivocal. "That this mausoleum is not exempt from taxation, it may be said, to use the language contained in the state tax board's conclusion, when the legislature exempted building for 'cemetery use,' it could hardly have had in mind such a structure as that involved in this appeal; for such were not then known or contemplated." Mausoleum Builders v. State Bd. 88 N. J. L. 592, 96 Atl. 495.

When the power of annexation given respondent, and other cities in the territory, under special charter in the language equally general, was embodied in the general incorporation laws of the territory and of the state, conditions had not changed substantially, and we are convinced that the legislature did not intend to enlarge the meaning of the words "territory" or "land" so as to permit a city to annex a village or a village to absorb a city, or a portion of its territory, or the one to detach territory from the other. The privileges and powers granted to the city of Fargo under its Special Charter of 1875 (See Sp. Laws, Terr. Leg. chap. 12) were coextensive with the territorial limits therein defined and operated throughout such territory. The same is true of the privileges, powers, and immunities granted villages duly incorpor-

ated, whether under general or special law. It is not necessary to the execution of any of such powers or the exercise of any of the privileges of municipal corporations that one such corporation have the power to encroach upon the territory or the territorial jurisdiction of another corporation as defined by the legislature.

It is contended that the municipal corporation which first initiates proceedings to annex territory of the other may do so. That is to say, the right of one municipal corporation to absorb all or a portion of the territory of another depends entirely, according to this argument, upon the issue of a contest of speed in commencing annexation proceedings. We do not believe that such was the intention of the legislature. It may have been true that, at one time, it was the unwritten law of the frontier that he who was quickest on the trigger had the longest expectancy of life. We do not believe that the legislature intended to adopt this rule and to make the continued existence of municipal corporations dependent upon the outcome of a race for the initiation of proceedings by one for the absorption or annexation of the other.

If two municipal corporations consolidate, or if one absorbs a portion of the territory of the other, practical and sometimes difficult questions arise involving the equitable apportionment of property and indebtedness. The statutes governing the annexation of territory by cities and villages, assuming that the respondents' claim of power be sustained, are wholly silent as to the assumption of indebtedness of the old by the new corporation, or of the division of property in the event that one municipal corporation annexes a portion of the territory of another. While silence on this important practical question, involving as it may contract rights of third parties and the interests of creditors, would not be conclusive against the claim of power to annex, were the intent clear, yet it is significant and should be considered.

It is legitimate in this connection to take note of the policy of the legislature of this state in regard to the general question of the division and consolidation of public corporations. The legislature has, on numerous occasions, provided for the division and consolidation of school districts, townships, and counties, and for the annexation of the territory of one such public corporation by another. In every instance, provision has been made by the legislature for the equalization of indebtedness and property generally in the event of division, annexation, or

consolidation. Comp. Laws, 1913, §§ 1312, 1321, 1327, 3212-3214, 4079-4082. No such provision is made in the statutes applicable to corporations of the next higher grade, namely, municipal corporations. It seems to us that this omission to deal with an important and practical aspect of the annexation question is significant and indicative, in connection with other considerations, of the absence of legislative intention to permit one municipal corporation to absorb another or annex a portion of its territory.

Power to annex the territory of another municipal corporation is not necessarily implied from or necessarily incident to the power granted to annex adjacent or contiguous platted territory. Nor is such power absolutely essential to the declared objects and purposes of the corporation. In the statute under consideration, such power is not given in express terms; if given at all, it must be deduced from language giving power of annexation in general terms. In view of what has been said heretofore and of the statutes which provide for the manner in which territory may be detached from an incorporated village, it seems that the doubt as to the existence of the power in a city to detach and annex a portion of the territory of an incorporated village must be resolved against the city, under the rule laid down in Treadway v. Schnauber, 1 Dak. 236, 46 N. W. 464, and Stern v. Fargo, 18 N. D. 289, 26 L.R.A. (N.S.) 665, 122 N. W. 403.

Section 3658, Burns's Annotated Statutes, Indiana 1894, is identical with § 48, chapter 4, Revised Codes of 1877, except for a difference in names of officers and offices. The Indiana statute was passed in 1867 and ours seems to have been adopted for the first time in 1877. Whether these statutes are of common origin or ours is adopted for Indiana, it is not possible or material to decide. The supreme court of Indiana in Forsythe v. Hammond, 142 Ind. 505, 30 L.R.A. 576, 40 N. E. 267, 41 N. E. 950, held that the city of Hammond could not annex territory if the same had, prior thereto, been annexed to East Chicago. The court say:

"The effect of this annexation to East Chicago, if valid, would be to defeat the Hammond petition, for if the strip was annexed to East Chicago, it could not also be annexed to Hammond. . . ."

The Indiana Statutes, §§ 3658–3660 are general in terms and give

cities the power to annex territory or land, in terms substantially as general as the language of chapter 68, Session Laws of 1915.

Darby v. Sharon Hill, 112 Pa. 66, 4 Atl. 722, is an interesting case. Under the statutes of Pennsylvania as then existing, the court of quarter sessions had the authority to incorporate boroughs. The court of quarter sessions of Delaware county entertained proceedings to incorporate the borough of Sharon Hill. Sharon Hill was an incorporated village at the time the incorporation proceedings were had and Darby was a borough. A portion of the borough of Darby was sought to be included within the proposed new borough of Sharon Hill and the question was whether or not this could be legally and properly done. The court thus states the question in the case:

"Laying aside all technical objections to this record, the main question raised is whether or not, in the incorporation of a borough by the courts of quarter sessions, it is competent to embrace within the bounds territory covered by the charter of a borough already incorporated."

After stating the proposition that a municipal corporation is merely an agency created for the purpose of carrying out in detail the objects of government, that the agency is revocable, that the charter is at all times under the control of the legislature, which body may enlarge or reduce the territorial extent and functions of the corporation or terminate its existence, the court says:

"The incorporation of Sharen Hill, according to the limits designated, it must be admitted, necessarily involves an alteration or change in the limits of the borough of Darby, and that change is not an enlargement, but a contraction of its lines."

The court then points out that the legislature made express provision for changing the limits of boroughs, and that the same proceedings for that purpose must be had as are required in the original incorporation. Since the legislature has provided a method for changing the boundaries of the borough, such change cannot be accomplished indirectly or in any other manner than as prescribed. The court held that it was not within the power of the court of quarter sessions to take a portion of the municipal corporation of Darby and annex the same to Sharon Hill and make it a part thereof.

Our legislature has provided a method for disconnecting territory from a village. That method was not followed in this case, but another

municipal corporation assumes to detach such territory in another manner. Furthermore, the statutes governing the disconnecting of territory from an incorporated village, provide that such territory may be disconnected, only if the same has *not been platted into lots and blocks.* The respondents claim the right to disconnect territory regardless of its platted or unplatted character. We are of the opinion that the legislature never intended to give a city such power and that such power cannot and should not be implied.

The demurrer should have been overruled.

The order of the trial court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

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

STATE BANK OF REYNOLDS, a Corporation, Respondent, v. FIRST NATIONAL BANK OF REYNOLDS, Appellant, Lorensi Wester and Farmers State Bank of Bijou, Minnesota, a Corporation, Defendants.

(192 N. W. 967.)

Mortgages — law providing thirty days written notice before foreclosure held not to negative legal effect of acceleration clause in mortgage and note.

1. Chapter 131 of the Laws of 1919, which provides for thirty days' written notice before proceedings to foreclose a mortgage on real property, is construed and held not to negative the ordinary legal effect of an acceleration clause in a mortgage and note.

Mortgages — tender of interest during thirty-day notice period for foreclosure held not to cure default in payment or reinstate mortgage.

2. Where a mortgagor was in default in failing to pay two annual interest notes secured by real estate mortgage, and where the mortgagee had served notice of the exercise of an option to declare the whole amount due, such declaration being in accordance with an acceleration clause in the mortgage and note, a subsequent tender of the interest during the thirty-day notice period, provided in chapter 131 of the Laws of 1919, does not cure the default or reinstate the mortgage.

Opinion filed March 23, 1923.

Mortgages, 27 Cyc. p. 1522 n. 96, 97.

Appeal from the District Court of Grand Forks County, *Cooley, J.* Affirmed.

McIntyre, Burtness & Robbins, for appellant.

"The object of all statutory interpretation and construction is to ascertain and give effect to the intention of the legislature." State ex rel. Linde v. Taylor, 33 N. D. 76; State v. Stockwell, 23 N. D. 70, 97.

"Where the language of the statute is ambiguous, it is proper to consider the conditions with reference to the subject-matter that existed when it was adopted, the occasion and necessity for the law, and the causes which induced its enactment, or, in other words, the mischief sought to be avoided and the remedy intended to be afforded." 25 R. C. L. 1015.

"A tender made of an instalment of interest due on a mortgage stipulating that, if default is made in payment of any instalment of interest for twenty days the whole of the principal may at the option of the holder, become due, a payment made within the days of grace specified and sufficient in amount, and before commencement of foreclosure deprives the holder of the right to demand payment of the entire principal." Beiver v. Goldburg, 117 N. Y. Supp. 211; Cresco Realty Co. v. Clark, 112 N. Y. Supp. 550; Sheik v. Donohue, 79 N. Y. Supp. 233; Lynch v. Cunningham, 6 Abb. Pr. 94.

"Stipulation in a mortgage conferring power of sale in case of default gives a remedy which must be exercised agreeably to the statutes relating thereto in force when the remedy is invoked." Orvik v. Casselman, 15 N. D. 34.

"Where a new statute deals with procedure only, prima facie it applies to all actions those which have accrued or are pending, and future actions." Craig v. Hertzman, 9 N. D. 140, 145.

"No person has a vested interest in any particular remedy, the exercise of which does not deprive him of any substantial right." Heitsch v. Minneapolis Thresher Co. 29 N. D. 94, 110.

J. E. Louden and *Murphy & Toner,* for respondents.

The obligation of a contract, in the constitutional sense is the means provided by law by which it can be enforced, by which the parties can be obliged to perform. Whatever legislation lessens the efficiency of these means impairs the obligation. If it tends to postpone or retard

the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, *qui cito dat bis dat,* he who gives quickly gives twice, has its counterpart in a maxim equally sound, quis serius solvit, minut solvit, he who pays late, pays less. Any authorization of the postponement of payment or of means by which such postponement may be effected, is in conflict with the constitutional inhibition. Louisiana v. New Orleans, 102 U. S. 203, 26 L. ed. 132; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; McCracken v. Hayward, 43 U. S. 606, 11 L. ed. 397; Green v. Biddle, 21 U. S. 1, 5 L. ed. 547, 568.

If a state may stay the remedy for one fixed period, however short, it may for another, however long. Edwards v. Kearsey, 98 U. S. 595, 24 L. ed. 793.

That a state may not pass a law which extends the period of redemption from mortgage foreclosure sales as regards mortgages already in existence has been many times decided by the Supreme Court of the United States. The leading case on this point is Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143. McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; Grantly v. Ewing, 3 How. 707, 11 L. ed. 794; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93; Lander v. Deemy, 176 N. W. 922.

"Plaintiff's exercise of his election to declare the entire sum due on account of the default in the payment of the first instalment was, we think, sufficient. Doolittle v. Nurnberg, 147 N. W. 400." 27 Cyc. 1524; Modgsdon v. Davis, 6 Dak. 21, 50 N. W. 478; Brown v. McKay, 151 Ill. 315, 37 N. E. 1037.

Where the court said: "That a payment of interest had been received after such default would not constitute a waiver of the right to enforce for the defaults in the payments on instalments of principal." Northwestern Mut. L. Ins. Co. v. Butler, 57 Neb. 198, 77 N. W. 667; McCarthy v. Goodsman, 167 N. W. 503.

Birdzell, J. In October, 1919, the defendant, Wester, gave to the plaintiff his note for $7,500, payable in October, 1929, with 6 per cent annual interest, evidenced by coupons. The note was secured by a real estate mortgage executed concurrently therewith. Both the note and the mortgage provided that if default were made in the payment of interest the whole of the principal and the accrued interest would, at the option of the creditor, become at once due and payable without

notice to the mortgagor. The mortgagor defaulted in the payment of interest on October 10, 1920, and again on October 10, 1921. In November, 1921, the cashier of the plaintiff bank told the defendant Wester that the bank had decided to foreclose the mortgage. Following this, a notice of intention to foreclose (dated December 1, 1921) was mailed to the mortgagor and also to the defendant, First National Bank of Reynolds. This notice, among other things, stated that there was due upon the mortgage the sum of $8,498.41, and that unless this sum were paid within thirty days proceedings would be commenced to foreclose the mortgage. The defendant Wester had transferred to the First National Bank, by deed dated November, 1920, the premises covered by the mortgage, such transfer securing an indebtedness of $7,200 at 9 per cent interest. On or about December 14, 1921, and within thirty days subsequent to the mailing of the notice of intention to foreclose, the defendant First National Bank tendered to the plaintiff the sum of $927.20 covering the amount of interest in default together with interest thereon. This tender has been kept good. Foreclosure proceedings by advertisement were commenced and enjoined, whereupon the present foreclosure action was brought in which judgment was rendered for the plaintiff. This is an appeal from the judgment.

The principal if not the sole question for determination on this appeal is the legal effect of the tender. Chapter 131 of the Laws of 1919 provides:

"Sec. 1. Any action or proceeding which shall be commenced to foreclose a mortgage on real property shall be void unless a written notice describing the land, the date and amount of the mortgage, the sum due for principal, interest and taxes, and stating that if the same be not paid within thirty days from the date of the notice, proceedings will be commenced to foreclose the mortgage, shall have been served more than thirty days prior to the commencement of such action or proceeding by registered mail addressed to the title owner of record at his or their last-known postoffice address. An affidavit of proof of such service of notice shall be filed with the clerk of the court at the time of filing complaint in any action for foreclosure and shall be filed and recorded with the notice and certificate of sale in all other cases."

The above section was in force when the mortgage in question was

executed and the notice thereby required was served. Chapter 66 of the Laws of 1921 amends the above act by continuing the requirement of notice in substantially the same language as quoted above and adding the following proviso:

"Provided, however, that if said owner shall, before the expiration of thirty days from the service of such notice, perform the conditions or comply with the provisions upon which the default shall have occurred, such mortgage shall be reinstated and shall remain in full force and effect the same as if no default had occurred therein."

The mortgage in question was executed subsequent to the Act of 1919 and prior to the amendment of 1921. It seems to be conceded that the proviso of the 1921 Act cannot be applied to pre-existing mortgages so as to give an original right to cure a default within the thirty-day period, for the reason that, so applied, it would result in impairing the obligations of contracts contrary to the Federal Constitution. E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 922. But it is the contention of the appellant that the provision of the 1921 Act for curing a default does not impair any valid contract obligation in a mortgage which is subject to chapter 131 of the Sessions Laws of 1919; for it is argued that the 1919 Act, when properly construed, was sufficient in itself to prevent foreclosure if the default were cured within the thirty days, and that the 1921 Act goes no further than this. It is said that, under the 1919 law, the holder could take no steps to enforce the terms of the mortgage until the provisions of that law had been fully complied with; that is, until the thirty-day period had fully run, no steps whatever could be taken to foreclose. Then it is argued that the declaring of the whole sum due under an acceleration clause, being a necessary step in the foreclosure must be a conditional act during the thirty-day period. Hence, the argument runs, during this period the default might be cured. In other words, as no step in the foreclosure can be taken until the thirty days have expired, and as the declaration that the whole amount is due is a step in the foreclosure, it is argued that the mortgagor can cure the default at any time before the foreclosure is actually instituted. From these premises the appellant draws the logical conclusion that the proviso added to the statute in 1921, which expressly permits the curing of the default and the reinstating

of the mortgage, in reality adds nothing to the statute but serves only to make clear and explicit that which was before necessarily implied.

It will be seen that these arguments are predicated wholly on the proposition that the option to declare the whole sum due upon default in the payment of interest is nothing more nor less than a step in the foreclosure. This view, in our opinion, is too restricted. The option, as we view it, is a valuable right secured by contract which gives to the creditor the privilege of seeking redress reaching the entire amount of the indebtedness whenever a default occurs. Foreclosure of the mortgage is only one remedy looking toward the recovery of the indebtedness and it may or may not be adequate. The appellant seems to regard the acceleration clause as being in the nature of a penalty or as involving a forfeiture. Such is not the accepted view. Acceleration clauses are enforceable in equity as well as at law. Pomeroy, in his work on Equity & Jurisprudence (1 Pom., 4th ed. § 439), says:

"The third instance of what is not a penalty is that of a contract, not that the amount of a debt should be increased, but that in a specified event the time for the payment of a certain sum due shall be accelerated. It is therefore settled by the overwhelming weight of authority that if a certain sum is due and secured by a bond, or bond and mortgage, or other form of obligation, and is made payable at some future day specified, with interest thereon made payable during the interval at fixed times, annually, or semi-annually, or monthly, and a further stipulation provides that in case default should occur in the prompt payment of any such portion of interest at the time agreed upon, then the entire principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such a stipulation is not in the nature of a penalty, but will be sustained in equity as well as at law. In exactly the same manner, if a certain sum is due and is secured by any form of instrument, and is made payable in specified installments, with interest at fixed successive days in the future, and a further stipulation provides that in case of a default in the prompt payment of any such installment in whole or in part at the time prescribed therefor, then the whole principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such stipulation has nothing in common with a penalty, and is as valid and operative in equity as at the law."

To the same effect is 2 Jones, Mortg., 7th ed. §§ 1181 and 1182. The latter authority, in § 1182, says that a mortgage due by the election of a mortgagee is as fully matured as one due by expiration of the time limit fixed in the mortgage,—citing Bartlett Estate Co. v. Fairhaven Land Co. 49 Wash. 58, 15 L.R.A.(N.S.) 590, 126 Am. St. Rep. 856, 94 Pac. 900. It is also established that notes containing similar acceleration clauses, upon the exercising of the option, are due not merely for purposes of foreclosure but for all purposes. Wheeler & W. Mfg. Co. v. Howard (C. C.) 28 Fed. 741; Detweiler v. Breckenkamp, 83 Mo. 45; Bergman v. Fortescue, 74 N. J. Eq. 266, 69 Atl. 474.

It is equally well established that the option to declare the whole amount due is effectively exercised by manifesting the fact in such a manner as to apprise the mortgagor. 2 Jones on Mortgages § 1182, expresses the rule as follows:

"Where the mortgagee has the option to consider the entire debt matured on any default, it is not necessary that any particular form of expression should be used for the purpose of declaring such option. A recital in a mortgagee's deed, under a power of sale in the mortgage, that 'having elected to declare said mortgage due and payable, as by said mortgage he was authorized to do, according to the terms and conditions thereof, he had proceeded to exercise the power,' is sufficient. It is only necessary that the mortgagee show an unmistakable intention to exercise the option, and this may be done by taking steps for foreclosure, filing foreclosure suit, sale pursuant to the mortgage, or advertisement of the property for sale pursuant to the terms of the mortgage. But there must be some outward act beyond a mere mental determination or a direction to his own agents that he has manifested an election."

See also Hodgdon v. Davis, 6 Dak. 21, 50 N. W. 478; 19 R. C. L. 497, 498.

In the instant case there was an affirmative declaration in writing served upon the mortgagor. When this declaration was communicated to the mortgagor, the entire indebtedness matured by virtue of the acceleration clause, unless chapter 131 of the Laws of 1919 operates to change the effect of such a clause. It will be seen that this statute deals with nothing except the subject of notices before foreclosure. Its title is so restricted. It does not purport to alter in any way the creditor's right to enforce the obligation according to the contract in an action at

law. If the creditor remains in a position to collect the entire indebtedness in an action at law, clearly it is because such amount is legally due. The statute, indeed, seems to presuppose that acceleration clauses shall continue to operate as in the past, for it requires the notice to state the "sum due" for principal, interest and taxes, and that if the same be not paid within thirty days, proceedings will be commenced, etc. There is no criterion laid down to determine the "sum due," so obviously it must be determined by the terms of the contract the parties have made. If such be not the proper construction of the statute, we would have the anomalous situation existing of a debt due for the purpose of an action at law to recover it and yet have the remedy of foreclosure barred because the mortgage given to secure the same debt is not in default. The construction contended for involves a reversal of the ordinary legal conception of the relation between an indebtedness and a mortgage given as security therefor,—the debt being the principal or primary thing and the mortgage an incident. A court should be reluctant to read into a statute of this character an implication which would credit the legislature with intending to permit a judgment to be obtained in a personal action, and the judgment collected, while a mortgage given to secure the same debt would be deemed not in default. We are of the opinion that any election which would be sufficient to enable a creditor to sue in an action at law for a money judgment would suffice to make the same "sum due" for the purpose of foreclosure. From this it follows that the tender in this case was insufficient to cure the default existing at the time it was made and that the judgment appealed from is correct.

It is affirmed.

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

ANNA KROKSATHER, Respondent, v. WESTERN UNION LIFE INSURANCE COMPANY, a Corporation, Appellant.

(193 N. W. 48.)

Insurance — evidence held insufficient to establish waiver by insurer of terms of life policy or estoppel by extension premium note.

1. In an action on a life insurance policy where the insured failed to pay the annual premium, which was made the subject of a separate contract for extension, and where a note given for the premium provided for fifteen days' grace, and that in case it was not paid on or before the last day of the grace period the policy should immediately terminate, and where, upon acceptance of the note, a receipt was given upon which was stamped the condition stated in the note, it is *held:*

The evidence is insufficient to establish a waiver of the terms of the policy or the conditions of the extension note and insufficient to establish an estoppel.

Insurance — provisions of premium note and conditional receipt controlling where note not paid within period of grace.

2. Where a premium is not paid within the time stipulated in the policy, and where within the grace period an extension agreement is entered into, evidenced by a note and a conditional receipt, the provisions of such note and conditional receipt with reference to termination of the policy upon nonpayment are controlling.

Opinion filed March 24, 1923.

Insurance, 32 C. J. § 532 p. 1303 n. 13 New; Life Insurance, 37 C. J. § 441 p. 639 n. 48.

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

Judgment reversed.

Greenleaf & Wooledge, for appellant.

McGee & Goss, for respondent.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff and from an order overruling a motion for judgment non obstante or for a new trial in an action upon a policy of life insurance. By a policy, dated April 24, 1918, the defendant insured the life of Lars Kroksather for three thousand dollars ($3,000), the beneficiary being Anna Kroksather, his wife, the plaintiff in this action. The annual premium of $62.88 was payable on the 24th of April each year,

Note.—On grace for payment of premium after maturity of premium note, see note in L.R.A.1917C, 921; 14 R. C. L. 977; 3 R. C. L. Supp. 325; 5 R. C. L. Supp. 790.

and the policy contained the usual provision allowing thirty-one days of grace without interest. The insured paid two premiums, but when the third premium came due in April, 1920, the insured was apparently unable to pay it.

By letter dated May 3, 1920, the insured inquired if his note would be accepted for the premium, writing as follows:

"I notice that my premium was due on April 24, 1920, but as I have not had any crop for three years I am not able to meet my premium at this time. Kindly let me know at once if you will take my note until after harvest, and oblige

"Yours truly,

"Lars Kroksather."

The insurance company acknowledged receipt of this letter and forwarded to the insured for execution a note payable October 24th with 6 per cent interest from April 24th, but before the note was returned to the defendant insurance company and at the expiration of twenty days of grace, the latter wrote the insured (under date May 14, 1920) as follows:

"Our renewal department has just called my attention to the fact that your remittance for $62.88 being the premium which was due April 24, 1920, on your policy, has not yet reached this office.

"No doubt you have this important matter in mind and are taking advantage of the grace period allowed for payment of this premium.

"But my reason for writing you is to assure you that we are looking after your interests here at the Home Office, and therefore want to remind you that twenty days of the grace period have already expired and unless your remittance is received within ten days from the date of this letter, your policy will lapse.

"Of course it is possible to have the policy reinstated, but you would be required to furnish evidence of insurability, and it is possible you would not be in as good health as when you were examined for the policy.

"I therefore want to urge you to send in your remittance *to-day,* so that it will reach us in plenty of time and your insurance may be kept in force.

"You may pay your premium annually, semi-annually or quarterly, whichever is most convenient. Or if there is any way we can assist

you in taking care of the premium do not hesitate to let us know, for we are ready and willing at all times to serve you."

The note, however, was executed and delivered to the defendant within the grace period and a receipt for the premium, countersigned May 20th, was sent to the insured. Stamped across the face of this premium receipt, in red ink and partially indistinct, is the condition that if the note given to extend the time of payment of the premium is not paid as therein stipulated the receipt shall become void and the policy become forfeited except as to the nonforfeiture benefits, if any, and that there shall be immediately due the company the earned portion of the premium as provided in the note. The note was expressed to be due on or before the 24th day of October with 6 per cent interest, and it provided for fifteen days of grace for its payment, and that the policy should remain in full force and effect during the grace period, but if not paid on or before the last day of grace that it should immediately terminate. The note further provided, that in case of its nonpayment and the termination of the policy, there should be immediately due to the company a proportion of the premium for the period the policy was kept in force from the date of the note to the last day of grace. The note was not paid and, on October 29th, the defendant wrote the insured as follows:

"This is to remind you that your note for $64.77 including interest, which was given to extend the time for payment of premium on your policy No. 30684 became due Oct. 24, 1920, and remains unpaid.

"If it is not convenient for you to pay the full amount of the note at this time, you should write us immediately upon receipt of this letter, sending us, if possible, a part payment on the note and tell us when you could probably pay the balance.

"Your note provides for fifteen days of grace, of which five days have already expired, and unless some adjustment is made by November 8, 1920, your insurance will terminate, unless otherwise provided in the terms of your contract.

"We ask you to give this important matter your prompt and serious attention, and assure you that we are at all times ready and willing to assist you in keeping your insurance in force."

The testimony on the part of the defendant is to the effect that it received no answer to the above letter, but on the part of the plaintiff,

that the letter was answered prior to the 8th of November, in which answer assurance was given that the note would be paid as soon as the insured could haul some of his crop to market. The insured was kicked by a horse on November 12th and received injuries from which he died November 16th.

There is evidence to show that a few days after the election in 1920, the insured, with the assistance of his wife, the witness, wrote a letter to the defendant, apprising it of his intention to pay the note when he could market some of his crop; that this letter was taken to town some thirteen miles distant about Saturday (November 6); that the insured was in the postoffice that day, bought some stamps and mailed some letters. The agents of the defendant denied the receipt of any such letter. If it was received there is no evidence that it was ever answered. Appellant contends that by force of the policy provisions, as well as the provisions of the note and the conditions stamped upon the premium receipt, the policy lapsed for nonpayment of the premium at the end of the period of grace, which would be fifteen days after October 24th or midnight November 8th. It further contends that there is no estoppel to invoke the policy provisions and no waiver of their legal effect evidenced by any act of the company. Hence, it is contended, the trial court should have granted the motion for a directed verdict, or after verdict should have granted the motion non obstante.

We are of the opinion that the evidence in this case is altogether insufficient to establish a waiver of the provisions of the policy or any estoppel to rely thereupon. If it be conceded, though we do not so decide, that the evidence of the plaintiff is sufficient to establish the writing of a letter on November 6th, advising the defendant that the premium note would be paid when the insured could market some of his crop, it does not follow, in our opinion, that the policy did not lapse on November 8th. While in the previous correspondence the defendant company had manifested a disposition to be liberal and accommodating in the matter of premium payments, there is nothing in its letters from which it can reasonably be said that the company was committed in advance to any terms that might be satisfactory to the insured or that he might desire or require for his accommodation. Its letter of the 29th of October advised the assured that unless some adjustment were made by November 8th, his insurance would terminate. The clear mean-

ing of this language, in our opinion, is that the insurance would be terminated unless some new agreement between the company and the insured, respecting the payment of the premium, were entered into, and the condition is not satisfied by a mere request for an extension not assented to by the creditor. The previous letter of May 14th, in which the company expressed its general solicitude for the interests of its policy holders, contains no expression which, in our judgment, signifies an assent in advance to an extension of premium payments beyond the time covered by express agreements. This record is entirely devoid of evidence going to prove that the defendant assented to any terms or extension requested by the insured in his letter written on or about November 6th. Under the undisputed facts, the insured was not justified in assuming, if he did assume, that the company would assent to the indefinite extension requested.

The respondent argues that the death of the insured occurred within the grace period. If this contention be sound, it would follow, of course, that the beneficiary could recover without reliance upon either waiver or estoppel. This argument is based upon the following provision of the policy:

"In the payment of all premiums hereunder after the first policy year there will be allowed a grace of thirty-one days, without interest, during which time this policy shall remain in full force and effect."

It is contended that this provision applied to the subsequent blue note transaction operated to give a grace period of thirty-one days after the maturity of the note instead of fifteen days, as provided therein. The note was payable on or before October 24, 1920. In the body of this note, immediately following the promissory obligations and in type uniform in size with that in which the forepart is printed, is the following sentence:

"The payee agrees to allow fifteen days' grace for the payment of this note, and during such grace period the policy herein below referred to shall remain in full force and effect, but if the note is not paid on or before the last day of the grace period, then and thereupon the policy shall immediately terminate as below provided."

The further provisions in smaller type are that the "policy is continued in force until midnight of the last day of grace hereunder and that if the note be not paid on the last day of grace, the policy will auto-

matically, and without notice, become forfeited and void except for the nonforfeiture benefits, if any."

There is additional provision to the effect that such part of the face of the note shall be immediately due to the company as may represent a proportion of the premium, governed by the ratio of the period to the last day of grace compared to the whole time covered by the premium. The stamp upon the receipt sent to the insured upon acceptance of his note was in every way consistent with the conditions stated in the note. We are clearly of the opinion that the grace period stated in the note is controlling. The grace provision in the policy was availed of by the insured to keep it alive during the period he was negotiating for the extension, and in our opinion it means just what it says—that a grace period of thirty-one days is allowed in the payment of all premiums under the policy, during which time the policy shall remain in effect, and that it has no application to any separate or collateral agreement which may provide for a further extension. An extension beyond the grace period in the policy is no part of the policy contract and depends entirely for its effect upon such collateral agreement as may be made controlling it. If, therefore, a policy holder takes the benefit of the delay or extension contracted for in a separate agreement, he is bound to perform the conditions on which it is granted, or to submit to the consequences of the failure to so perform.

See Pitt v. Berkshire L. Ins. Co. 100 Mass. 500; Hudson v. Knickerbocker L. Ins. Co. 28 N. J. Eq. 167; Banholzer v. New York L. Ins. Co. 74 Minn. 387, 77 N. W. 295, 78 N. W. 244, 84 N. W. 1115; Baker v. Union Mut. L. Ins. Co. 43 N. Y. 283; Kerns v. New Jersey Mut. L. Ins. Co. 86 Pa. 171; 14 R. C. L. 978.

It follows that the grace period had expired at least seven days before the alleged maturity of the policy, and that, as no nonforfeiture benefits had accrued, the policy was automatically terminated.

For the foregoing reasons the judgment appealed from is reversed and the action dismissed.

BRONSON, Ch. J., and NUESSLE, CHRISTIANSON, and JOHNSON, JJ., concur.

CARL MILLER, Respondent, v. ED CAFFRAY, Appellant.

(192 N. W. 974.)

Account stated — action properly brought on account stated.

In an action upon an account stated, where merchandise was sold, thereafter a note given therefor, later, a payment made, the note surrendered to defendant, and a slip made, signed by the defendant, evidencing the balance due, and, where, before action commenced, defendant destroyed the note, it is *held*, for reasons stated in the opinion, that the action was properly brought and that the evidence supports the jury's verdict that the merchandise was sold by plaintiff to defendant.

Opinion filed March 26, 1923.

Accounts and Accounting, 1 C. J. § 331 p. 706 n. 99.

In District Court, Logan County, *McKenna*, J.
Action upon account stated.
Defendant has appealed from a judgment.
Affirmed.
Arthur B. Atkins and *Scott Cameron*, for appellant.
I. F. Wagner, for respondent.

BRONSON, Ch. J. Plaintiff recovered, in justice's court, judgment upon a general account for goods and merchandise sold. Defendant appealed to the district court. There, after reframing of the pleadings and trial de novo before a jury, plaintiff recovered a judgment for $130.70. Defendant has now appealed to this court.

The complaint in the district court alleges an account stated for $90 and interest. The defense is a general denial and that plaintiff's claim was the debt of a third person which defendant never, in writing, had agreed to pay. Plaintiff conducted a store in Napoleon, North Dakota. Goods were furnished by plaintiff to defendant and to his tenant in the amount of $198.

Later, pursuant to plaintiff's testimony, defendant gave a note therefor and received from plaintiff the charge slips for the goods sold. Later, he paid plaintiff $108 upon this note. Plaintiff surrendered to defendant the note, upon the understanding that defendant would pay the balance in a few days. Plaintiff thereupon made a slip which showed a balance of $90 owing plaintiff upon sales to defendant. Later,

defendant signed this slip. Defendant destroyed the note. Defendant contends that erroneously plaintiff has brought this action upon an account stated instead of upon the note. This contention is without merit. Suit was upon an account stated, that is, upon a settled account. Defendant was in no position to complain concerning the form of the action after the destruction of the note and signing the slip that evidenced the balance due upon this account as a settled account. The defendant also maintains that there is no proof of any oral agreement or promise on the part of defendant in the record to pay for goods furnished the tenant. This contention is likewise without merit, for there is direct evidence, sufficient to support the jury's verdict, that the goods were sold by plaintiff to defendant.

The judgment is affirmed with costs.

CHRISTIANSON, JOHNSON, BIRDZELL, and NUESSLE, JJ., concur.

COMPANY A, FIRST REGIMENT, NORTH DAKOTA NATIONAL GUARD TRAINING SCHOOL, a Corporation, Respondent, v. EDMUND A. HUGHES, Appellant.

(193 N. W. 144.)

Trover and conversion — evidence held to show conversion.

1. In an action for the conversion of personal property, the evidence is examined, and it is *held* sufficient to support a finding of conversion.

Evidence — members and directors of corporations not necessarily qualified to testify as to value of property of corporation alleged converted.

2. Witnesses who were members and directors of a corporation are not, by virtue of that fact alone, qualified to testify to the value of property of the corporation which is alleged to have been converted.

Opinion filed December 30, 1922. Rehearing denied April 3, 1923.

Evidence, 22 C. J. § 786 p. 695 n. 44; Trover and Conversion, 38 Cyc. p. 2086 n. 25.

Note.—On evidence of an act of ownership or control exercised over plaintiff's property as sufficient proof of a conversion, see 26 R. C. L. 1110; 4 R. C. L. Supp. 1698; 5 R. C. L. Supp. 1440.

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

Judgment reversed and the cause remanded for a new trial.

Newton, Dullam & Young, for appellant.

To constitute conversion there must be a positive tortious act, a tortious detention of personal property from the owner, or its destruction, or an exclusion or defiance of the owner's right, or the withholding of possession under a claim of title inconsistent with that of the owner. 8 Wait, Act. & Def. 1194; Bolling v. Kirby, 90 Ala. 215, 24 Am. St. Rep. 789, 7 So. 914; Terry v. Binghamton Nat. Bank, 30 Am. St. Rep. 87 and note; 2 Kinkead, Torts, § 582; Tinker v. Morrill, 39 Vt. 477, 94 Am. Dec. 345; Magnin v. Dinsmore, 70 N. Y. 417, 26 Am. Rep. 608; Taugher v. N. P. R. Co. 21 N. D. 111, 129 N. W. 747, 750.

"Trover will lie only where the defendant is guilty of a conversion, which implies a wrongful disposition, appropriation, wasting, destruction, or withholding of the property. The essential element of a conversion is malfeasance." Central R. & Bkg. Co. v. Lampley, 76 Ala. 357, 52 Am. St. Rep. 334.

"A mere wrongful transportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect of destroying or changing the quality of the chattel." Rogers v. Huie, 2 Cal. 571, 56 Am. Dec. 363; Evans v. Mason, 64 N. H. 58, 5 Atl. 766; Salt Springs Nat. Bk. v. Wheeler, 48 N. Y. 792, 7 Am. Rep. 564–566.

"The mere not doing of an act is not a conversion." McCrombie v. Davies, 6 East, 538.

"A conversion implies a wrongful act, a misdelivery, a wrongful disposition, or withholding of the property. A mere nondelivery will not constitute a conversion, nor will a refusal to deliver on demand if the goods have been lost through negligence or have been stolen." Hawkins v. Hoffman, 41 Am. Dec. 767; Nutt v. Wheeler, 30 Vt. 436, 73 Am. Dec. 316.

F. O. Hellstrom and *Theodore Koffel*, for respondent.

"A demand and a refusal is not always necessary, however where the defendant came lawfully into possession it may be dispensed with, when the wrongful assumption of property in or the right of disposing of

the goods is shown." 23 R. C. L. 888, 1098; Olson v. Merrill, 20 Wis. 462, 91 Am. Dec. 428; 24 L.R.A.(N.S.) 226.

"One who exercises dominion over property in exclusion and defiance of plaintiff's rights has converted the property." Nicholas & S. Co. v. Minnesota Threshing Mach. Co. 73 N. W. 415; Town v. St. Anthony Dakota Elevator Co. 77 N. W. 608; Elstad v. Western Elevator Co. 69 N. W. 44; Sanford v. Bell, 48 N. W. 434; Rosson v. Hodges, 47 N. W. 140; Consolidated Land Co. v. Hawley, 63 N. W. 904.

"It is well established that the owner of personal property may himself testify as to its value without any other foundation being made except as to his ownership and control thereof. He need not qualify as an expert on values. So, too, second-hand goods of the nature described can hardly be said to have a market value and the rule as to such only requires a strict limitation as to the market value in cases where such values would be the fairest and the best measures of damages and is ascertainable. What the law requires is certainty as far as possible and an absence of speculation. It does not however require the impossible or the unreasonable." Seckerson v. Sinclair, 24 N. D. 625, 140 N. W. 239.

"The authorities are ample that the owner may testify without other qualifications." Tubs v. Garrison, 23 N. W. 921; City Nat. Bank v. Jordan, 117 N. W. 759; Hutchinson v. Poyer, 44 N. W. 327; Erickson v. Drazkowski, 54 N. W. 283; Michaud v. Grace Harbor Lumber Co. 81 N. W. 93; Bailey v. Walton, 24 S. D. 118, 123 N. W. 701; Enos v. St. Paul F. & M. Ins. Co. 4 S. D. 639, 57 N. W. 919; Pollock v. Jordan, 22 N. D. 132, 132 N. W. 1000; Goldstein v. Northern P. R. Co. 37 N. D. 602, L.R.A.1918A, 612, 164 N. W. 143; Missouri P. R. Co. v. Sherwood Thompson & Co. 17 L.R.A. 643.

BIRDZELL, Ch. J. This is an appeal from a judgment for the plaintiff in an action for conversion. The case was tried in the district court of Burleigh county, before a jury, and resulted in a verdict of $6,000, plus interest from October 1, 1917, at 6 per cent. Upon this verdict judgment was entered.

The plaintiff is a civil corporation, organized in 1906 under the laws of this state, § 1425a, Rev. Codes 1899, for the purpose, among others, of maintaining an armory for Company A, First Regiment, North

Dakota National Guard, as a training school. The articles provide that the corporation shall be managed by a board of directors of five members, one of whom shall be the captain of Company A, who shall be ex officio president of the board, all being members of the company in good standing, who shall hold office for a term of one year, and until their successors are elected and qualified under such by-laws and rules as may be adopted by the members of the corporation.

In March, 1917, Company A was called into Federal service as a part of the Second Battalion of the North Dakota National Guard, and assigned to guard duty at Camp Frazier, near the Missouri river railroad bridge at Bismarck. July 1st, 1917, this battalion was relieved of guard duty and mobilized at Fort Lincoln, near Bismarck, Company A being under the command of Captain J. W. Murphy. Soon thereafter, the Second Regiment of North Dakota National Guards was organized, Company I and the Headquarters Company of this Regiment being recruited in Bismarck, and placed under the command of Captains A. B. Welch and H. T. Murphy, respectively. It seems that the First Regiment entrained for Camp Greene, North Carolina, on September 29, 1917, and the Second Regiment, October 1, 1917. Shortly prior to the departure of the First Regiment, according to his contention herein, the defendant had purchased some of the property belonging to the plaintiff, through negotiations with Captain John W. Murphy, and by an instrument, or letter, dated September 29, 1917, it is contended that authority was conferred upon the defendant to take full charge of the armory building on October 1st, on behalf of plaintiff corporation, until the captain or his successor should return to Bismarck. On or about August 5, 1918, Captain J. W. Murphy returned to Bismarck, where he died sometime later. According to the defendant's contention he turned back to Captain Murphy, upon the latter's return, the property which he had not purchased.

It appears, however, that prior to the departure of Company A, and at about the time the defendant obtained custody of the plaintiff's building and contents, the armory contained the following equipment (the numbers of some of the articles being indefinite): Steel lockers, steam boiler, a large number of pairs of roller skates, a large number of chairs, a roll top desk, a piano, punching bag and rack, horizontal bar, basket ball frames, ladies' dresser, a rug, two rocking chairs, hot water

heater, supply tank, cooking ranges, wall mirrors, gymnasium horse, office table, kitchen chairs, and kitchen table; and that upon the return of the company from military service, all, or practically all, of this material was gone. Hence this action.

It is first argued that the court erred in not directing a verdict for the defendant, on the ground that there was no substantial evidence on which a jury could find that the defendant had converted the plaintiff's property, in that there was not shown to have been any evidence of a tortious taking or any intent to convert the property; that the testimony, when construed most strongly against the defendant, shows no more than negligence in the care of the property,—negligence in the sense of nonfeasance, rather than misfeasance; that there was no demand for the property, and no unlawful detention. We are of the opinion that no error was committed in the denial of the defendant's motion for a directed verdict. There is affirmative evidence in the record to the effect that the defendant, in order to regain possession of the building from one O'Connor, to whom he had leased it, paid him a bonus in cash, and authorized him to take from the building about seventy chairs and a piano. The defendant disputed this, but he testified that he made a deal with Captain J. W. Murphy, whereby he purchased the lockers for the Beulah Coal Mining Company, supposing there were a hundred of them, for $180, but that there were only, in fact, some forty-seven or forty-eight lockers; that the men who took the lockers for the mining company said that they wanted the water tank also, and he, the defendant, told them to go ahead and take it, but that he hadn't seen Murphy about the tank prior to that time. If it be assumed, therefore, though we do not so decide, that Captain J. W. Murphy had authority to dispose of plaintiff's personal property, obviously, this authority was not, under the evidence in this case, exercised further than to dispose of the lockers to the defendant. As the defendant himself has testified to the unauthorized taking of the water tank, and as other witnesses for the plaintiff have testified to the taking and disposal of other property under the defendant's direction, the evidence is clearly sufficient, in our opinion, to support a finding of conversion. In as much as the same evidence goes to establish an original tortious taking, it is not essential, under well settled legal principles, to make or prove a demand for a return.

Error is assigned upon rulings of the trial court, denying motions to strike out the testimony of the witnesses Captain Welch and Langley upon the question of value. It is shown in support of these assignments that the verdict of the jury, covering as it does practically the entire amount claimed by the plaintiff, must necessarily have been based upon the testimony of these witnesses as to the value of the items covered by their testimony. Captain Welch testified, among other things, that the lockers were worth $20 each, the roller skates, $6 a pair, the punching bag and frame, $50, the rug, $65, the roll top desk, $75, etc. He had personally purchased some of the skates; they had all been used, some for one winter, and some for two; he thought that they had paid $6 a pair for the skates, and he testified that they were worth that much after one or two winter's wear; that as to the remaining items, he was estimating the value and that his estimates were not necessarily based upon knowledge of values. He disclaimed knowledge of the value of the boiler, for instance, but he nevertheless testified that it was worth $750. Again, on redirect examination, he stated that his values were based upon what he had paid "for these articles mostly," but in the record it appears that, aside from the roller skates, he had made few, if any, purchases for the company.

The testimony of the witness Langley as to value related principally to the piano. He stated that it was worth a thousand dollars; his knowledge of the value, according to his testimony, was gained from negotiations that he had had in Minneapolis, for the purchase of a new piano. Upon the record we think it clear that this witness was not shown to have been qualified to testify as to the value of the piano. Neither was the condition of the piano shown. In fact, one of the witnesses for the plaintiff, namely O'Connor, who took the piano from the armory, testified that it was worth $85, and that while it was supposed to be, or to have been, an electric player piano, the player part was gone. Whether it disappeared before or after the alleged conversion does not appear.

The respondent insists that the testimony of the witnesses Welch and Langley, as to value, comes properly within the rule that an owner may testify to the value of his property, but we do not consider the testimony offered here to come within this rule. These witnesses were not the owners; neither does it appear, with the exception noted as to the skates, that either of them had purchased, or had otherwise become

familiar with the value of the articles concerning which the testimony was given. Their interest was not any greater than that of any other member of the company, and if they might give testimony as to value on the sole ground of the interest they had as members of the company, or even as directors, then any stockholder or director of an ordinary business corporation would be competent to testify as to the value of any article of property owned by the corporation, even though he might never have acquired any knowledge whatsoever concerning it. We are clearly of the opinion that such is not the law, and that the ordinary rule of testimonial knowledge applies to these witnesses. The liberal rule that permits an owner to testify concerning the value of his property is based upon a presumed familiarity with the subject, acquired from having purchased it or from having gained a knowledge in some other way, sufficient to qualify him. 13 Enc. Ev. 560. There is no presumption that a stockholder or a director of a corporation acquires such knowledge concerning the value of all the property owned by the corporation.

For the error thus affecting a substantial part of the recovery, the judgment must be reversed and the cause remanded for a new trial.

It is so ordered.

ROBINSON and CHRISTIANSON, JJ., concur.

GRACE, J. (concurring in part and dissenting in part). I concur with the majority opinion in so far as it holds that the evidence is sufficient to show a conversion of the property in question by the defendant. I dissent from the majority opinion in so far as it holds that there is no substantial evidence in the record to support the verdict.

The property converted is located in the armory in Bismarck, North Dakota. It was only such property as was used for the convenience, use and entertainment of the members of the company. The members and officers of the company were familiar with it and were perhaps in just as good a position to know its value as the adult members of the household would be familiar with and know the value of the furniture of the home. Because the company had a corporate existence, would not prevent the officers or members or directors, in the circumstances here, from knowing the value of the property in the armory. The wit-

nesses who testified for plaintiff were competent to give evidence as to value. They did so. I think the plaintiff has adduced some substantial evidence of value of all the property converted, which is sufficient to support the verdict.

BRONSON, J. (dissenting). I am of the opinion that the judgment should be affirmed. I concur in the majority opinion to the extent that it holds the evidence sufficient to support the jury's findings of the conversion. I disagree with the majority opinion concerning the admissibility of competency of the testimony of the witnesses Captain Welch and Langley.

Many years ago, an armory building was established in Bismarck. Company "A" of the National Guard was quartered there. The personal property involved, located therein, was bought by, or furnished to, the company for its use. The company was the owner. Plaintiff, a civil corporation, was organized for purposes of holding this property. Its board of directors was composed of members of the company, one of them being the captain. With the exception of a few months the witness Welch was captain of the company from 1913 to April, 1917. During the time when preparations were being made for engaging in the world war he was assigned to Company "I." Captain Welch was president of the plaintiff corporation. He was president of it at the time of the trial. As company commander it was his duty to see that the personal property was conserved. As far as the government property was concerned he was directly charged with it. This property involved was not government property. The witness Welch had charge of this property. He was familiar with it. He testified that he knew the reasonable value of this property. Some of it he had bought, such as the roller skates. His knowledge of value was based upon what he had paid for these articles. He further had inquired recently as to the value thereof. He had made inventory of this property. He saw the property in September, 1917, when the company was entraining for the Front. On cross-examination he testified that the values he placed upon the property were his estimate; that concerning some of the articles that he did not know what their real value was; that he was giving merely his estimate.

The witness Langley has been a member of the board of directors

for the plaintiff since 1914. He is familiar with the property. He testified concerning its condition. He gave testimony concerning the value of an electric piano. He stated that in his estimation the value of this electric piano, at that time (referring to September, 1917) allowing for the scratches on it, was $1,000; he knew what it would cost to replace it. No objection was made to this testimony. On cross-examination he testified that he had dealt in second-hand instruments; that he had dealt in nearly everything; that he based his conclusion as to the value on what it would cost him to get one like it; that he also knew what it would cost to have the electric piano refinished; that he allowed about $150 for such purpose.

At the conclusion of Welch's testimony defendant moved to strike out certain portions thereof concerning value of certain property for the reason that witness testified that he did not know what its value was. A similar motion was made with reference to the witness Langley.

The testimony of other witnesses was introduced, both by plaintiff and defendant, concerning the condition of the property and its value.

Pursuant to all of this testimony, considering the highest values testified for the various items, the total amount aggregated over $7,100. The jury returned a verdict for $6,000.

It is apparent that the evidence of the witnesses Welch and Langley, which was received without objection, was competent for the purposes for which it was offered. Goldstein v. Northern P. R. Co. 37 N. D. 602, 609, L.R.A.1918A, 612, 164 N. W. 143. Generally an owner is permitted to testify concerning the value of property owned by him. 22 C. J. 581; 13 Enc. Ev. p. 560. The reason for such rule is that there exists a presumption of familiarity with that which is owned and a better means of knowing the quality and value than other persons. Fairmont Gas Engine & R. Motor Car Co. v. Crouch, 133 Minn. 167, 157 N. W. 1090. Wigmore, in his work on Evidence, § 716, vol. 1, states, concerning property values, viz.:

"Here the general test, that anyone familiar with the values in question may testify, is liberally applied, and with few attempts to lay down detailed minor tests. The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would

be trifling) may be left to the jury; and courts have usually made no objections to this policy."

See Goldstein v. Northern P. R. Co. supra; Needham v. H. S. Halverson & Co. 22 N. D. 594, 603, 135 N. W. 203. So, under this rule, a part owner may testify the same as a full owner, 13 Enc. Ev. 561. So may a former owner testify. Paterson v. Chicago, M. & St. P. R. Co. 95 Minn. 57, 103 N. W. 621. Thus, the competency of an owner is not affected by the fact that his knowledge is recently acquired and is based in part on the result of inquiries made of experts and others. 12 C. J. 582. It certainly appears from this record that the witnesses Welch and Langley fall within the reason of the rule permitting an owner to testify concerning the value of his property. There is no necessity of applying any presumption that a mere stockholder or director of a corporation may testify like an owner. Upon this record the witnesses, whose testimony is questioned, knew the property, were familiar with it, and had a custody and control thereover. Under the peculiar circumstances it may well be said that they were directly interested in this property. In fact they stood precisely in the position of one who would be the owner of such property. The reason for the rule applying, the rule should apply. It fairly well appears upon the record in this case that the plaintiff as a civil corporation simply existed for the purpose of holding a status in law as the owner of this property. It was not engaged in business. It was simply holding the title to the property for the benefit of the composite members of an organization that formed a military unit of our government. Hence, all of these facts should be considered in connection with the general principles of law that any witness, whether owner or not, sufficiently familiar with property to make his estimate serviceable may state his estimate of its value. 22 C. J. 573; Lines v. Alaska Commercial Co. 29 Wash. 133, 69 Pac. 642. For, ordinarily, value is simply a matter of opinion. In many cases, such as this case, the proof must rest on the opinion of witnesses. See 22 C. J. 574. In such cases the liberal rule of construction is applied concerning the competency of such witnesses. 22 C. J. 574; City Nat. Bank v. Jordan, 139 Iowa, 499, 504, 117 N. W. 760.

The judgment should be affirmed.

On rehearing.

PER CURIAM. A rehearing has been had in this case and the majority of the court is agreed to the views expressed in the opinion previously rendered herein. That opinion is therefore adopted as the opinion upon rehearing. The chief justice adheres to the views expressed in his dissenting opinion and Judge Burr concurs in that opinion.

BRONSON, Ch. J., and BIRDZELL and CHRISTIANSON, JJ., and BURR and PUGH, Dist. JJ., concur.

The Honorable A. G. BURR, District Judge of the Second District, and the Honorable THOMAS H. PUGH, District Judge of the Sixth District, sitting upon rehearing in place of NUESSLE and JOHNSON, JJ., disqualified.

PETER WELLER and Arthur Jalbert, Respondents, v. MULGREW & SONS COMPANY, Appellant.

(192 N. W. 969.)

Drains — contractor excavating public drainage ditch held to reasonable care, to avoid overflowing adjacent lands.

1. A contractor, who is engaged in excavating a public drainage ditch, must use, in the performance of his contract, reasonable care so as to avoid injury to adjacent lands and to him the familiar maxim "sic utere tuo ut non alienum lædas" is applicable.

Drains — ditch contractor held liable for damages for overflowing adjacent fields.

2. Where a contractor engaged in excavating a drainage ditch has obstructed and filled up an old road ditch that served to drain flood waters in the territory tributary and, where, after a heavy rain, flood waters in such road ditch, through the obstruction, were cast upon plaintiff's field and, thereupon, the contractor, becoming cognizant of the conditions, removed the obstruction by a communicating ditch where by such ditch properly functioned to drain off

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Note.—On application of common law maxim "sic utere tuo ut non alienum lædas" to corporations as well as individuals, see 20 R. C. L. 7; 5 R. C. L. Supp. 1073.

flood waters, and where, thereafter, after receiving advice from the chairman of the drainage commission to use his own judgment, the contractor renewed the prosecution of the work and again maintained the obstruction so as to cast flood waters upon plaintiffs' field and to destroy his crops there growing, it is *held*, for reasons stated in the opinion, that, under the circumstances, the duty was imposed upon the defendant to exercise reasonable care in the continuation or renewal of the work, for the failure of which plaintiffs may recover damages suffered thereby.

Drains — right of way release granted county for ditch held not to release damages caused by contractor's negligence.

3. A right of way release, granted by plaintiffs to the county for the construction of such drainage ditch, did not release damages occasioned by the contractor's negligence.

Drains — extraordinary character of storms and the sole contributing and proximate cause of damages to crops by flood claimed to be due to contractor's negligence held for the jury.

4. Questions concerning the extraordinary character of the storm and concerning the sole contributing and proximate cause of the damages awarded, were for the jury.

Opinion filed February 27, 1923. Rehearing denied April 3, 1923.

Drains, 19 C. J. § 204 p. 711 n. 86.

In District Court, Cass County, *Englert*, J.

Action to recover damages for water flooding.

Defendant has appealed from an order denying a motion to enter judgment notwithstanding the verdict.

Affirmed.

Young, Conmy & Young, for appellant.

"A contractor to excavate a ditch for a drainage district established by public authority is not liable for damages naturally resulting to adjacent lands from carrying the plan of drainage into execution." Fitzgibbon v. Western Dredging Co. 117 N. W. 878; Hipwell v. Surety Co. 130 Iowa, 656, 105 N. W. 318; Pearson v. Zable, 78 Ky. 170; Shaw v. Crocker, 42 Cal. 435; Chapel v. Smith, 80 Mich. 100, 45 N. W. 69.

"In the exercise of its privileges and powers, a drainage district must exercise reasonable care and skill, and, if it be necessary to do a particular act in a particular manner, it may do so, though evil may result to others; but if the same act may as easily be done in another way, without hurt to others, it is the duty of the drainage district to adopt the nonhurtful method of exercising its powers." Moore v. Swamp

Dredging Co. 88 So. 52; Nicholson v. Inlet Swamp Drainage Dist. 117 N. E. 445; Olson v. Ry. Co. (Minn.) 38 N. W. 490; Railway Co. v. Huddelston, 52 N. E. 1008; Henderson v. Hines (N. D.) 183 N. W. 531; Karo v. Rye Twp. 13 N. D. 458, 101 N. W. 894; Froemke v. Parker, 41 N. D. 417; Davenport Twp. v. Leonard Twp. 22 N. D. 151; Gulf C. & S. F. R. Co. v. Huffman, 81 S. W. 537; Berninger v. Sunbury, H. & R. Co. 53 Atl. 361; Cleveland, C. C. & St. L. R. Co. v. Wisehart, 67 N. E. 993; Bellinger v. N. Y. C. R. Co. 23 N. Y. 49; Harris v. Lincoln & N. W. R. Co. 137 N. W. 865; Newby & White v. Board of Drainage Commrs. (N. C.) 79 S. E. 266; Van Sickle v. Drainage Dist. 172 S. W. 405; Soules v. N. P. R. Co. 34 N. D. 7; Reichert v. N. P. R. Co. 39 N. D. 114.

"Where the evidence as to the unprecedented character of a flood was such that reasonable men could not differ, the question whether the negligent construction of a bridge caused an overflow should not be submitted to the jury." Wm. Tackaberry Co. v. Simmons Warehouse Co. 152 N. W. 779.

Fowler, Green & Wattam, for respondents.

A contractor constructing a drain, if by his negligence he obstructs an existing ditch so as to overflow another's land, may not escape liability on the grounds that the method of digging the drain was necessary for his own convenience in performing the contract, or was done under the direction of the drainage board's engineer, and the board itself. Dredging Company v. Madin (Ark.) 175 S. W. 400; City of Tucson v. Dunseith (Ariz.) 139 Pac. 177; Boschulte v. Elkhorn R. Drainage Dist. (Neb.) 167 N. W. 730; Jungblum v. R. Co. (Minn.) 72 N. W. 972.

An act of God signifies, in legal phraseology, "any inevitable accident occurring without the intervention of man. The expression 'act of God' excludes the idea of human agency, and if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to have been the act of God, but must be regarded as the act of man." Black v. Pioche, 35 Cal. 423.

"It is also agreed that if the negligence of the defendant concurs with the other cause of the injury in point of time or place, or otherwise so directly contributes to the plaintiff's damage and that it is reasonably certain that the other cause alone would not have sufficed to pro-

duce it, the defendant is liable notwithstanding he may not have anticipated, or been bound to anticipate the interference of the supreme force which, concurring with his own negligence, produced the damage." 1 Shearm. & Redf. Neg. 6th ed. § 39; cited in Piqua v. Morris, 98 Ohio St. 42, 120 N. E. 300. See also Brown v. Coal Co. (Iowa) 120 N. W. 732 and cases cited. Gould v. Schermer, 101 Iowa, 582, 70 N. W. 697; Burke v. Creamery Pkg. Co. 102 N. W. 793, 126 Iowa, 730; Hasse v. Morton, 115 N. W. 921; Grimes v. Bowerman, 92 Mich. 258, 52 N. W. 751; McMahon v. Davidson, 12 Minn. 357; Campbell v. City of Stillwater, 32 Minn. 308, 20 N. W. 320; King v. C. M. & St. P. R. Co. 77 Minn. 104, 79 N. W. 611.

Statement.

BRONSON, Ch. J. Plaintiffs sue to recover for damages to crops through water flooding. A verdict for $600 in plaintiffs' favor was returned. Defendant has appealed from an order refusing to enter judgment in its favor notwithstanding such verdict.

The facts are: Plaintiffs own a half section of farm lands abutting upon the county line between Cass and Trail counties, North Dakota, and distant west from the Red river, about 2 miles. Defendant is a drainage ditch contractor. Along this county line, running east and west past these farm lands, there was a graded road with road ditches on each side that had existed for some twenty years. The flow of water in these ditches was eastward. Pursuant to some testimony in the record the drainage from these farm lands was northward into the south ditch along this graded road. The land in the vicinity was level, flat land. From plaintiffs' farm lands there were runways and furrows for purposes of drainage into this south road ditch. In 1920 there was a good grade on the road and a good ditch along these lands upon the north. During times of heavy rains, this ditch would handle the surface waters in fairly good shape without causing the same to back up or spread over these farm lands. Flood waters would drain off these lands as well as off other farm lands in the vicinity; if trouble was experienced with flood waters upon the fields, neighboring lands were likewise affected.

In 1920 defendant made a contract with the commissioners of Cass

county and Trail county, composing a bicounty drainage board, for the construction of a drainage ditch, to be known as drain No. 42, along this county line from Red river westward about 6 miles. The specifications provided that all material taken from the excavation of the ditch should be deposited upon one or both sides of the ditch as directed by the engineer; that, where deposited as a spoil bank or on the highway and leveled into a road, a berm of 8 feet at least should be left; that a road should be built along that part of the ditch where the road now exists, such road to be 26 feet wide on the top, crowned one foot in the center. That the contractor should have charge and be responsible for the entire line of work until its completion and final acceptance. That he "shall carry on the work as expeditiously as possible, with due regard to the safety and convenience of public travel and he shall be responsible for any damage to property or individuals due to the negligence on his part or on the part of his employees." The contract required the ditch to be completed and ready for acceptance on or before August 1st, 1921.

For purposes of this ditch construction, plaintiffs granted, by deed dated March 31st, 1921, to Cass county, a right of way 75 feet wide along the north side of their lands. In this deed they released all claims to damages by reason of the laying out, construction, and maintenance of such ditch through their lands. This ditch was constructed along the north line of their lands about 10 feet south of the south road ditch. This ditch varied in depth from 4 to 9 feet. The road ditch was about 3 feet deep.

In October, 1920, defendant initiated this construction and worked about three weeks. In April, 1921, the work was renewed. On June 14th, 1921, defendant had progressed with the work to plaintiffs' farm and a distance of about 150 feet along the north line thereof. In this construction a crew of seven men were employed upon a night and day shift. A steam shovel, or digging machine was used. In excavating the dirt it could deposit the same on either side of the ditch, through a crane, as might be directed. As the ditch was being constructed the excavated dirt was deposited on the graded road and in the south road ditch. This created a road some 23 to 24 feet wide with an average depth of dirt some 3 to 5 feet deep on top of the road and that much higher than the surrounding land; it filled up the south road ditch;

some dirt was also deposited on the south side of this drainage ditch so as to leave a berm.

Upon these farm lands plaintiffs had sown, in the fall of 1920, about 120 acres of rye and, in April, 1921, about 140 acres of wheat and 22 acres of flax. These crops were upon summer fallowed land. On June 14th, 1921, these crops were in fine condition. There had been little moisture during the spring. The rye was just starting to fill. No water had occasioned any trouble until the rain storm about to be mentioned.

On Tuesday, June 14th, 1921, about 4 or 5 A. M. a heavy rain occurred, lasting several hours. Then, the south road ditch was closed where dirt had been placed. Then, there was no opening into the drainage ditch. Pursuant to the testimony of defendant's day engineer, who operated the engine and shovel, about 8 A. M. or later, they cut a ditch from the old road ditch into the new ditch; a ditch as large as the old ditch. They did not operate that day. The next day they operated about two hours. Their operations filled the ditch up, backed up the water, and they had to stop. Then they opened the ditch up again. On June 16th, the third day, they started about noon. They ran until 6 P. M. There was water standing around in the fields on both sides. When they were not running and there was an opening from the road ditch into the drainage ditch, the water ran off all right. There was no chance for it to run off when they were operating.

Pursuant to the testimony of defendant's night engineer, the rain started about 4:30 A. M. It was a very heavy rain, like a cloudburst. It rained so hard that the belts got wet and they could not operate the machine any longer. It rained about two or two and a half hours. He went to breakfast about 6 A. M. The next night they started up but the water backed up and they had to shut down. On the night of the 15th they did not work at all nor on the night of the 16th. He saw plaintiff Jalbert in the field on this day after the rain, digging ditches in the field. There was a culvert to the east of the machine on the section line; it was running full of water. This was the second day after the rain. Water was running down the north ditch. At the northwest corner of the quarter he noticed the culvert to be blocked and filled. There was water standing in the fields all around. When they were

operating the machine, the water could not flow out of the south road ditch. It had to stay there until it dried up.

Pursuant to testimony of defendant's foreman, he had general charge of the whole construction. For some four or five years he has been working for defendant in charge of this ditching machine. When he got up about 5:30 A. M. it was raining and this rain continued for an hour and a half. After the rain stopped there was considerable water in the road ditch and on the land to the south. They did not work that day only they opened up a ditch from the road ditch to the drainage ditch to let the water out. They did not run that night. On the night of the next day they started up and worked for half an hour or something like that; the water commenced to fill up again and they had to shut down; they did not run any more that day nor that night. On the next day they started in the afternoon and kept on working after that. When they started this next day there was some water coming down the ditch. There was water then in the fields; in all the fields around there. The north ditch took care of the water all right. After this rain all the ditches were full. Plaintiff Jalbert was there a few times to see him about stopping the machine. Larson, chairman of the Drainage board, came about noon to see him. Larson told him "I would not start up now. Use your own judgment when you think you can go to work. Whenever you think the water is down enough to start up, use your own judgment." When the machine was stopped and this opening was in the drain it took care of the water in good shape and drained it in good shape. Of course, when they started to work there was no place for the water to go. It had to back up and would have to go right over the banks. He shut down every time he noticed it going over the banks and he told his men and gave them orders to shut down.

Pursuant to the testimony of the plaintiff Jalbert, on the day after the rain he went down to the ditching machine. A ditch had just been opened from the road ditch. On the road home he saw the foreman and told him the water was coming down for some 6 miles back and that he would like to have him stop as he thought the water would not get through the ditch for three or four days. He shut down until that night but the machine was operated all that night and until the next morning about half past ten. Again he saw the foreman. The dirt was being put into the ditch as the machine was operating. The road

ditch was full and the water was running off into the field. After a talk with the foreman he stopped the machine, made an opening and the water started to run off. The foreman advised him that he could not stop any more for the farmers; that plaintiff had to get orders from the highway authority. Plaintiff then saw Larson. He procured from him an order to have the foreman stop. When plaintiff got back to the ditching machine it was running right along. The road ditch was full and the water was going upon his fields. He gave the foreman this order and he stopped again that morning about 9 A. M. and until next morning at 6 A. M. The road ditch was then not quite so full, but it was not down enough so he could get the water off his field. Then he again talked with the foreman about stopping. The foreman advised him that he should go and see the chairman of the drainage board. Plaintiff could not locate over the telephone, the chairman. He came back again and the foreman said he would shut down. He did shut down from 9 A. M. until noon; then he started up and continued operations. Otherwise he testified that he dug a ditch west of the machine across the road. He tried to protect himself because the machine was going to start, but his brother, who had land on the north side came that night and filled it up. This was the first day after the rain. Also he dug ditches in his field the second day after the rain to make clean runways so the water would run off.

Another farmer testified he owned land a mile west from plaintiffs on the north and south sides of the road. After the rain the ditches were full of water. Land on the north side was pretty well covered with water. On the south side water was backing up into plaintiffs' field. The ditching machine was then working on the 14th. At his corner, water was actually running over the grade to the north from the south and from the west towards the east. The water remained on the land for about a week. Ordinarily this road ditch would carry the water off. This was a heavy rain but he did not think it was as much as there had been at times before.

Pursuant to the testimony of plaintiff Jalbert's brother he farmed the lands on the north side of plaintiffs' land. He thinks the south ditch was a little larger than the north road ditch. There was water on his land. This water flowed away through the north road ditch and his crops were not drowned out. After the rain he went down to the

ditching machine. It stopped that morning but started again at 6 P. M. It ran all that night. When this ditch was open the water ran out pretty good. He shut off the ditch that his brother had dug across the road from 30 to 40 rods in front of the machine. The water was running across and drowning him out and he shut it off to protect himself. He went over to the machine that morning about 9 or 9:30 A. M. They opened a ditch into the road ditch then while he was there. They operated the machine the morning of June 15th, but not in the afternoon. They stopped in the forenoon of June 16th and started up again.

Pursuant to the testimony of Larson, chairman of the drainage commission, he went to the machine on the day after the rain. In the section where the machine was, there was water in all the fields. On the north side the water was running pretty strong in the road ditch. On the south side the water was running slowly out of the field. It was flowing into the ditch at the east end and was going right out because they had cut an opening between the old road ditch and the new ditch they were digging. He arrived about noon and stayed a couple of hours. He saw the foreman and told him he had better wait until the water got down and the foreman agreed to do that. When he asked how long he should wait Larson advised him that he could not set any time, but he must use his own judgment; that as long as the water ran as strong as it did he did not think it advisable to start because it would only fill up in a little while and run upon the fields. Larson was a witness for the defendant.

Pursuant to the testimony of the engineer of the drainage commission, called as a witness for defendant, he instructed the defendant to deposit the dirt as indicated on the plans and profile. They required the earth to be placed on the highway and leveled and graded to form a perfect and good road after construction; the balance placed on the land side, which dirt was to be graded and leveled down after construction. It was impossible to pile this dirt in the highway and avoid putting the dirt in one or the other ditch. The work was done in accordance with the plans and specifications and entirely to his satisfaction. He gave no orders to the defendant to cease work. He did have some talk with the chairman of the drainage commission about the time of the storm. The water remained on plaintiffs' field some ten days and destroyed crops.

Contentions.

The defendant maintains that the evidence is insufficient to show any negligence on defendant's part proximately causing the loss; that, upon the record, the work was properly done in accordance with the plans and specifications; that the contractor, accordingly, was not liable for damages resulting therefrom; that there is no liability; furthermore, because plaintiffs gave a right of way deed for this construction and released all claims to damages thereby; that upon the evidence it appears, as a matter of law, that the damages were occasioned through an unusual and extraordinary storm for which defendant was not responsible; that, in any event, there were causes other than defendant's negligence which occasioned the loss; so that it was impossible for the jury to determine the proportion, if any, of defendant's contribution to such loss.

Decision.

Upon the record and the contentions made by defendant, the following principles of law are invoked by the parties:

(1) That a contractor who has constructed a public drainage ditch properly, pursuant to contract, is not liable for damages occasioned thereby to adjacent lands.

(2) That a contractor who is engaged in excavating a public drainage ditch must use, in the performance of his contract, reasonable care so as to avoid injury to adjacent lands and that to him the familiar maxim "sic utere tuo" is applicable.

If the first stated principle of law be conceded, the question is presented whether the record discloses evidence to support the jury's finding that defendant failed to use reasonable care as required under the second principle of law.

It may be conceded without deciding, as defendant contends, that the contractor properly excavated this ditch pursuant to the plans and specifications and properly deposited the excavated dirt in the road ditch and upon the graded road; that all of this work was performed to the entire satisfaction of the drainage commission or its engineer; and, consequently, neither the drainage commission, as a public body, nor the

defendant, as a contractor, are liable for any resulting damages occasioned thereby.

However, from the evidence the finding is warranted that in the prosecution of this work the old road ditch was obstructed as the new drainage ditch was constructed. This process occasioned neither harm nor damage excepting when rains came and the functions of the old road ditch were required for drainage purposes. Of course, in such event, the obstruction, created in the prosecution of the work, served to dam water which necessarily had to escape over plaintiffs' adjoining fields. When the rains came, defendant, through its foreman and employees, became cognizant of the effect of so damming the water through this obstruction. Upon request made defendant removed this obstruction by a communicating ditch between the old road ditch and the new drainage ditch and adjourned the prosecution of the work. This served to permit the drainage system, theretofore existing, to function and the flood waters to run off and not occasion damage. Defendant renewed its work and discovered that the renewal of such work served to renew or maintain the flood and to give the occasion for floods upon, and damage to, plaintiffs' lands. Again it ceased work and removed the obstruction. It started again. Then defendant was requested by the drainage commission, through its chairman, to halt the prosecution of this work and to use its judgment so that damages might not be occasioned. Defendant assumed to act upon these orders and suggestions. It gave orders through its foreman, in that regard to its employees. Thus, with knowledge of the situation, defendant presumed to act and to prosecute the work and, through the floods existing, perhaps resulting, plaintiffs' crops were in part destroyed.

Do these facts form a basis for a finding of negligence or the failure to exercise reasonable care? Were the damages sustained directly attributable to defendant's negligent acts through the avoidance of which, if defendant had so chosen, injury might have been obviated? If it be conceded that defendant had the right, under his contract, pursuant to the plans, specifications, and orders of the drainage engineer, to deposit the dirt in the ditch and upon the road, and that its acts in so doing did not constitute negligence, yet, was it a failure to exercise reasonable care, the degree of care demanded by the circumstances, hence, negligence, to continue or renew the prosecution of this work

when, within defendant's knowledge, damage would thereby be occasioned to the property of others?

These questions involve fundamental considerations and the application of the familiar maxim "sic utere tuo ut non alienum lædas." Upon the record, the facts warranted the finding that defendant possessed a knowledge of conditions and possible or probable consequences that gave occasion for the exercise of foresight and care; a knowledge that might lead an ordinarily prudent man to apprehend danger and damage to the property of others, unless in the conduct of his own affairs, even his own rights, he acted with prudence and care.

Thus, it may be said that the facts warrant a finding that, under the circumstances, a duty was imposed upon the defendant for the violation of which plaintiffs might hold such defendant accountable; that the performance of this duty did not prevent, under the circumstances, the proper performance and fulfilment of the terms of defendant's contract. Therefore, we are of the opinion that the question of the performance or violation of this duty, in continuing or renewing the prosecution of this work under the circumstances, and, whether the violation of such duty was the proximate cause of the damages suffered, was properly a question of fact for the jury and that its finding should not be disturbed. See 29 Cyc. 420; 20 R. C. L. 7, 9, 12; 1 Thomp. Neg. § 685; Hope v. Fall Brook Coal Co. 3 App. Div. 70, 38 N. Y. Supp. 1040, 1042; 19 C. J. 711; Solberg v. Schlosser, 20 N. D. 307, 310, 312, 30 L.R.A. (N.S.) 1111, 127 N. W. 91; Fitzgibbon v. Western Dredging Co. 141 Iowa, 328, 117 N. W. 878; Mitchell v. Hahn, 131 Ark. 286, 198 S. W. 528; Greenwell v. Wills & Sons, 20 Mo. App. 651, 239 S. W. 578; Tant v. Little River Drainage Dist. 210 Mo. App. 420, 238 S. W. 848; Kochtitzky v. Bond, 128 Ark. 255, 194 S. W. 8; Moore v. Swamp Dredging Co. 125 Miss. 842, 88 So. 522; Timothy J. Foohey Dredging Co. v. Mabin, 118 Ark. 1, 175 S. W. 400.

The right of way granted by plaintiffs to the drainage commission for the construction of this drainage ditch and the release therein of all claims to damages by reason of the laying out, construction, and maintenance thereof through plaintiffs' land did not, by its terms, or otherwise, release or purport to release damages that might be occasioned through the contractor's own negligence. See Hopper v. Elkhorn Drainage Dist. 108 Neb. 550, 188 N. W. 239.

No complaint has been made concerning the instructions. We are not prepared to hold, as a matter of law, that the rains were of such an extraordinary and unprecedented character so as to absolve the defendant from liability, or that defendant's acts were not the sole contributing and proximate cause of the damages awarded. See Soules v. Northern P. R. Co. 34 N. D. 33, L.R.A.1917A, 501, 157 N. W. 823; Henderson v. Hines, 48 N. D. 152, 183 N. W. 531, 535; Meehan v. Great Northern R. Co. 13 N. D. 432, 443, 101 N. W. 183.

The order is affirmed with costs.

CHRISTIANSON, JOHNSON, NUESSLE, and BIRDZELL, JJ., concur.

THE STATE OF NORTH DAKOTA, Respondent, v. SID McDANIELS, Appellant.

(192 N. W. 974.)

Intoxicating liquors — evidence held sufficient to sustain conviction for violation of state prohibitory law.

1. In a criminal action for violation of the State prohibitory law (Laws 1921, chap. 97), the evidence is examined and *held* to sustain a verdict of guilty.

Criminal law — admission of search warrant and return thereon in prosecution for violation of prohibitory law held without prejudice.

2. For reasons stated in the opinion it is *held* that the error, if any, in admitting a search warrant and the return thereon in evidence, is error without prejudice.

Indictment and information — unnecessary to negative exception in statute, unless essential to definition of offense.

3. In an information for a statutory offense, it is not necessary to negative an exception in the statute unless the exception is such as to render the negative of it an essential part of the definition of the offense.

Intoxicating liquors — information for violation of state prohibitory law need not negative Federal exceptions.

4. An information for violation of the state statute which prohibits the unlawful manufacture of intoxicating liquors, or the possession of any utensil, contrivance, or machine designed or intended for use in the unlawful manufacture of intoxicating liquors (Laws 1921, chap. 97), need not negative the

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Note.—On the general rule as to negation of exceptions in statute, see 14 R. C. L. 188; 3 R. C. L. Supp. 192; 4 R. C. L. Supp. 886; 5 R. C. L. Supp. 752; 15 R. C. L. 389; 3 R. C. L. Supp. 453.

proviso in such statute permitting certain liquors to be manufactured, sold, "furnished and possessed when permitted by Federal statute."

Opinion filed March 13, 1923. Rehearing denied April 3, 1923.

Criminal Law, 17 C. J. § 3664 p. 321 n. 47; § 3665 p. 324 n. 68; Indictments and Informations, 31 C. J. § 269 p. 720 n. 58; Intoxicating Liquors, 33 C. J. § 447 p. 727 n. 24. p. 729 n. 30 New; § 502 p. 758 n. 80.

Appeal from the District Court of Mountrail County, *Moellring*, J.

Defendant was convicted of violating the state prohibition law, and appeals from the judgment of conviction and from the order denying a new trial.

Affirmed.

Funke, Campbell & Eide, for appellant.

R. E. Swendseid, State's Attorney, and *Geo. F. Shafer*, Attorney General, for respondent.

CHRISTIANSON, J. The defendant was convicted of violating the laws of this state prohibiting the manufacture, or possession of utensils designed or intended for use in the unlawful manufacture, of intoxicating liquor, Laws 1921, chap. 97, and appeals from the judgment of conviction and from the order denying his motion for a new trial.

It is contended that the verdict is against the evidence. Error is also assigned upon rulings in the admission of evidence and the instructions to the jury. We will consider these questions in the order stated.

The evidence shows that the sheriff and his deputy, on or about October 11th, 1921, came to a small shack in the woods on the banks of the Missouri river where a still was in operation. It is undisputed that there was found at this place a still and a considerable quantity of mash and moonshine liquor. At the time the officers came, the still was being operated and liquor being manufactured. It is further undisputed that at the time, the defendant was the only occupant of the place. The defendant claims that the place did not belong to him, and that he was in no manner interested therein; that the place belonged to a party named William Holt; that on the day in question he walked down to the place with Holt; that the purpose was to look at a certain horse on the way down; that after they arrived at the shack, Holt built a fire and started the still; that when the noon hour approached, he (Holt) suggested to defendant that he (Holt) wanted to go home for

lunch and asked the defendant if he would stay and keep the fire going until he (Holt) came back; that the defendant agreed to do this and that this was the sole reason why he was there at the time the sheriff and his deputy appeared.

The shack in which the still was being operated was situated in a place that was secluded and quite inaccessible. The defendant was the only person in or about the place at the time the officers appeared. He was sitting in the shack reading a paper or magazine. According to his own story, he was there for the purpose of keeping the fire going so that the still could continue to manufacture liquor until Holt returned. He did not, however, say anything to the officers about Holt, or inform them that Holt was the owner of the still. He, in fact, offered no explanation whatever to the officers, and in no manner sought to inform them that the still did not belong to him, or that he did not operate it. The statement to the effect that the still belonged to Holt and was being operated by Holt, and that defendant merely stayed there while Holt went home for dinner, was first told upon the trial in the district court.

We are entirely agreed that it cannot be said as a matter of law that the facts and circumstances stated did not warrant the jury in returning a verdict of guilty. On the contrary, we are of the opinion that the facts and circumstances shown here were sufficient to justify the jury in concluding that the still belonged to the defendant, and was being operated by him.

It is contended that the court erred in admitting the search warrant and the return thereon in evidence over defendant's objection. The search warrant and the return are not in the record transmitted to this court; but assuming that the warrant and the return are as stated by the defendant's counsel, we do not believe that any prejudicial error was committed in admitting the same in evidence. The search warrant was issued against some person unknown. The return,—according to what is said,—merely purported to recite what the sheriff found in examining the shack in question. We have very serious doubt if the objections interposed by the defendant were sufficient to call the trial court's attention to the particular grounds now urged as reasons why the same should not have been admitted in evidence. But in any event the error, if any, in admitting these instruments in evidence was error without prejudice, as both the sheriff and his deputy testified fully with respect

to the search of the premises and as to what they found in making such search; and there is no dispute as to what they actually did in the way of search or what they found at the time the search was made. The defendant himself, as already indicated, admitted that the sheriff found the still, mash and moonshine liquor to which reference has already been made. Hence, so far as the search warrant or the return thereon is concerned, there is no contention that anything was said therein which in any manner changed or affected the testimony given by the officers and the defendant. And it is inconceivable that the jury could have been influenced to the prejudice of the defendant by any statement either in the search warrant or the return.

In its instructions to the jury the court said: "I charge you that under the laws of this state it is unlawful for a person to manufacture and possess any utensils, liquors, or other property designed and intended for use in the manufacture of intoxicating liquors fit for beverage purposes, except as permitted by Federal statute. I shall not define for you the exceptions wherein the Federal statute permits such manufacture and possession, as under the evidence in this case no such exception or exceptions are disclosed."

It is contended that the court erred in failing to define the exceptions provided by the Federal statute. It is also contended that the information in this case is defective because it failed to allege that the acts charged against the defendant did not fall within such exceptions. In our opinion neither contention is well founded. The exceptions enumerated in the statute do not constitute an element of the crime described. The exceptions merely withdraw certain cases from the operation of the statute. Hence, they need not be alleged or proven by the prosecution, but constitute matter of defense. 22 Cyc. 344–346; Sofield v. State, 61 Neb. 600, 85 N. W. 840; Shelp v. United States, 26 C. C. A. 570, 48 U. S. App. 376, 81 Fed. 694; McKelvey v. United States, 260 U. S. 353, 67 L. ed. 301, 43 Sup. Ct. Rep. 132. In McKelvey v. United States, supra, the Supreme Court of the United States said:

"By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere; and that it

is incumbent on one who relies on such an exception to set it up and establish it."

In Shelp v. United States, supra, it was held that an indictment for selling liquor contrary to an act forbidding the "importation, manufacture, and sale of intoxicating liquors, . . . except for medicinal, mechanical, and scientific purposes," need not negative the exceptions in such statute. In the opinion in the case the court said:

"The exception stated in the statute does not either define or qualify the offense created by the statute. The offense designated in the statute is the sale of intoxicating liquors in Alaska. This can be properly stated without any reference to the exception. There is nothing in the exception that enters into the offense condemned by the statute. The exception is purely a matter of defense, which, if relied upon, could readily have been proven by the defendants. A careful examination of the authorities will show that it is only necessary in an indictment for a statutory offense to negative an exception to the statute when that exception is such as to render the negative of it an essential part of the definition or description of the offense charged." The language quoted is directly applicable here.

This disposes of all assignments of error worthy of discussion. Other errors assigned are either controlled by those discussed or are so obviously without merit as to require no consideration. From what has been said it follows that we are of the opinion that the record discloses no prejudicial error. Appellant's counsel contends, however, that even though no assignment standing alone can be said to show prejudicial error, that the record as a whole demonstrates that defendant did not receive a fair and impartial trial. We are unable to agree with this contention. On the contrary we believe that the record before us indicates that the defendant received a fair trial, and no valid reason has been shown to justify our interference with the judgment and order appealed from.

Affirmed.

BRONSON, Ch. J., and BIRDZELL, NUESSLE, and JOHNSON, JJ., concur.

On petition for rehearing.

PER CURIAM. In a petition for rehearing it is asserted that this court in its former opinion failed to consider that the defendant in this case was charged only with the manufacture or possession of utensils intended to be used in the unlawful manufacture of intoxicating liquors; and it is contended that the trial court erred in not defining the term "possession" as contemplated by such statute, and, also, failed to give instructions on other phases of the case.

No request was made for instruction on any of the propositions alluded to. And there is, in our opinion, no reason to believe that the jury was in any manner misled by failure to define the term "possession," or instruct on any of the other abstract propositions alluded to. In other words, upon the record here there is no basis for the alleged error predicated on nondirection. See State v. Glass, 29 N. D. 620, 151 N. W. 229.

Rehearing denied.

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

MARGARET STRONG BRETT and Warren B. Strong, Respondents, v. The ST. PAUL TRUST COMPANY, a Corporation, Robert J. Strong, Mrs. Robert J. Strong, Maggie Strong, and All Other Persons Unknown Claiming Any Estate or Interest in, or Lien or Encumbrance upon, the Property Described in the Complaint, Defendants. MRS. ROBERT J. STRONG, Appellant.

(193 N. W. 317.)

Wills — provisions of will held to create express trust without vesting title or estate in cestui que trusts.

1. Where a will devised land to a trustee with active duties concerning the collection of rentals and income therefrom and the payment of the net income

Note.—On recitals in tax deed as evidence of regularity of tax proceedings, as to advertising and notice of sale, and as time, manner, and place of sale, see note in 30 A.L.R. 8; 26 R. C. L. 422; 5 R. C. L. Supp. 1411.

to beneficiaries in the discretion of the trustee during the lifetime of one of them, with the power, after his death, to sell the land and to pay the proceeds, in the discretion of the trustee, to certain beneficiaries, it is *held*, for reasons stated in the opinion, that an express trust was created with title vested in the trustee and without any title or estate being vested in the cestui que trusts.

Taxation — tax deed void on its face where recitals show that tax sale upon which issued illegal.

2. Where the recitals in a tax deed, pursuant to the statutory form prescribed by law at the time of its issuance, show that the tax sale was illegal, the tax deed so issued is void on its face.

Trusts — conveyance by beneficiary held not to affect title of trustee, nor inchoate rights of other beneficiaries under it.

3. Where one of the designated beneficiaries under a trust conveyed all of his right, interest, title, and estate therein to a brother it is *held*, for reasons stated in the opinion, that such conveyance did not in any manner affect the title and estate of the trustee nor the inchoate rights of other beneficiaries pursuant to the trust.

Trusts — courts at domicil of testator have jurisdiction to remove trustee and appoint a new one; trustee, while acting as such, could not receive valid title to lands involved in trust pursuant to void tax deed.

4. Where a will has been probated and allowed at the domicil of the testator affecting lands devised in a foreign state, and where such will was also probated and allowed in the state where the lands are situated, and where, pursuant to action taken in both jurisdictions, the title thereto was vested by decree of the probate courts in a trustee upon an express trust, and where, thereafter, through an action in equity at the domicil of the testator, the trustee was removed and a new trustee appointed over all the trusts, including the land in a foreign state, and where, subsequently, in another action, the new trustee secured a determination by a court at the domicil of the testator that he was the owner, individually, of the land by reason of tax deeds, it is *held*, for reasons stated in the opinion as follows:

(a) That the courts at the domicil of the testator had jurisdiction and authority to remove the trustee and appoint a new trustee.

(b) That the new trustee did not receive a valid title to the land in North Dakota which he could receive and accept while acting as trustee pursuant to the void tax deed issued to him.

Trusts — trustee, while acting as such, cannot secure title personally by adverse possession.

5. A trustee cannot secure title personally by adverse possession while the duties of a trustee under an express trust are imposed upon him.

Opinion filed April, 3, 1923.

Taxation, 37 Cyc. p. 1437 n. 22; p. 1439 n. 41; Trusts, 39 Cyc. p. 217 n. 59; p. 226 n. 99; p. 227 n. 2; p. 237 n. 65; p. 265 n. 84; p. 298 n. 30; Wills, 40 Cyc. p. 1768 n. 51; p. 1770 n. 55; p. 1775 n. 76.

In District Court, Pembina County, *Burr*, J.

Action to determine adverse claims.

Defendant, Ella C. Strong (Mrs. Robert J. Strong), has appealed from a judgment quieting title in plaintiffs.

Judgment reversed and cause remanded for further proceedings.

Brickner & Knox, for appellant.

In a statutory action to determine adverse claims to real property it is incumbent upon the plaintiff to prove a title sufficient to authorize him to maintain the action, and, until he furnished such proof, the defendant is not required to prove his adverse claim, and that where a tax deed is void upon its face it is not sufficient to sustain plaintiff's action. Youker v. Hobart, 115 N. W. 839.

"A life estate in land may be created by a will providing that the devisee may enjoy the income for life."

"A gift of the income of personal property or of the rents and profits of land, perpetual or without limit as to time, carries the personal property absolutely or the lands in fee simple."

"If the enjoyment of the income be restricted to the life of the legatee or devisee, a life estate in the property passes." 30 Enc. Law, 743; Lewis v. Harrower, 197 Ill. 315; Andrews v. Boyd, 5 Me. 199; Butterfield v. Haskins, 33 Me. 392; Stone v. North, 41 Me. 265; Sampson v. Randall, 72 Me. 109; Fuller v. Fuller, 84 Me. 475; Parine v. Forsaith, 86 Me. 357; Wilson v. Curtis, 90 Me. 463; Fogler v. Titcomb, 92 Me. 184; Diament v. Lore, 31 N. J. L. 220.

"The rule is well settled that the possession of land by a tenant for life is not adverse to the remainderman or reversioner." 1 Cyc. 1056 and cases cited.

"Until the death of the life tenant the statute does not begin to run in favor of the life tenant or his grantee against the remainderman whether the estate in remainder be vested or contingent, legal or equitable." Lamar v. Pearre, 82 Ga. 354, 9 S. E. 1043; Augusta v. Radcliffe, 66 Ga. 469.

"Thus a tenant for life cannot debar the rights of a remainderman by a surrender or a release, or by any other voluntary acts for merging the lesser estate into the greater." Moore v. Luce, 29 Pa. 260, 72 Am. Dec. 629.

"The life tenant may not, by failure to pay taxes, acquire a certain

adverse claim founded upon a tax title issued by reason of such default." Watkins v. Greene, 101 Mich. 493.

A tax deed is void on its face when it shows a sale of land in a manner not authorized by statute. Murphy v. Wilson, 37 N. D. 300, 163 N. W. 820; Youker v. Hobart, 17 N. D. 296, 115 N. W. 839; Cain v. Ehrler, 36 S. D. 127, 153 N. W. 941; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357.

"The purpose which underlies this legislation has been pushed further in some states, and under the provisions of the revised statutes of New York, enacted in 1828, and adopted to a greater or less extent in a number of states, not only are passive trusts of realty to be construed as direct conveyances to the beneficiary, but express active trusts in real property are valid as trusts for certain enumerated purposes only. But if the performance of any act lawful under a power is authorized, the trust is effective as a power in trust." 28 Enc. Law, p. 867.

"A trust may be defined as an obligation arising out of a confidence reposed in one who has the legal title to property conveyed to him." 28 Enc. Law, p. 858.

Powers are not estates but rather operate upon estates.

"A general power is one which enables the donee to appoint whomever he pleases."

"A special power is one whereby the donee is restricted to an appointment to, or among, particular objects only." 22 Enc. Law, p. 1092.

Feetham & Fraine, for respondent.

It has been held that a quitclaim deed may be merely a release. Wightman v. Spafford, 8 N. W. 680.

And this may be inferred not only from the recitals of the deed but from the adequacy of the price given and other circumstances showing the purpose of the instrument. Taylor v. Harrison, 26 Am. Rep. 304.

Under the circumstances in this case, what better inference can be drawn than that Freeman was obtaining a mere release and engaged in a laudable endeavor to purchase peace in his possession. Kuh v. Flynn, 189 N. W. 280.

Statement.

BRONSON, Ch. J. This is an action to determine adverse claims

brought against the St. Paul Trust Company, Robt. J. Strong, Mrs. Robt. J. Strong, Maggie Strong, and all other persons unknown claiming an estate or interest. The property concerned is a half section of land in Pembina County, North Dakota. Service was secured against the defendants by publication. The defendants, Robt. J. Strong and his wife, Ella C. Strong, interposed an answer. None of the other defendants appeared. The answering defendants alleged a right, interest, and title in themselves through a devise to defendant Robert J. Strong contained in the will of his father, Charles D. Strong, deceased. This particular devise reads as follows:

"Twelfth. I give, devise, and bequeath unto the St. Paul Trust Company, as trustee, two certain farms and parcels of land situated in Pembina County, Dakota Territory, being the same tracts and farms of land heretofore sold and conveyed to me by my son, Robert J. Strong, and his wife. To have and to hold the same as such trustee, upon the trusts following, viz.: to demise, lease and let the said farms, upon such time and terms as to the said trustee may seem best, to collect the rentals and income therefrom, to pay the taxes and other expenses necessary to the execution of said trust, for and during the natural life of my said son, Robert J. Strong, to pay over the said net rentals and income, either to my said son, or to his wife, or to his children, or to the guardian of such children, as may be best for his family, in the judgment and discretion of the officers of said trustee; and upon and after his death, to sell the said real estate or any part thereof, upon such terms and times as to said trustee shall seem best, and to pay over the net proceeds of such sales either to the widow of my said son, if any, or to his surviving children, or to the lawful guardian of his minor children, as to said trustee shall seem for the best interests of the widow or children of my said son. Provided always, that, if my said son shall choose to reside upon and occupy either of said farms and cultivate the same, he may do so, without rental, and during his lifetime, so long as he shall pay the taxes and other lawful assessments against the same. But my said son shall have no control over the income or rentals of any of said real estate, during his lifetime."

They further alleged that the will was duly admitted to probate in the probate court of Ramsey county, Minnesota; that the nominative trustee, the defendant St. Paul Trust Company, entered upon the exe-

cution of its trust but defaulted therein; that Freeman P. Strong, the brother of Robert and the father of the plaintiffs, was substituted as trustee to execute the continuing trusts imposed by the will; that the plaintiffs are fully acquainted with the terms and conditions of this trust and the right and title of the answering defendants as cestuis que trust in the land. They request that the court protect and confirm their interests; that Freeman P. Strong be made a party defendant; that plaintiffs be required to make full proof as to the origin and validity of their alleged title and be required to account to the answering defendants for the rentals and income from said property. In a reply, plaintiffs admit the making of the will and its admission to probate, both in Ramsey county, Minnesota, and in Pembina county, North Dakota. Plaintiffs further allege that defendants Robert J. Strong and Maggie Strong, his wife, on February 11th, 1891, made a quitclaim deed of the land to Freeman P. Strong, who later conveyed to plaintiffs. Further, that prior to August 21, 1896, the lands were forfeited to the state for nonpayment of taxes and on that day the state, by two certain tax deeds, conveyed the land to Freeman P. Strong. Further, that in an action in the district court of Ramsey county, Minnesota, in which the St. Paul Trust Company, as trustee, and Robert J. Strong, Maggie Strong, and Freeman P. Strong were named as parties, the same issue involved herein became there directly involved and a final judgment was rendered on May 19th, 1902, whereby Freeman P. Strong was adjudged to be the owner of this land. That Freeman P. Strong, as trustee under the will, did not accept any trusteeship concerning this land; that such Freeman P. Strong made full accounting of his trust and was discharged from all of his duties as trustee with approval by Robert J. Strong and Maggie Strong. That neither of the answering defendants has been seized of the premises within twenty years before the commencement of this action; that plaintiffs have been in the open, adverse, continuous and exclusive possession of the lands through themselves and their immediate grantor ever since January 27th, 1896, and, for a period of more than ten years, have paid all taxes and assessments legally levied thereupon.

On September 23d, 1921, the trial court made findings of fact conforming substantially to the facts alleged in the reply and ordered the

title to be quieted in the plaintiffs free from any right, title, or claim by the defendants.

On March 22nd, 1922, at Washington, District of Columbia, the defendant, Robert J. Strong, died. On April 14th, 1922, the defendant Ella C. Strong appealed from the judgment. She had requested a trial de novo in this court.

The record is voluminous. It is necessary to state the facts somewhat at length. These facts are: The defendants Robert J. Strong and Maggie Strong were married in Philadelphia in October, 1864. Robert secured a divorce from Maggie at St. Louis, Missouri, in January, 1876, but he afterwards lived with her in St. Louis, in Pembina county, North Dakota, and in Washington, District of Columbia. They lived together in North Dakota for some nine years. There Robert homesteaded some land. He acquired the half section of land herein involved. He and Maggie left Pembina county about 1885. Prior to that time he and Maggie deeded this land to Charles D. Strong, a resident of St. Paul and the father of Robert J. Strong.

On August 21st, 1886, Charles D. Strong made the will concerned and on January 5th, 1889, a codicil thereto. On January 7th, 1890, Charles D. Strong died at St. Paul, Minnesota. In December, 1891, Robert secured another divorce from Maggie in the district court of Ramsey county, Minnesota. This was done, pursuant to Robert's testimony, by reason of his father's desire. Later, in Washington, District Columbia, Robert continued to have relations with Maggie until 1902 when they separated. In January, 1903, at Washington, District of Columbia, Robert married the appellant, Ella C. Strong. She was the wife of Robert at the time of his decease. There are no surviving children as the issue of Robert's marriages. Charles D. Strong at the time of his death possessed considerable property. This consisted of notes, stock, real estate in Minnesota, in Pembina county, North Dakota, in Manitoba and in Massachusetts. He left surviving him a widow and several children. Robert was the eldest.

The testator devised to the wife a life estate in his homestead at St. Paul, Minnesota, and certain other property and $5,000. He bequeathed to the St. Paul Trust Company, as trustee, all his stock in the Strong-Hackett Hardware Company, to be held in trust by the trustee for the life of his wife for certain particular uses and trusts. He directed the

trustee to collect dividends on the stock and to pay to his wife $2,500 per year during her life, and, out of the net income from such stock, to otherwise pay a certain income to his children and grandchildren and others, in a certain manner, pursuant to stipulated conditions. He directed his trustee to take an active interest in the affairs of the hardware company. After the death of his wife, he directed the trustee to hold 150 shares of stock, during the lifetime of his sons Robert J., Charles H., and Cyrus D., to collect the income and dividends thereon, and to pay over the net income, in the exercise of its judgment, to them, their wives, or their children as might be most for the benefit of them or their families. This trust continued upon the death of any such son for the benefit of his widow or children. He gave specific directions to the trustee concerning other shares of stock and the disposition of the income thereof. The specific devise of the land involved herein is hereinbefore contained in the 12th subdivision of this will. In the 13th subdivision of the will he devised certain real estate in Pembina city to the St. Paul Trust Company as trustee. During the life of Robert J., Charles H., and Cyrus D., his sons, the trustee was authorized to lease and generally manage the real estate, collect the income and to pay over the net income to such sons during their joint lives, with the provision that if a widow or issue should survive any such son, the trustee should convey to such widow or issue the proper share of the deceased; otherwise, the property should revert to the estate of the deceased. In the 17th subdivision of the will the trustee was directed to pay all taxes, insurance, and necessary expenses for repairs on any and all real estate of which he might be seized at his decease so long as the trust relating to the same continued. Specifically the will gave to the trustee full power and authority to sell any and all property, real and personal; to make, execute, and deliver deeds and writings necessary; and to make new or different investments of the trust property, with the provision that the proceeds of any sales or exchanges made should be held on the same uses and trusts as provided for concerning the original trust property. This was subject to the provision that no sale or exchange of real estate held for his wife or his sons should be made without their written consent or approval. The rest and residue of his estate was devised and bequeathed to his children.

In the codicil it is recited that the testator had disposed of all its

stock in the hardware company, for which he held six promissory notes aggregating $115,000. The testator bequeathed these notes and the title therein to the trust company, subject to the same trusts with reference to the proceeds, investments, and income thereof, as was imposed in the will concerning the shares of stock. The trustee was given full power and authority to collect the principal and interest of such notes and to collect, invest, and reinvest the proceeds thereof for all the purposes of the trusts upon which the stock would have been held by it if the same had not been sold by the testator.

This will was admitted to probate in Ramsey county, Minnesota, on February 10th, 1890. The St. Paul Trust Company, named in the will as executor, was duly appointed by the probate court of Ramsey county as the executor. It accepted the trust and qualified as trustee. On February 28th, 1891, through an interlocutory decree entered in the probate court of Ramsey county, Minnesota, certain trusts designated in the will were vested in the St. Paul Trust Company as trustee. In particular, the land involved herein was assigned and awarded to the trust company, as trustee, upon and for the particular uses, purposes, and trusts which are created and specified in the 12th subdivision of the will; likewise, the Pembina city property, mentioned in the 13th subdivision of the will, was assigned and awarded to the trust company.

On February 27th, 1892, authenticated copies of this last will and codicil were proved, allowed, and admitted to probate in the county court of Pembina county, North Dakota. In this county court, W. J. Kneeshaw was appointed administrator of the estate of Charles D. Strong with the will annexed.

On February 13th, 1893, a final decree was entered in this county court of Pembina county. It recited payment of all expenses of the estate and of administration; the payment of all debts existing against the deceased; that the estate had been fully administered. It recited the residue of the estate existing, namely, the Pembina city property and the lands involved herein. It vested title thereto in the St. Paul Trust Company, as trustee and in trust, according to the terms, conditions, and trust named in the last will of Charles D. Strong, deceased, concerning which the St. Paul Trust Company had qualified as foreign executor and trustee in the administration and probate of such will in the probate court of Ramsey county.

From the record, it appears that the taxes upon this land levied for 1891, viz.: Upon one quarter, $28.05, upon another, $33.55, were not paid. Accordingly, on December 6th, 1892, the county sold such land for taxes to one C. W. Moore. Freeman P. Strong, son of the deceased and the brother of Robert, purchased these certificates. Thereafter, pursuant to proceedings had, on January 27th, 1896, a county treasurer's tax deed, upon each of the quarter-sections, was made to Freeman P. Strong. He testified that after he received these deeds he took possession of the property and has had possession of it ever since until he deeded it to his children, the plaintiffs. The deed to his children was made in February, 1919. Ever since the time of these tax deeds the taxes on this land have been paid by him or the plaintiffs. They have received the rentals during all such years. He employed an agent to look after the land. He considered it his property. He signed leases for this land. He never exercised any control over it or right of possession in the character of a trustee. The defendant, Robert J. Strong, never took possession of the land at any time after the death of his father.

From the record it appears that the St. Paul Trust Company, as trustee, did collect some rentals or income from the Pembina city property and these lands involved herein. In May, 1896, it collected $27 from its agent Kneeshaw for a grass privilege upon these lands.

From the four corners of the record it does appear that the St. Paul Trust Company, as trustee, proceeded to collect the assets of the estate and thereafter, to invest the same in St. Paul real estate. Apparently these investments were made at a time when real estate in St. Paul was buoyant, for tremendous losses afterwards occurred when deflation in the realty values there came. The record is not complete concerning all of these transactions but it appears that, in April, 1900, the St. Paul Trust Company instituted an action in equity against the beneficiaries of the trusts named in the will of Charles D. Strong. The complaint therein alleges that the trustee accepted several trusts named in the interlocutory decree of February, 1891; entered upon the discharge thereof and ever since has been acting as such trustee; that in the execution of the trust it has collected moneys, made divers expenditures, and invested and reinvested trust funds; that an accounting is rendered, but the same does not cover nor include receipts or account of the trusts

named in the 12th and 13th subdivisions of the will. It requests that a court adjudicate and determine its account and the balance of money in its hands pertaining to the trusts, and that the defendants be required to establish their interests and estates to the money and to the realty and other property subject to the trusts. Thereupon, as the record discloses, a concert of action was attempted by the beneficiaries to contest the trustee's account, to charge it with mismanagement of the estate, and to cause its removal as trustee. Freeman wrote to Robert about this mismanagement. An attorney likewise wrote to him. By reason of authority that Robert gave to Freeman, and otherwise, attorneys were secured who appeared for Robert Freeman and other beneficiaries. The account and administration of the trustee was accordingly contested. Trial was had in the district court of Ramsey county, Minnesota; findings were made that the trustee's account should be surcharged with the amount of certain investments aggregating $78,200 and with profits accruing therefrom amounting to $27,745; that the title to the real estate and securities representing such investments was in the trust company individually. The trustee appealed from the decision. Thereafter, in December, 1901, the supreme court of Minnesota affirmed, with certain modifications, the decision of the trial court. See St. Paul Trust Co. v. Strong, 85 Minn. 1, 88 N. W. 256. The St. Paul Trust Company resigned as trustee. In this same action thus appealed to the supreme court, the district court, on January 7th, 1902, made an order which recited that Freeman P. Strong had been appointed by the court trustee of all the trusts created under the will of Charles D. Strong, deceased, and, having qualified as such trustee by the execution of a bond in conformity with the order of the court and the same having been duly approved by the court, he was duly authorized to act as such trustee in the place and stead of the St. Paul Trust Company. As a result of this decision the St. Paul Trust Company became in an insolvent condition. Meetings of creditors were had and a committee appointed to take charge of its affairs through voluntary agreement. Freeman P. Strong was a member of this committee. He took and established his offices in connection with this committee work in the offices of the St. Paul Trust Company. The old officers resigned and new ones took their place. On March 3d, 1902, in a letter Freeman wrote Robert at Washington, District of Columbia, he stated that the

trust company had resigned as trustee and that the court had appointed him trustee in its place; that the creditors had insisted that the officers of the trust company should resign and that the committee of creditors should manage its affairs; that it should go into voluntary liquidation; that this was done; that the committee was composed of himself and three other parties, naming them; that he, Freeman, had a desk at the trust company's offices and went there daily; that the assets of the company were all in real estate in St. Paul and were the worst possible lot of assets imaginable, the debts amounting to about $320,000; that the course they were pursuing was quicker than to throw the trust company into the hands of a receiver; that, while it was a fact that he was now the trustee of the general fund, it was necessary for the trust company, before they could turn over the special trusts, to do it through the court for his protection in the future; that it must show what came into its possession in the special trusts as well as the general fund and what they have done with the same.

Prior to this time, in February, 1901, Robert J. and Maggie executed a transfer of all of their interests in the estate of Charles D. Strong to Freeman P. Strong for a recited consideration of $1,000 and other valuable considerations; also, they made a quitclaim deed to Freeman P. Strong of the land involved herein. Freeman P. Strong testified that he paid $100 in cash and gave a note for $900 which afterwards matured and was paid by him; that he took up and paid a note for Robert amounting to $224; that he advised his brother when he was in Washington, at the time he got these deeds or transfers, about his tax title. Robert J. testified, on the contrary, that he did not receive any consideration for this deed; that he represented to him when he visited him in February, 1901, that he had a tax title on these two farms; that he was the absolute owner of the property and had been recognized in court as such; that in order to handle this property as a separate matter from the St. Paul Trust Company, as trustee, he wanted from Robert a quitclaim deed; that he signed a deed, absolutely in blank excepting that the names were signed and the jurat added; that Freeman agreed to send him a written agreement to show that he would hold this property and protect his interests during his lifetime. He further testified that in June, 1900, Freeman P. Strong told him in Washington that he expected to be trustee; that he, Robert, acquiesced in his being trus-

tee; that he had full confidence in his brother; that he wrote to other heirs recommending it; that he assigned this residuary interest in the estate upon suggestion of his brother who offered him $1,000. He subsequently learned that it brought $6,000; that he signed these papers under protest, calling attention of the attorney to the fact that he never agreed to sell Freeman other than the residuary interest in the estate and that he expected him to send him other papers showing the true transaction. That he did these things having absolute confidence in his brother, but Freeman never sent the promised papers. The witness Robert further testified that he was a drinking man and that seems to have been the trouble with him for many years; for at one time he was confined in a hospital and treated for alcoholism.

In January, 1902, the St. Paul Trust Company instituted an action against Robert J., Maggie, and Freeman P. Strong. The complaint concerns the 12th subdivision of the will. It alleges the trusts created thereunder, the acceptance thereof by the trustee and its entering upon the discharge of its duties as trustee. It further alleges that title vested in such trustee concerning the land involved herein, pursuant to an interlocutory decree in the probate court of Ramsey county made in February, 1891, and pursuant to a decree in the county court of Pembina county in February, 1893. That in May, 1896, the trustee through one Kneeshaw, its agent, collected grass privilege rentals for the use of the real estate in the sum of $27; that the trustee by reason of want of funds had no money to pay the taxes levied and assessed upon such real estate for the years 1891, 1892, 1893, and 1894; that Freeman P. Strong claims to have become an owner of such real estate by virtue of tax sales and has ever since been in possession thereof; that when the trust became vested in the trustee under the interlocutory decree, the trustee requested Robert J. to take possession and occupy the land as he was authorized to do under the will, but he has always refused so to do; that it advised Robert of the unpaid taxes upon the land and of the sales thereof and of the time within which the same could be redeemed and demanded that he should pay and redeem the same or furnish the trustee with money necessary so to do; that Robert neglected so to do. The complaint demanded that Freeman be required to disclose his right, title, and interest in the property and that such title be adjudged and determined by the court; that the plaintiff be

allowed a reasonable allowance for its services and that it be permitted to resign its trust after adjustment of its account for services and the appointment and qualification of its successor. The summons in this action was served by publication against the defendants Robert J. and Maggie in the month of February, 1902.

The record discloses correspondence between Robert and Freeman and between Robert and an attorney concerning this action and concerning the estate. In March, 1902, this attorney wrote Robert that there were two suits by the trust company brought concerning the North Dakota property; that he was acting as Freeman's attorney and that Freeman had become the owner of the farms; that it would not be possible for him to represent Robert in such action but as to the other action, concerning the city property, he did not see any antagonism between Freeman's interest and Robert's interest and he could appear for him. This attorney also wrote Robert that Freeman had called, had seen this letter and approved of it. Then Freeman, a few days later, (March 4th, 1902) wrote Robert to the effect that, as to the farm lands, he did not see that Robert could do anything because it would cost him more than he would get out of it; that the title to the land was in him through his tax deed and the deed from Robert and Maggie, but that if he wanted to spend any money on an attorney he would get an attorney for him. In this action Freeman interposed an answer. It alleged that the trust company accepted the trust mentioned in the complaint and entered upon its duties as trustee; that it continued to so act until January 4th, 1902, when, in an action pending between plaintiff and the devisees, plaintiff tendered its resignation as trustee which included the trust relative to the subject-matter of this suit, and that on January 6th, 1902, the district court accepted such resignation and appointed defendant trustee of such trusts; that on January 7th, 1902, this defendant qualified and became and has ever since been the trustee of all existing trusts created under and by virtue of the last will of Charles D. Strong. He admits that the taxes became delinquent upon the property for the years 1891, 1892, 1893, and 1894, and he alleges that he personally became the owner of the property by virtue of tax sales and ever since has been and is now the owner, personally; that he became such owner prior to January 1st, 1900. He further alleges that under date of February 11th, 1901, Robert J. and Maggie executed

to him a conveyance of the property. He demanded judgment that he be decreed the owner, personally, of the property.

After hearing in April, 1902, the district court of Ramsey county, Minnesota, found that the trust company accepted the trust concerning the land involved in 1891 and entered upon the discharge of its duties; that by final decree in the county court of Pembina county, North Dakota, the real estate was awarded to the trust company as trustee; that the trustee received no income from this property excepting $27 collected for grass rentals through its agent, on May 19th, 1896; that Freeman P. Strong became owner by virtue of taxes paid and has since been in possession; that the trustee requested Robert to take possession of the land but he refused so to do; that also the trustee advised Robert during the years 1891 to 1895 to pay the taxes but he refused to pay such taxes or to advance any moneys that, in the action of the plaintiff against Abigail Spur and other devisees, the plaintiff trust company tendered its resignation as trustee including the trust relative to the subject-matter of this suit under the 12th subdivision of the will; that on January 6th, 1902, the court accepted the resignation and appointed Freeman P. Strong as trustee in place of the trust company; that on January 7th, 1902, Freeman P. Strong qualified, and since such time has become and now is trustee of all the existing trusts including the trust involved in such action. The court ordered that the plaintiff was entitled to judgment, releasing it, as trustee, from further liability and as trustee under the 12th subdivision of the will, and that Freeman P. Strong was the owner of the land described in the complaint. Pursuant thereto judgment was entered on May 29th, 1902. In such action Robert and Maggie did not appear.

From the record it also appears that another action was brought by Ellen A. Strong as administratrix of the estate of Charles H. Strong and personally, against Freeman P. Strong individually and as trustee, against Robert J. and Maggie, and others, all in the district court of Ramsey county, Minnesota, in the year 1905. In that action the resignation of the St. Paul Trust Company as trustee and the appointment of Freeman P. Strong as trustee in its place on January 7th, 1902, is alleged. It alleges that Freeman has administered various trusts. These certain trusts concern the devise of shares of stock, afterwards converted into cash, aggregating about $17,500. It alleges that Freeman, as

trustee, is ready to submit a report. That he is desirous of resigning as trustee and that it is desirable that his resignation be accepted and that the court appoint the Northwestern Trust Company as trustee to succeed him. It further alleges that Freeman is the trustee of property in Pembina county, North Dakota, under the 13th subdivision of the will (the city property); that the plaintiff, as widow of Charles H. Strong, and the son Charles S. are entitled to a conveyance of one third of such property; that Freeman is ready to file his report as trustee thereof. The complaint requests that the account of Freeman as trustee of such Pembina property be examined by the court and allowed and that the trustee convey to plaintiff and Charles S. Strong a one-third interest in the Pembina property and that the Northwestern Trust Company be appointed trustee of the remaining two-thirds interest therein. To this complaint Freeman answered individually and as trustee. He admitted that he was the duly appointed and qualified trustee under the will of Charles D. Strong, as successor to the St. Paul Trust Company as trustee. He alleges that prior to the time he became trustee he purchased from Robert J. and Cyrus the interest and income due them from certain funds. He submitted in his report an account as trustee and requested that the same be allowed and approved. He resigned his trust covering the Pembina property under the 13th subdivision of the will and requested an order of the court directing conveyance to the plaintiff and Charles S. for one third and that the Northwestern Trust Company be appointed as trustee for the property described in the 13th subdivision of the will. He requested that he be continued as trustee of the Robert J. and Cyrus D. trusts aforesaid. In the account attached to his answer it appears that, concerning the Pembina trust, Freeman, as trustee for Charles H., Robert J., and Cyrus D. Strong, received from the trust company, on August 1st, 1902 $176.19 and in 1902, 1903, and 1904, certain rent for the Pembina city property.

The record does not disclose what action was taken by the court in this case.

The record further discloses still another action pending in the district court of Ramsey county, Minnesota, wherein Charles S., Ellen A., and Freeman P. Strong are plaintiffs and Robert J., Maggie, Cyrus D., and Mary J. Strong are defendants. The record shows only an order

made by the district judge, on February 23d, 1910. This order shows an appearance for the plaintiffs and an appearance by an attorney for the defendants and a stipulation made by the parties. The court determined that under the 13th subdivision of the will Freeman, as trustee, was chargeable with $341, moneys derived from the Pembina trust, and recites items of its account; that Charles H. died in 1899; that the trust, under the 13th subdivision of the will, thereupon lapsed; that Robert J. and Cyrus D. and the widow and issue of Charles H. Strong became entitled to a division of the property then remaining in said trust under subdivision 13; that some of such property remains undisposed, vacant, unoccupied, and encumbered with tax liens and is practically of no value; that it would be a waste of trust funds to further pay taxes thereon; that it is to the interest of the beneficiaries that the remaining real property be abandoned and the trust closed; that no other matters alleged in the complaint are admitted or at issue in the proceeding and as such the proceeding is dismissed. It was further ordered that the account of Freeman as trustee be allowed; that one third of the balance be paid to Robert J., amounting to $113.67, or to his attorney, and a like sum to Cyrus D. and to Ellen A. and Charles S.; that on filing receipts for such sums, Freeman should be discharged from the trust under subdivision 13 of the will.

Decision.

The Title under the Trust. Concerning the farm lands involved, the will of Charles D. Strong, in the 12th subdivision, created an express trust. Comp. Laws, 1913, §§ 5364, 5367. It did not create a use which the statute of uses, as codified, would execute. Comp. Laws, 1913, §§ 5360, 5363; 26 R. C. L. 1176; 3 Pom. Eq. Jur. 3d ed. § 984; Smith v. Security Loan & T. Co. 8 N. D. 451, 454, 79 N. W. 981; Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 315, 83 N. W. 245. It devised the title in fee to the St. Paul Trust Company, to hold and administer as an active trustee. As such, the duty was imposed to collect the rentals and income, to pay the taxes and other necessary expenses, and to pay over the net rentals and income to one or more persons in its judgment and discretion. It possessed the power of sale after the death of Robert and the duty thereupon to pay over the net

proceeds of such sales to one or more persons as shall seem for the best interests of the widow or children of the son Robert. Otherwise, this trust was subject only to a right of occupancy by the son without rental, conditional upon his choice so to do and the payment of taxes and assessments by him. Expressly, the son was denied any right of control over the income or rentals of such real estate.

Thus, it may be seen that no estate was devised to Robert, to his prospective widow or children, either in præsenti or in futuro. The cestui que trusts, the beneficiaries, were ascertainable pursuant to and subject to the exercise of a power and a duty imposed upon the trustee, akin to a power of appointment coupled with the trust imposed. Perry, Trusts, 6th ed. § 251. The object of the trust, the benefits to be derived by a class of proposed beneficiaries, did not create any equitable estate in the land for any person or class of the proposed beneficiaries but simply the right, subject to the discretion of the trustee, to receive out of the corpus of moneys received from income, rentals, or sale, an allotment thereof. This was a mere right, not an estate for the class of beneficiaries. Comp. Laws, 1913, § 5373; 39 Cyc. 43, 76; Pom. Eq. Jur. 3d ed. § 991; 26 R. C. L. 1176, 1258, 1262; De Haven v. Sherman, 131 Ill. 115, 6 L.R.A. 745, 22 N. E. 711; note in 37 L.R.A.(N.S.) 400; Perry, Trusts 6th ed. § 307.

This devise of title to such lands, was confirmed in the probate court of Ramsey county, Minnesota, by the probate and allowance of the will and by the interlocutory decree of such court in February, 1892, appointing the St. Paul Trust Company as trustee, and vesting the title of the lands in such trustee, subject to and upon the trusts imposed. Such probate court had jurisdiction so to do concerning the trust involved by reason of its jurisdiction over the will and the parties. Perry, Trust, 6th ed. § 71; 26 R. C. L. 1359. It was further confirmed by the final decree rendered in the county court of Pembina county, North Dakota, specifically vesting title in the St. Paul Trust Company, as trustee, subject to the trust imposed under the conditions of the will. See Penfield v. Tower, 1 N. D. 216, 46 N. W. 413. The St. Paul Trust Company accepted and qualified for the trust imposed. It entered upon the performance of its duties as trustee. It became vested with the title to the lands as an active trustee for the purposes of that trust.

The Tax Deeds. Each of the tax deeds were issued to Freeman P. Strong on January 27th, 1896. Each conformed to the statutory form, then prescribed by law, § 1268, Rev. Codes, 1895; each contained a recital of the amount for which the tract of land delinquent was sold and the recital—*"and which was the least quantity of the tract above described that would sell for the amount due thereon for taxes, costs, and charges as above specified."*

But the tax sale occurred on December 6th, 1892. At that time, the then existing law (Laws 1890, § 70, chap. 132) provided:

"The auditor shall sell by public vendue each piece or parcel of land separately in the order in which they are described in the delinquent list returned and by the description therein; but if the sum bid for any piece or parcel shall not be paid before the sale closes, he shall again offer such piece or parcel for sale; he shall state the amount for which each piece or parcel is to be sold, and shall then offer the same in fee to the highest bidder, who shall bid not less than the amount for which the same is to be sold. If no bidder shall bid an amount equal to that for which the piece or parcel is to be sold, then he shall bid in the same for the state at such an amount."

At this tax sale, one C. W. Moore was the purchaser of the lands. In 1891 this law of 1890 was supplemented by providing for a statutory form of tax deed in conformity therewith. Laws 1891, § 7, chap. 100. This law of 1890 repealed the prior existing law which provided for a method of sale conforming to the recitals in the tax deeds involved. Terr. Code 1887, § 1622. The Code of 1895 restored the law of 1887 and repealed this law of 1890. Rev. Codes, 1895, § 1257.

Accordingly, it is apparent from the recitals in the tax deeds that the auditor did not follow the method of sale required by the then existing law. Hence, the tax deeds show on their face that they are void. Youker v. Hobart, 17 N. D. 296, 115 N. W. 839; Murphy v. Wilson, 37 N. D. 300, 163 N. W. 820, Ann. Cas. 1918E, 1101. These recitals in the tax deeds, though following the statutory form prescribed at the time of their issuance, show an illegal tax sale and, hence, the tax deeds, issued thereupon, to be void. Reckett v. Knight, 16 S. D. 395, 92 N. W. 1077; King v. Lane, 21 S. D. 101, 110 N. W. 37. Such tax deeds, void on their face, did not operate to set in motion the statute of limitations: Rev. Codes, 1895, § 1269. Hegar v. De Groat, 3 N. D.

354, 364, 56 N. W. 150; Eaton v. Bennett, 10 N. D. 346, 350, 87 N. W. 188. See Groesbeck v. Seeley, 13 Mich. 343; note in 8 L.R.A. (N.S.) 356.

The Deed and the Transfer from Robert to Freeman. The quitclaim deed and the transfer made by Robert and Maggie to Freeman on February 11th, 1901, conveyed, if anything, only such rights, interests, title, or estate as Robert possessed. Certainly, so far as these lands are concerned, they did not convey nor transfer the title and estate of the trust company, nor any inchoate rights of Robert's prospective widow or children, pursuant to the will and trust.

Concerning these lands, the only surviving beneficiary of the trust imposed thereon is the appellant, the widow of Robert. Her rights are measured by the terms of the trust pursuant to the will, not by her rights in the estate of her deceased husband.

It is wholly unnecessary to determine the validity of this deed and transfer as affecting these lands. See § 5377, Comp. Laws 1913. It is evident that whatever rights Robert possessed, whether termed a right, a title, or an estate, in any event, expired with his death. Such rights, whatever they were or are, could not and did not affect the title of the trustee or the rights of the appellant, the widow of Robert.

The Minnesota Cases and Decisions. The probate court of Ramsey county, Minnesota, had jurisdiction to allow and probate the will of Charles D. Strong, a resident of St. Paul at the time of his decease. 40 Cyc. 1245. Most of the property of the deceased was situated in Minnesota. Some property was situated in other states and some in a foreign country.

This probate court, pursuant to the probate of the will and the interlocutory decree made in 1891, had jurisdiction to appoint the St. Paul Trust Company, as executor, and to designate it as trustee pursuant to the terms of the will. At least its jurisdiction comprehended the right to appoint the executor, to supervise such executor during the course of administration, and to ascertain the devisees. Farnham v. Thompson, 34 Minn. 330, 336, 57 Am. Rep. 59, 26 N. W. 9; State ex rel. Martin v. Ueland, 30 Minn. 277, 282, 15 N. W. 245; Bengtsson v. Johnson, 75 Minn. 321, 324, 326, 78 N. W. 3. See 23 C. J. 1010; Pom. Eq. Jur. 4th ed. §§ 156, 348, p. 2147. The county court of Pembina county likewise had jurisdiction to allow and probate the will and

determine the devisee of the lands. Terr. Code 1887, §§ 5677, 5678, 5679. Such was in the nature of an ancillary administration. 24 C. J. 1111. The St. Paul Trust Company accepted the trust and entered upon the discharge of its duties as trustee for all of the trusts involved in the will. The administrator, with the will annexed, for a time in North Dakota, exercised his duties for purposes of administration. It is sufficient to state, that, pursuant to these probate proceedings, a title in these lands involved was vested in the trust company, as an active trustee upon an express trust. As trustee this trust company did exercise some of its duties concerning these lands. It collected from its agent, Kneeshaw, rentals therefrom in 1896. In 1900 the St. Paul Trust Company, as trustee, instituted its action in equity in the district court of Minnesota for a determination concerning its trusteeship, an accounting thereof, and the rights and interests of the defendants. The devisees in the will were made parties. So far as this record discloses the district court of Minnesota secured and had jurisdiction over the trustee Freeman P. Strong, Robert Strong, and the other devisees. It may be noted that although the complaint by the trust company alleges that the accounting rendered does not cover or include receipts or disbursements covering the specific trusts created by the 12th and 13th sections of the will relating to real estate in Pembina county, North Dakota, nevertheless, the will and codicil are made a part of the complaint as well as the interlocutory decree made by the probate court of Ramsey county; likewise, there is attached to the complaint a statement of all real estate and personal property belonging to the trust estate which includes the land involved herein. Also, the complaint demands that the defendants be required to establish and prove their interests and estates in the real estate and other property remaining subject to the trust. The record does not disclose what answer was interposed by the devisees. It does appear, however, that the district court and the supreme court, pursuant to the issues presented and considered, made a determination concerning the trusteeship of the trust company; that, pursuant to this determination the trust company resigned as trustee of all the trusts and that the court, in January, 1902, appointed in its place Freeman P. Strong as trustee thereof.

Accordingly, it sufficiently appears, from the record, that the courts of Minnesota had jurisdiction over the parties, including the trustee,

Freeman P. Strong, and the devisees. The Minnesota courts had authority so to do even though the trusteeship concerned lands situated in another state. See Perry, Trusts, 6th ed. §§ 71, 72; notes in 69 L.R.A. 673, and in 23 L.R.A. (N.S.) 924. In 1902, after the resignation of the trust company as trustee, and after the appointment of Freeman P. Strong as trustee, the action, hereinbefore mentioned, was instituted by the trust company against Robert and Maggie and Freeman P. Strong. This action was brought to secure a determination involving the trusteeship of the trust company concerning these lands. Neither Robert nor Maggie appeared in the action and no jurisdiction was secured over them through the publication of the summons. Freeman P. Strong appeared, asserted title in himself, individually, and demanded a confirmation of that title. In his answer Freeman alleged that the trust company accepted the trust mentioned in the complaint and continued to act as trustee until January 4th, 1902, when plaintiff tendered its resignation as trustee concerning the trusts that included the subject-matter of the suit and that on January 6th, 1902, the district court accepted such resignation and appointed Freeman as trustee of such trusts. In this action the court found that the trust company was not a trustee and had resigned as trustee; nevertheless, it proceeded to adjudicate and determine that the title to this land in North Dakota was in Freeman P. Strong. The respondents admit that the only effect of the decision of the Minnesota court would be to settle some question possibly an issue between persons and upon property within its jurisdiction. It is apparent that at the time this action was instituted, heard, and determined Freeman P. Strong was a trustee possessing the title as such to these lands in North Dakota. It is admitted by the court proceedings in that regard in Minnesota. It is admitted by the answer of Freeman P. Strong himself. The trust company then had no active duties as trustee and could secure no other determination by the court than a discharge of its obligations and duties as a trustee. It is further evident that the judgment in that action did not create a title in Freeman P. Strong, personally, that he did not then possess and, further, that under plain principles of estoppel he could not receive and accept a title personally which he then had and possessed as trustee. See Pom. Eq. Jur. 4th ed. §§ 1062, 1067, 1075; Turner v. Fryberger, 94 Minn.

433, 110 Am. St. Rep. 375, 103 N. W. 217; King v. Remington, 36 Minn. 15, 29 N. W. 352.

It also appears that about the same time another action was instituted or contemplated in the district court of Minnesota concerning the administration of the trust as it affected the Pembina city property. What happened with reference to this contemplated action, the record does not disclose; but it further appears that in 1905 another action was instituted in the district court of Minnesota that concerned the trusteeship of Freeman P. Strong and his administration thereof. Under the specific allegations made in that action it concerned administration of the trust involving the real estate in Pembina city, North Dakota. In that action Freeman P. Strong, as trustee and individually, admitted that he was the duly appointed and qualified trustee of his father's estate, so appointed by the court. He submitted a report as trustee, requested its allowance and the acceptance of his resignation as trustee of the Pembina city property. In his account attached, it appears that he collected moneys as trustee concerning this Pembina city property, from 1902 to 1904. What finally happened in this action, the record does not disclose; otherwise, the record does disclose, however, an order made in an action wherein Charles S., Ellen A., and Freeman P. Strong were plaintiffs and Robert, Maggie, Cyrus D., and Mary J. Strong were defendants, which allows the account of Freeman as trustee and directs that, upon the payment of certain amounts pursuant to the trust, Freeman be discharged from the trust under the 13th subdivision of the will which affects the Pembina city property.

From all of these considerations, it follows that Freeman P. Strong, in January, 1902, became a trustee for the trusts created in the will; that he qualified for, and assumed the duties of, such trustee; that at that time he did not have any title to the Pembina county lands; that the judgment of the district court of Minnesota, rendered in 1902, did not create any title in him concerning such Pembina county land; that as such trustee it was his duty to continue the trust and carry it into force and effect pursuant to the terms of the will.

The Statutes of Limitations concerning Adverse Possession. Pursuant to the considerations hereinbefore applied the statutory periods concerning adverse possession have never operated so as to devest the trustee of the title possessed in these lands pursuant to the terms of the

will. Between 1896 and 1902 the time was insufficient. Since 1902 Freeman P. Strong has been the trustee of these lands. While trustee, pursuant to his duties and obligations as such, he could not secure a title by adverse possession, in himself, individually, as against himself as trustee. Nowhere in the record does it appear that Freeman P. Strong was ever released from his obligations and duties as trustee concerning these lands herein involved. Freeman P. Strong, it is true, did testify that he never exercised any duties as trustee but this testimony cannot negative nor override his specific obligations and duties, imposed upon him by acceptance of the duties of a trustee pursuant to an appointment for all of the trusts concerned under this will and his admissions made in this record in that regard.

Conclusion.

Accordingly, it follows that an active express trust was created concerning these lands; that the title pursuant thereto was vested in the trustee; first, in the St. Paul Trust Company and, then later, in Freeman P. Strong as trustee; that Freeman P. Strong never acquired any title individually through the tax deeds or the deed from his brother Robert; that, otherwise, he has not acquired title through statutes of limitations; that his children, through the deed of Freeman to them, stand in the same position concerning this title as their father. It further follows that the estate of Robert J. has no title in these lands; that the right and interest of the appellant exists, not by virtue of her rights to the estate of Robert J., her husband, but by virtue of the express trust created in the will of Charles D. Strong and the action that may be taken by the trustee thereof. Accordingly, the title to the Pembina county lands is still vested in the trustee; in Freeman P. Strong as trustee, the successor of the St. Paul Trust Company, and in the plaintiffs as equitable trustees subject to the jurisdiction of a competent court, all for the purposes of the trust as created in the will. 39 Cyc. 373.

The trial court erred in determining the plaintiffs to be the owner of these lands. The judgment must be reversed and the cause remanded for the purpose of further proceedings, to the end that the court may enforce this express trust pursuant to the terms of the will and may

appoint and designate a trustee, enforce an accounting, or otherwise compel the present trustees to act consonant with the terms of the trust. The judgment is accordingly reversed and remanded for further proceedings consonant with this opinion. The appellant will recover costs.

JOHNSON, CHRISTIANSON, BIRDZELL, and NUESSLE, JJ., concur.

STATE OF NORTH DAKOTA, Respondent, v. ROY D. HAND and Clarence Maynard, Appellants.

(193 N. W. 148.)

Intoxicating liquors — evidence held to sustain conviction for violation of prohibitory law.

1. In a criminal action for a violation of the State Prohibitory Law (Laws 1921, chap. 97), the evidence is examined and *held* to sustain the verdict of guilty.

Indictment and information — unnecessary to negative exception in statute unless essential to definition of offense.

2. Following State v. McDaniels, ante, 648, just decided, held that in an information for a statutory offense, it is not necessary to negative an exception in the statute unless the negative of the exception is an essential part of the definition of the offense.

Criminal law — error cannot be predicated on admission of evidence in joint trial inadmissible as to one defendant unless objected to.

3. Where on a joint trial evidence inadmissible as to one of the defendants is received without objection and submitted to the jury without instruction as to its consideration, the matter not having been called to the attention of the trial court by a request for an appropriate instruction or otherwise, error cannot be predicated thereon.

Opinion filed April 3, 1923.

Criminal Law, 16 C. J. § 2500 p. 1059 n. 38; 17 C. J. § 3333 p. 66 n. 15; Indictments and Informations, 31 C. J. § 269 p. 720 n. 58; Intoxicating Liquors, 33 C. J. § 502 p. 758 n. 80.

Appeal from the District Court of Mountrail County, *Moellring*, J. Defendants were convicted of violating the State Prohibition Law,

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Note.—On necessity of negation of exceptions in statute defining offense, see 14 R. C. L. 188; 3 R. C. L. Supp. 192; 4 R. C. L. Supp. 886; 5 R. C. L. Supp. 752; 15 R. C. L. 389; 3 R. C. L. Supp. 453.

and appeal from the judgment of conviction and from an order denying a new trial.

Affirmed.

Funke, Campbell & Eide, for appellants.

R. E. Swendseid, State's Attorney, and *George F. Schafer,* Attorney General, for respondent.

NUESSLE, J. The defendants were convicted of violating the laws of this state prohibiting the manufacture or possession of utensils designed or intended for use in the unlawful manufacture of intoxicating liquor (Laws 1921, chap. 97), and the appeal is from the judgment of conviction and from the order denying their motions for a new trial.

It appears from the record that the state's attorney of Mountrail county obtained a search warrant directed to an unoccupied building some 3 miles from the village of Sanish. This warrant was put into the hands of the sheriff. On Monday, the 15th of August, he and his deputies searched the premises under the warrant. They found no one in possession, but they did find in the unoccupied house 3 barrels of "mash" and 10 gallons of syrup. This building was situated in a coulee more or less surrounded by brush and trees, and remote from and out of sight of the highway. The officers did not disturb the premises or any of the property therein. The sheriff left, but the deputies concealed themselves about the place awaiting tthe return of anyone who might be interested in the mash. About midnight Monday night the defendants, Hand and Maynard, appeared on the scene with a team and several barrels of water. This they emptied into a dry well located near one corner of the building, and Maynard said to Hand, "This is the first time I have ever hauled water to put into a well." The officers, without making their presence known, permitted Hand and Maynard to depart. On Wednesday night between 1 and 2 o'clock, a team and wagon was again driven to the premises and three men carried various articles from the wagon into the building where the mash was. Owing to the darkness it was impossible to see who the men were or what any of them carried. In a few minutes the officers also went into the building. There they found the defendants, Hand and Maynard, and one Mummert, all of whom they arrested. Hand and Mummert were engaged in setting up some of the apparatus which had been brought there.

When arrested some one of the three, in the presence and hearing of the others, said, "They had found this mash here and didn't know to whom it belonged so they thought they would come out and boil it up." The others said nothing. After the arrest the party went to Sanish, first loading up the apparatus which had been found and seized, and which consisted of a coil, a boiler, parts of a compresser tank, a gas stove and various other articles. The officers destroyed the mash in the barrels excepting only a portion of it which they put in a jug and loaded into the wagon. In going to Sanish, Maynard drove the team. On the way Hand took the jug containing the sample of mash and tried to destroy it, but was prevented from doing so. When they arrived at Sanish, Hand said to his wife, "I was out starting to boil out a little brew, and got picked up, and I will have to go to Stanley (the county seat)."

All three of the men were taken before a justice of the peace. They waived examination and were held for trial at the next term of the district court, but gave bail and were released. At that term the state's attorney filed his information charging them jointly with the commission of "the crime of manufacturing and possessing utensils and substances designed and intended for use in the unlawful manufacturing of intoxicating liquors committed as follows, to wit:

"That at said time and place the said Roy D. Hand, Otis Mummert and Clarence Maynard and each of them did wilfully and unlawfully manufacture and have in their possession a large iron boiler, copper coil, gas burner, pressure tank, condenser and mash then and there designed and intended for use in the unlawful manufacture of intoxicating liquors for beverage purposes."

When the state's attorney moved the arraignment of the defendants, Mummert failed to appear and his bond was ordered forfeited. The defendants, Hand and Maynard, appeared and entered their pleas of not guilty. No objection was urged as against the information, either by demurrer or motion to set aside; nor was there any objection to the admission of any testimony on the ground that the information was defective. The case was moved for trial, and they were tried jointly. No request was made by either for separate trials. The jury found them guilty, and sentence was imposed. The trial court denied their motion for a new trial.

The defendants urge that the verdict is against the evidence; that the information is bad because not negativing the exceptions in the statute; that the statute under which the search warrant was issued is unconstitutional; that the court erred in ruling upon the objections to the admission of evidence; that there was error by reason of the court's refusal to give certain requested instructions, and that the instructions as given were erroneous.

Considering first the question of the sufficiency of the evidence, it appears to us that on the record as made the jury were clearly warranted in returning their verdict of guilty. No evidence was offered on behalf of the defendants. No explanation of the peculiar circumstances was attempted. The evidence of the state's witnesses stood wholly uncontradicted. The sheriff testified that he had seen stills used in the manufacture of intoxicating liquors in operation, and that the appliances which were seized at the time the arrests were made were parts of a still or might be used in connection with the operation of a still. From the whole record under all the circumstances as shown there is no question but that the evidence is sufficient to warrant the jury in returning their verdict.

It is contended by the defendants that the court erred in admitting the search warrant in evidence. No objection was raised to the warrant or to its admission in evidence, therefore, no error can be predicated upon the court's action in this respect. The other objections raised on account of the admission of evidence are without merit and need not be further considered.

It is further contended that the statute under which the search warrant was issued is unconstitutional. This objection was not raised at the time of trial. No objection on this ground was made either to the warrant or to the offer in evidence of any article seized under it. That being so, the attack on that ground is in any event too late and cannot avail the defendants.

The charge as given by the court was a written charge. Three requests for instructions were submitted. One, as to the fact that the defendants had not seen fit to take the witness stand, was given by the court. A second, with reference to what must be found in order to enable the jury to return a verdict of guilty was refused in the form as requested but given in substance, as follows: "If, therefore, you find

from all the evidence in this case and beyond a reasonable doubt that either of said defendants did . . . wilfully manufacture and have in their possession any or all of the utensils and things described in the information and then and there designed and intended by him for use in the manufacture of intoxicating liquor or intoxicating liquors, then I charge you such defendant has committed an unlawful act and you should find him guilty, otherwise you should find him not guilty." There was no error in refusing to give the instruction as requested in view of the fact that the above instruction, substantially incorporating all the matters included in the requested instruction, was given. The third instruction requested and which was refused by the court was manifestly improper under the evidence in the case, and there was no error in the court's refusal to give the same.

The information in this case and the instructions of the court to the jury were in all substantial respects identical with the information and the instructions in the case of State v. McDaniels, just decided, ante, 648, 192 N. W. 974. The same objections there raised are advanced here. What is said by the court there with reference to the information as to the negativing of an exception in a statute defining an offense, is exactly applicable in this case. We approve and affirm the rule therein laid down.

There needs to be considered only one other matter. On the trial, Alger, the deputy sheriff, testified that after the defendants were arrested the defendant, Hand, said to his wife, "I was out starting to boil out a little brew and got picked up and I will have to go to Stanley." It does not affirmatively appear that this was said in the presence of the defendant, Maynard. However, no objection was made to the question in response to which this testimony was elicited, no motion was made to strike out the answer, nor was the court's attention directed to it in any manner. In the charge the jury were instructed that "in determining upon the guilt or innocence of the defendants the jury should consider *all* the evidence as bearing upon the guilt or innocence of each separately." The defendant, Maynard, takes exception to this instruction contending that it is erroneous in view of the fact that the statement of Hand to his wife does not appear to have been made in the presence and hearing of Maynard. It is a sufficient answer to this contention that no objection was made to the admission of this testi-

mony, nor was the fact that it had been so received pointed out in any way to the trial court, by request for an instruction thereon or otherwise.

The judgment of conviction should be affirmed. It is so ordered.

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

IN THE MATTER OF THE APPLICATION OF UNA WALKER FOR MOTHERS' PENSION.

(193 N. W. 250.)

Infants — mother's pension held compensation for rearing future citizens in proper surroundings.

1. Chapter 185, Session Laws of 1915, commonly known as the Mothers' Pension Act, is not a poor relief statute, but the pension therein provided as rather in the nature of a compensation by the state for services rendered in rearing future citizens in proper surroundings.

Infants — mother held not to lose right to pension for temporary removal from county of qualification.

2. Where a mother has been granted a pension under chapter 185, Session Laws 1915, and removes from the county wherein she qualified for the pension and resides for over one year in another county in the state, it is held that she does not, merely because of such removal, under the facts stipulated in this case, lose the right to such pension. The legal effect of permanent removal, with intention to acquire permanent residence in another county, on the right to a continuance of a pension, is not decided.

Opinion filed April 7, 1923.

Infants, 31 C. J. § 14 p. 993 n. 49 New: p. 994 n. 51.

Appeal from Order of the District Court of Renville County, North Dakota, *Burr*, J.

Affirmed.

J. E. Bryans, for appellant.

Flynn, Traynor & Traynor, for respondent.

JOHNSON, J. This is an appeal from an order of the district court of Renville county, made December 7, 1922, vacating an order of the

county court of Renville county, which last-named order attempted to discontinue the payment of a pension to Mrs. Walker under the provisions of chapter 185, Session Laws of 1915. The facts are stipulated by the parties and, so far as material, are as follows: Mrs. Walker petitioned the county court of Renville county for a Mothers' Pension under the provisions of chapter 185, Sess. Laws 1915. The petition was granted, and a pension awarded. At the time she made her application, she had been a resident of Renville county for more than one year, as required by the act, and she brought herself clearly within its terms and purpose. On or about April 10, 1920, Mrs. Walker moved from Renville county to Ramsey county, North Dakota, where she has since been working as a housekeeper. Her children have at all times remained with her since she moved to Ramsey county. On or about the 14th day of April, 1921, the county court of Renville county, without notice to Mrs. Walker, made an order discontinuing the payment of pension, effective on and after May 1, 1921, for the reason that she had removed from Renville county, and had been absent therefrom for more than one year. On the 12th of September, 1922, Mrs. Walker made a motion, in the county court of Renville county, that the order aforesaid be rescinded and vacated. This motion was denied. In due time, the petitioner appealed to the district court of the second judicial district and the judge of the district court made an order reversing the order of the county court and directed the payment of the pension to Mrs. Walker, pursuant to the original order of the county court allowing her a pension. It is from this last-mentioned order of the district court that this appeal is taken.

The only question on this appeal is whether a mother, to whom a pension has been granted, under chapter 185, Sess. Laws 1915, loses the right thereto upon removing from the county where the pension was granted, and continuing to reside in another county, but within the state, for a period of one year or more. There is nothing in the stipulation of facts to indicate that her removal from Renville county is with the intention of permanently establishing a residence outside thereof. The legal effect of such permanent change of residence upon the right to a continuance of a mother's pension is not an issue on this appeal and is not here decided.

The decision turns upon the construction to the given chapter 185,

Session Laws of 1915, commonly known as the Mothers' Pension Law. This law provides, in substance, that in every county in the state, any woman who has a child or children under fourteen years of age dependent upon her may receive an allowance from the county of not to exceed $15 a month for each such dependent child, to be paid out of the county treasury. The conditions upon which the allowance is made are set out in § 2 substantially as follows: The allowance is made for the benefit of the children who must be living with the mother and may be made only if, without such allowance, the mother is unable to maintain "a suitable home for her children;" the mother must be a proper person morally, physically, and mentally to bring up children, and the court may allow the pension only when necessary to "save the child or children from neglect." If the county court finds that the funds are not being judiciously expended, the allowance may be made in provisions or supplies, to be administered by the overseer of the poor, or by some proper person appointed by the county judge. Subdivision 5 of § 2 provides as follows:

"No person shall receive benefit under this act who shall not have been a resident of the county in which the application is made for at least one year previous to the making of such application."

Section 7 provides expressly that this act "is intended to supplement existing laws for aid of the poor, and is for the specific purpose of furnishing permanent aid to mothers who come under its provisions." The purpose of the law appears, in § 5, to be to insure, as far as possible, that "dependent children may grow into useful citizens."

This act is evidently of a remedial nature and should be liberally construed. It was undoubtedly the legislative purpose to provide a remedy that would mitigate or remove the evils presumed to result when children are reared in poverty, neglect, or immoral surroundings and away from the presumptively beneficent influence of home and parental care. It is a statute passed in the interest of a better citizenship and the purpose of the act should not be frustrated by narrow construction. Primarily, the beneficiaries of the law are children. It is not in any sense a poor relief act to aid a certain class of indigent adult persons. Mothers are not, by this act, put into the class of paupers just because the legislature deems it wise to assist them in maintaining a home in which to bring up children and to enable them to supervise

the training and education of their offspring. The pension awarded under the law is rather in the nature of a compensation for services rendered the state in bringing up its future citizens in proper surroundings and giving them the proper care. Startup v. Harmon, 59 Utah, 329, 203 Pac. 637; Re Koopman, 146 Minn. 36, 177 N. W. 777; Cass County v. Nixon, 35 N. D. 601, L.R.A.1917C, 897, 161 N. W. 204; Pierce County v. Rugby, 47 N. D. 301, 181 N. W. 954.

It is contended by the appellant, Renville county, that the statutes governing relief for the poor control in this case as to the requirement of residence and that the pensioner, upon removing from the county, loses her right to a pension after one year. It is contended that the Renville county court can exercise no control over the method of expenditure of funds by the pensioner residing in Ramsey county and could make no order binding upon any overseer of the poor in Ramsey county, with reference to the administration of the law, should provisions be ordered instead of money. Counsel overlook the fact that the law makes it the duty of the overseer of the poor in the township, village, or city in which the applicant lives, or of some proper person appointed by the county judge to supervise the administration of the relief, if the overseer of the poor be not so designated, when the pensioner lives out of the county of payment. The court has the power to designate some proper person and would, therefore, have jurisdiction over such person, whether a resident of the county, where the pension is granted, or not.

We do not believe that it was the intention of the legislature to impose any burdensome restrictions upon the mother in her endeavors to bring up and educate her children properly. If the mother could better her economic condition by moving from one county to another within the state, and bring her children, the beneficiaries under this law, into more desirable surroundings and give them improved educational advantages thereby, there is nothing in the language, reason or purpose of the act that would justify a holding that such removal should deprive her of a right to the pension or the children of its benefits. The pension may not be allowed or paid after the child has attained the age of fourteen years; one of the conditions of receiving a pension is that the petitioner must have resided in the county for at least one year before the petition is filed. It is clear to us, in view of the expressed purpose of the law, that the legislature did not intend that there should be any

interruption in the compensation to the mother for the benefit of her children due to the single fact that economic necessity or considerations of prudence impelled her to move from one county to another within the state. The interest of the state in the welfare of its future citizens under this law is not measured by the boundaries of political subdivisions. Through agents duly appointed, the law makes ample provision for control, by the officers of the county which pays the pension over the manner in which relief may be administered under the law. The applicant must satisfy the county court that she is not a mere transient, but is in fact a resident of the county which she asks to help her rear her children. Having once convinced the proper authorities that she is a person entitled to a pension under the law, that right follows her regardless of her choice of temporary residence within the state, unless forfeited by breach of express or implied conditions, or lost because the necessity for aid has ceased to exist. The law nowhere, neither expressly, nor by necessary implication, restricts her liberty of movement or choice of residence; the only object the state is seeking to advance,—the welfare of the children,—is best served by giving the mother the utmost freedom of opportunity to reside at that place in the state where the conditions, on the whole, are most advantageous for herself and the objects of the state's bounty. To hold otherwise would be to read into the law a restriction not warranted by its language and, to some extent, to defeat the beneficent purpose the legislature intended to accomplish. It is not difficult to arrive at this conclusion if we bear in mind that solicitude for the welfare of dependent children prompted the enactment of this law and that that welfare would not be promoted by limiting the mother's right to take advantage of opportunities within the state, or to select within the state the environment in which to bring up her children.

A mother of dependent children, whose husband has just died, may find it utterly impossible to continue in the business or to remain in the place her husband selected. Suddenly thrown upon her own resources, she must fight the battles of life with the means at her command. She must look for work and a place to live and rear her children. Section 5 of the act prescribes the condition on which the allowance of the pension, when once made, may be suspended or discontinued, before the child attains the age of fourteen years, and that is when the

allowance made is failing of the purpose intended by the law, that "dependent children may grow into useful citizens." Temporary removal from one county to another does not in any manner tend to defeat this purpose and is not enumerated as a condition justifying a discontinuance of the allowance. It would be a perversion of justice to read into the law any such condition or limitation.

The order of the trial court is affirmed.

CHRISTIANSON, BIRDZELL, and NUESSLE, JJ., concur.

BRONSON, Ch. J. (concurring). I concur in the result and in the principles of law announced in the syllabus.

FRANK O. HELLSTROM, and Clifford R. Norton, Copartners Doing Business under the Style and Firm Name of Hellstrom-Norton Brokerage Company, Respondents, v. J. L. PRICE and E. D. Smith, Copartners Doing Business under the Style and Firm Name of Price-Smith Fruit Company, Appellants.

(193 N. W. 51.)

Brokers — seller held bound by contract whereby brokerage company was expected to solicit its own trade, in pursuance of which it solicited orders in its own name and forwarded them to seller, who accepted with knowledge of terms.

1. In an action to recover commission and overage earned upon the sale of apples in carload lots for the defendant, it is *held:*

Where the written negotiations of the parties show that plaintiff was expected to solicit its own trade and where, in pursuance of the arrangement, it solicited orders in its own name and forwarded them to the defendant who accepted with knowledge of the terms, it is bound by the contract so evidenced.

Brokers — attempt of brokerage company to cancel orders for apples rendered ineffective by seller's refusal does not preclude recovery of commission when later filled by seller.

2. An attempt to cancel orders which is rendered ineffective by the refusal of principal, who had accepted the orders to cancel them, does not preclude recovery of commission and overage on account of such orders when later filled by the defendant.

Brokers — broker may recover loss for failure to fulfil quality of goods sold.

3. Where plaintiff, a broker, has sustained loss by reason of being held answerable to a purchaser on account of the failure of the fruit furnished by defendant to fulfil the warranty of quality, the broker may recover such loss in an action against the principal.

Opinion filed December 29, 1922. Rehearing denied April 10, 1923.

Brokers, 9 C. J. § 68 p. 569 n. 79; § 73 p. 572 n. 3; § 107 p. 634 n. 29.

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

W. K. Amick, and *Newton, Dullam & Young*, for appellants.

A broker is defined as "one whose occupation it is to bring parties together to bargain, or to bargain for them, in matters of trade, commerce, or navigation; he is essentially a middleman or go-between." Turner v. Crumpton, 21 N. D. 298.

If a broker employed to negotiate a transaction abandons the employment, he is not entitled to commission although the transaction is afterwards consummated. Williston, Contr. § 1475; 9 C. J. p. 562; Jackson v. Parrish, 157 Ala. 584, 47 So. 1014; Everett v. Farrell, 11 Ind. App. 185, 38 N. E. 872; Jones v. Buck, 147 La. 494, 126 N. W 452.

Before a broker is entitled to compensation he must show that he has completed his undertaking according to its terms. Mechem, Agency, § 965; 9 C. J. p. 588.

"So careful is the law in guarding against the abuse of fiduciary relations that it will not permit the agent to act for himself and his principal in the same transaction as to buy of himself as agent the property of his principal, or the like." People v. Township Bd. 11 Mich. 222; 2 C. J. 694; Smith v. Courant Co. 23 N. D. 297, 136 N. W. 781.

A broker has no authority to rescind or cancel a contract made for his principal. Mechem, Agency, § 950.

The alteration of the contract by the broker without the principal's consent, renders the contract void. Harrison v. Lakanan, 189 Mo. 581, 88 S. W. 53.

If a broker is engaged to sell for his principal and sells for himself, he is not entitled to compensation. Powers v. Black, 159 Pa. 53, 28 Atl. 133; Hammond v. Bookwalter, 39 N. E. 872; Finnerty v. Fritz, 5 Colo. 174; Diamond v. Fay, 23 Cal. App. 566, 138 Pac. 933; Albert

Booth Cohn Co. v. Lee, 117 N. Y. Supp. 550; Robbins & Warner v. Maher, 14 N. D. 228, 103 N. W. 755; Turner v. Crumpton, supra.

Thus it is error for the court to tell the jury what is the better evidence in a case. Chicago etc. R. Co. v. Robinson, 106 Ill. 142.

It is error also to charge that a controverted fact is established, or that any fact is conclusively proven. Hill v. Graham, 72 Mich. 659, 40 N. W. 779; Rushim v. Shields, 11 Ga. 636, 56 Am. Dec. 436; Ball v. Cox, 7 Ind. 453.

Benton Baker, for respondents.

In determining whether particular facts constitute one an agent, strictly so-called, or a broker, the circumstance that the employments are many or few, cannot be made the controlling test. Stratford v. Montgomery, 110 Ala. 619, 20 So. 127; Green v. United States, 25 App. D. C. 549.

BIRDZELL, **Ch. J.** This is an appeal from a judgment in favor of the plaintiff in an action to recover commission and overage earned in selling apples, and, upon a second cause of action, damages sustained through defendant's breach of warranty.

In the summer of 1920, the defendant, who is a car lot distributor of fruits and produce, doing business from St. Joseph, Missouri, sent to the plaintiff, a marketing agency in the city of Bismarck, North Dakota, a circular designed to interest plaintiff in selling apples in carload lots during that fall. Negotiations by correspondence resulted, and such contract as was made between the parties is evidenced by their correspondence. Early in the negotiations the defendant sent the plaintiff copies of specifications of fruit they would have to sell, quotations of prices, and an offer to pay a commission of $100 a car for the sale. They proposed to ship the cars direct to the plaintiff's customers and referred to the trade to be solicited by the plaintiff as "your trade." On September 6th, plaintiff wrote defendant as follows:

"Replying to your letter of the 2nd, beg to say that we can use forty or fifty of those circulars entitled "Western Boxed Apples." We also note what you say in regard to prices. Your price probably would have to be revised before shipping season as market conditions may change.

"We shall be very glad to handle your apples at $100 per car and would like to have you quote us your very best figure on car load of Jonathans for early shipment. Also state how soon you can get a car loaded, etc.

"Wish you would furnish us with the circulars and printed matter promptly so that we may be prepared to get the trade. We would like to have your proposition on bulk apples as we have a good many customers that desire bulk apples."

Replying to this letter on the 8th, the defendant said:

"We accept your proposition of selling apples for us at $100 per car commission, this commission to be paid upon acceptance and delivery of each car and we enclose you 50 specifications on Western Box and Western Bulk. . . ."

In this and later correspondence, an understanding was reached that the prices quoted by the defendants included a commission or brokerage of $100 per car, payable to the plaintiff, and in addition, an agreement effected that the plaintiffs were to be credited with overage where the price obtained exceeded the net price quoted.

On September 17th, plaintiff wrote advising that orders had been obtained for about five cars of bulk apples and ten of boxed apples, and in this letter it stated:

"We find, however, that some places are under our prices. Wish you would kindly keep in mind, that the only way we can get business, and deliver the goods is to guarantee the price against competition in same grade of stuff."

On September 28th, plaintiff forwarded to the defendant seven orders, each for one car, to be shipped to the following stations, respectively: Page, Michigan, Cando, Rolla, Twinbridge, Towner, and Gardena. In submitting the orders, plaintiff stated:

"We are submitting these orders and will expect you to return such as you cannot fill and allow us to draw on you for our brokerage upon receipt of these orders. Kindly wire us if you can accept and allow us to draw brokerage."

The following day plaintiff wired:

"Mailing bunch of orders. Since mailing have been offered Orchard Run Jonathans at dollar thirty and other varieties in proportion. Your price is out of line. What is your last word? We can sell them. Do

you want our business? Will hold open to hear from you. Answer here."

The following day defendant wired in reply:

"Letter twenty eighth received. We accept your orders with exception one to Twinbridge, North Dakota. Cannot agree furnish one half car Johnson's bulk. Will credit your account with brokerage and overage and remit you when apples are delivered as per your sales. You have our lowest prices."

This telegram was confirmed by letter on the same day which, however, was more specific as to the brokerage and overage. The letter stated "brokerage and overage to be paid when cars are delivered and paid for. We certainly cannot pay brokerage on the sale of a car. The transaction is not then complete, but your brokerage will be paid when the cars are delivered and paid for."

Each of the orders taken and forwarded to the defendant was taken in the name of the plaintiff and contained a provision to the effect that the price was guaranteed, with the explanatory remark that the shipper agrees to protect the dealer in case of lower market at time of delivery. October 7th, plaintiff wired defendant canceling three of the orders material here and directing the shipment of three others.

In response to this telegram the defendant both wired and wrote, refusing to cancel. It took the position that unless the buyers accepted the cars, it would sue for the difference in the market value, and advised the plaintiff of its suspicion that it had been quoted a lower figure and was trying to make an extra profit and that it was sacrificing defendant's position in the matter. Plaintiff replied, reminding the defendant that the orders provided for a guaranteed price and that apples were offered upon the market 20 cents lower. Defendant then wired accusing the plaintiff of not representing it and stating that it would meet the prices of legitimate competition to each individual buyer as advised of quotations. It took the position that it was not guaranteeing a price to the plaintiff but to the buyers, and insisted on filling the orders.

The evidence shows that the defendant filled the orders for deliveries at Page, Michigan, Rolla, Towner, and Gardena, and this action is for the commission and overage on these orders. It also filled an order at Beach, which the plaintiff had obtained, and upon which the latter contends it had sustained a loss by reason of the inferior quality of the

apples and of being held liable therefor to the purchaser. This loss is sought to be recovered here in the second cause of action. Trouble was experienced with the other purchasers likewise, who claimed that the fruit did not comply with the specifications, some or all of them rejecting it on this ground.

Upon this appeal there are numerous specifications of error. It is contended, first, that the court erred in overruling the defendant's motion for a directed verdict. The argument is that the contract places the plaintiff in the relation of a broker for its principal, the defendant, and that the plaintiff, having abandoned the employment, is not entitled to a commission; although the transaction be shown to have been consummated afterwards. Loyalty to the principal being the first duty of the broker, it is said that one should not be permitted to place himself in a position where his private interest conflicts with his duty to his principal. It is claimed that the evidence shows a disregard of these fundamentals of the legal relationship, that consequently no recovery can be had. We are of the opinion, however, that the contract as evidenced by the correspondence is one whereby the broker, contrary to the usual rule in such cases, was expected to contract in its own name. Consequently it was free to solicit orders and to forward them to whatever jobber it might choose. This interpretation of the contract, evidenced by the early negotiations, is strengthened by the fact that when the orders were received by the defendant, no criticism was offered on account of the orders being taken in plaintiff's name. As we construe the correspondence, the plaintiff did not bind itself to confine its efforts in the sale of apples to those furnished by the defendant.

As to the contention that the plaintiff abandoned the agency as to these particular orders through the attempted cancelation, we think it is clear that so long as the defendant did not recognize the cancelation as being within the plaintiff's rights, plaintiff can abandon, as it has done for the purpose of this action, any rights it might have predicated on the defendant's refusal to cancel and treat the contract as being in force. The defendant has recognized the contract by shipping the apples on the orders furnished by the plaintiff, and it is therefore precluded from asserting that it is not bound. It cannot accept the benefits and absolve itself from the burdens.

There are a number of specifications directed to errors in the admis-

sion of testimony. These relate principally to testimony of the character of hearsay. The record shows that for the most part evidence that was open to this objection was ruled out when objection was made, with a few possible exceptions, and that in those exceptions the testimony relates to matters that are not seriously controverted. Appellant also complains that it was prejudiced by the failure of the court to rule promptly on objections and by reserving rulings and permitting evidence to go in for the time being. This is a practice that is not, of course, to be commended, but, in view of the manner in which the real issues in the case appear to have been obscured during the greater part of the trial, this practice is not without some justification in the instant case. At any rate, we are impressed that the defendant was not prejudiced by the rulings on the evidence, and it will serve no good purpose to discuss the alleged objectionable rulings in detail.

Error is also predicated on the instructions of the court to the jury. The instructions are lengthy and the specifications thereon numerous. We are satisfied, however, that they properly state the issues and the law applicable to the same, and that they do not transcend the legitimate bounds at any point by usurping the functions of the jury. Wherever the court referred to facts as being undisputed, they were facts that had been proved by the defendant's unequivocal conduct or by its own written admissions.

Upon the second cause of action, the court instructed the jury that if they should find the plaintiff suffered a loss by virtue of a breach of the warranty of the quality of the fruit, furnished to the Economy Store at Beach, it was entitled to recover such sum as it suffered by reason of the failure of the fruit to reach the quality warranted. It is argued that this does not properly state the measure of damages for breach of warranty of quality; that the true measure is the excess of value which the property would have had, had the warranty been complied with, over its actual value. In this connection, we may also note the error assigned upon the admission in evidence of the judgment recovered against the plaintiffs at the suit of the purchaser, the Economy Store. While the appellant correctly states the rule of damages applicable in suits for breach of warranty of quality between vendor and purchaser, it does not follow that the instruction complained of is erroneous. The relation between this plaintiff and defendant was such that the defend-

ant is answerable to the plaintiff for any loss it reasonably sustained by reason of the former's breach of warranty. Inasmuch, however, as it does not appear that the defendant was given an opportunity to defend the suit previously brought by the Beach Economy Store against the plaintiff, it is clear that the defendant is not answerable for the amount of the judgment. But the court did not regard this as the measure of the plaintiff's loss under this cause of action. It specifically directed the jury that it should disregard the amount of the judgment in assessing that loss. There is abundant evidence, however, of the condition of the car of apples delivered to the Economy Store, showing the percentage of defective fruit, to afford abundant legal basis for a loss to the plaintiff in the amount of the judgment based upon this cause of action. There is a specific finding, in response to an interrogatory submitted by the court, as to the amount included in the verdict on account of the second cause of action, and this was reduced in the court below to an amount that is well within the evidence.

We are of the opinion that the record as a whole does not reveal any errors prejudicial to the defendant. On the contrary it appears that a fair trial has been had. The judgment is affirmed.

CHRISTIANSON and BRONSON, JJ., concur.

ROBINSON, J., dissents.

GRACE, J. (specially concurring). I am of the opinion that the result arrived at in the principal opinion is correct. I am also of the opinion there is no reversible error in the record.

On petition for rehearing.

BIRDZELL, J. The original opinion in this case is in itself an indication of the unsatisfactory character of the record upon which the judgment is based. This is due to a variety of circumstances, chief of which may be mentioned, first, the fact that at the trial the parties were at variance as to the theory upon which it was sought to recover on the one hand and to defend on the other; second, the evidence is quite inconclusive as to the ultimate disposition of the apples that were ac-

tually shipped. Some of it is hearsay and was properly objected to. We think, nevertheless, that the record clearly establishes, prima facie, the right of the plaintiff to recover and that there was no prejudicial error in the instructions or in the trial going to the root of the plaintiff's cause of action. A careful resurvey of the record, however, upon the petition for rehearing, leads us to the conclusion that the evidence does not sufficiently establish the purchase of the apples by the various customers at invoice prices to support the claim for overage. In the plaintiff's correspondence it is intimated that the defendant's prices are too high. In fact, it is stated that they are "out of line," and inasmuch as all the orders taken embodied a stipulation guaranteeing the price, the plaintiff is obviously not in a position to recover overage based on the stipulated price if, as a matter of fact, the purchasers might properly have objected to the payment of the full price on the ground that the market had declined or was lower than the price mentioned in the orders and invoices. Under the terms of the contract in question it was incumbent on the plaintiff, in order to recover overage, to establish either actual settlements by the customers on a basis that would entitle it to overage, or, if the apples were rejected on account of quality, that overage would have been recoverable under the market conditions had the apples not been rejected. The amount of the judgment thus affected on this record is $567.20. The order of this court is that upon the filing of a remittitur of $567.20, the judgment is affirmed; otherwise, that the judgment be reversed and a new trial granted. In any event, the appellant will recover costs on this appeal.

CHRISTIANSON and BRONSON, JJ., concur.

NICK STOFFEL and Peter Stoffel, Appellants, v. J. S. SULLIVAN and F. Johnson, Respondents.

(193 N. W. 45.)

Chattel mortgage — incorporation in mortgage of mortgagor's receipt showing surrender of copy of mortgage held insufficient; attached.

Where the receipt required to be surrendered to the mortgagor by the

Note.—On effect of failure to execute and record chattel mortgage as required by statute, see notes in 127 Am. St. Rep. 833; 137 Am. St. Rep. 471; 5 R. C. L. 395.

mortgagee, under § 6763, Comp. Laws 1913, is incorporated in the body of the mortgage, and the mortgagor signs but once, and in the usual place at the end of the body of the instrument, it is *held* that this is not a substantial compliance with the statute and that the filing of such an instrument is not notice to anyone.

Opinion filed March 22, 1923. Rehearing denied April 13, 1923.

Chattel Mortgages, 11 C. J. § 141 p. 489 n. 49.

Appeal from a judgment of the District Court of Ransom County, *Allen*, J.

Affirmed.

C. G. Bangert, for appellants.

C. O. Heckle and *Curtis & Remington,* for respondents.

JOHNSON, J. This is an appeal from the judgment dismissing plaintiffs' cause of action with prejudice and for taxable costs in favor of defendants. A concise statement of the facts will disclose the issues. One, Oien was engaged in the lumber and hardware business at Venlo in Ransom county. He first conducted the business in the name of A. P. Oien and later as the Venlo Lumber Company. Later he became indebted to both the plaintiffs and the defendants. On January 13, 1921, he gave a note for $1,925, to the plaintiffs. He attempted to secure this note by a mortgage upon certain real estate and on a stock of lumber and hardware then in the yards of the Venlo Lumber Company, at Venlo. Oien was the owner of the Venlo Lumber Company. On the 17th day of May 1920, Oien desiring to purchase a quantity of lumber for retail, procured the defendants to sign an agreement to indemnify the Farmers State Bank of Anselm for any sum advanced him for the purchase of lumber. In pursuance of that agreement the defendants signed notes in the sum of $4,317.21. During the month of August 1920, Oien delivered to defendant Sullivan a bill of sale of the lumber purchased with the proceeds of the notes. The bill of sale was not witnessed, acknowledged, nor filed but was retained by Sullivan among his papers. On May 10th, 1921, defendants entered into a written agreement with Oien (Exhibit "6") whereby they took the lumber in satisfaction of their claim against him.

Defendants took possession of the personal property, sold it and applied it to the discharge of the debt which Oien owed them. It is the

claim of plaintiffs that the chattel mortgage, whatever its form, was a first lien upon this personal property, while the defendants claim the mortgage was not executed according to the forms required by law and was not entitled to be filed and therefore no notice to them. The mortgage was recorded as a mortgage on real property in the office of the register of deeds. It was also filed in his office as a chattel mortgage, on the 23d day of February, 1921, a few minutes after the time it had been recorded as a real estate mortgage. It was in form a combination real estate and chattel mortgage. The mortgage was dated January 13, 1921, but was not acknowledged until February 21, 1921.

Section 6763, Comp. Laws provides:

"A mortgage of personal property must be signed by the mortgagor in the presence of two witnesses who must sign the same as witnesses thereto, or acknowledge the execution of the same before some official qualified to take acknowledgments. And every mortgagee must surrender to the mortgagor at the time of the execution of the mortgage a correct copy of the original mortgage, so signed, with witnesses or acknowledgment shown thereon. And the mortgagor must surrender to the mortgagee a receipt which shall be attached to the original mortgage showing that the mortgagee has surrendered to him a copy of such mortgage, and said receipt must accompany the mortgage when presented to the register of deeds and filed therewith. Otherwise said mortgage shall not be filed as a chattel mortgage by the register of deeds."

The concluding paragraph of the body of the mortgage is as follows:

"And the said party of the first part does hereby acknowledge the receipt of a true and correct copy of the foregoing mortgage from the said mortgagee the day and date above written.

"In witness whereof the said party of the first part has hereunto set his hand the day and date first above mentioned."

Immediately following the language quoted and at the end of the body of the instrument is affixed the signature of A. P. Oien. He signed at no other place.

The sole question in this case is whether the language quoted above, the concluding paragraph of the body of the mortgage, and the inclusion of this receipt in the body of the mortgage is a sufficient compliance with § 6763, which required that the receipt for the copy "shall

be attached to the original mortgage showing that the mortgagee has surrendered to him (the mortgagor) a copy of such mortgage."

Section 6763 was enacted in 1913 and it is evident that the primary purpose of the law was to prevent fraud or imposition upon the mortgagor, in the description or inclusion of property, or otherwise. It seems that the legislature designedly required the receipt to be "attached" to the mortgage rather than, by the use of apt language, permitting the receipt to be included in the body of the instrument. It was probably supposed that if the mortgagor executed a receipt, either separately or attached to the original mortgage, but signed separately, at the time of the execution thereof, it would call to his attention his right to a copy and tend to insure that the mortgagee, in compliance with the statute, would deliver the copy. On the other hand, if the receipt were incorporated within the body of the instrument, which is seldom read in detail by the mortgagor, then, in all probability, nothing would ever come to his attention apprising him of his right to a copy of the instrument, and he might not receive the copy, thereby enabling the mortgagee to frustrate, in fact, the purpose of the legislature. In this case, furthermore, it is impossible that the mortgagor could have received a copy of the mortgage on the 13th of January, because it was not completed by appending an acknowledgment thereto until more than a month afterwards. Neither was the alternative requirement of two witnesses complied with. If, at the time he signed the mortgage containing this receipt, he received a copy thereof, it was a mortgage in form binding as between himself and the mortgagee, but not entitled to record, and therefore of no effect against third parties without actual knowledge.

It is significant that the legislature required the receipt to be "attached" to the *original:* if the legislature contemplated that it would be sufficient to incorporate the receipt in the body of the instrument, it would of course have been a part of the copy delivered as well. It is clear that the mortgagee is not required to deliver to the mortgagor a copy of the mortgage with a copy of the receipt attached; the receipt need be attached only to the original mortgage which is filed in the office of the Register of Deeds. In our opinion this is indicative of a legislative intent that the receipt should not appear in the body of the instrument.

Webster's Dictionary defines "attach" to mean "to bind, fasten, tie, or connect; to make fast or join; as, to attach one thing to another by a string, by glue, or the like." To incorporate a receipt in the body of the instrument is not "attaching" the same thereto, within the letter or the spirit of this statute. The word "contain," which appears in the South Dakota statute, hereafter referred to, does not mean the same as "attach." Standard Dictionary gives as the first definition of "contain" "To have for its contents." In the "Introductory" to the Standard Dictionary it is said that the most common meaning is first given. It would be a gross misconstruction and misuse of words well understood to use the words "contain" and "attach" synonymously, or give "attach" the same meaning as "contain." If a statement of fact is included in the body of an instrument, it would be manifestly incorrect to say that such statement was "attached" to the instrument. We have been unable to find any statute like our own and no decision in point upon the same state of facts.

The statute prohibits the register of deeds from filing the mortgage unless it has "attached" to it the mortgagor's receipt. There being no receipt attached to the mortgage in this case, and the incorporation of a receipt within the body of the instrument not being in compliance with the statute, the register of deeds was without authority to file this instrument as a chattel mortgage.

The authorities are substantially unanimous that an instrument in the form of a chattel mortgage, but which for some reason appearing upon the face thereof, is not entitled to be filed or recorded, does not constitute constructive notice to subsequent purchasers or incumbrancers for value without actual knowledge. This rule has been announced many times by this court. Pease v. Magill, 17 N. D. 166, 115 N. W. 260; Davis v. Caldwell, 37 N. D. 1, 6, 163 N. W. 275.

It may be contended that the receipt is not a part of the mortgage, but is a sort of appendage thereto, and that the mortgage itself, being regular and complete in form, is sufficient to impart constructive notice, and that, therefore, this case is distinguishable from the line of authorities where, because of defect upon the face of the instrument, it was not entitled to record. We are unable to perceive any force in this argument. The execution and filing of the receipt are specifically required by the statute and the register of deeds is directed not to file the mort-

gage if this provision be not complied with. In the absence of statutory provision, a mortgage on personal property, when possession is retained by the mortgagor, is of no avail against creditors or subsequent purchasers and encumbrancers without actual knowledge of the existence of the mortgage. The legislature has prescribed, in general terms, the form of chattel mortgage, the manner of its execution, and has imposed certain conditions, upon substantial compliance with all of which the mortgagee may file the instrument with the register of deeds, whereupon he becomes entitled to enlarged protection by virtue of such filing, which, but for such filing, he would not enjoy. It is incumbent upon him to comply substantially with the provisions of the statute in order to become entitled to its full benefits. The notice imparted to the public from the filing of an instrument is purely theoretical and constructive; yet the person who properly files such an instrument becomes entitled to certain rights to the same extent as if every member of the public had actual knowledge of the details of the contract between the mortgagor and the mortgagee. The statute should not be extended by any strained or unnatural construction of words of well understood meaning. Nor, on the other hand, should this court, by giving an unusual or strained signification to words, lay down a rule, the result of which must be to defeat the real purpose the legislature had in view and which it expressed in unambiguous language. The making of the receipt and the delivery of the copy of the mortgage to the mortgagor may be a part of, must, at least, be associated with, the transaction that results in the execution and filing of a mortgage that will be sufficient to impart constructive notice to third parties without actual knowledge. This situation cannot, on principle, be distinguished from those cases where the statute requires an affidavit to be attached to and filed with the mortgage. This provision is usually for the protection of creditors against fraudulent mortgages executed to hinder them in the enforcement of their rights. In the case at bar the purpose is to protect the mortgagor. We have found no case in those jurisdictions where affidavits are required, where the courts, in passing upon the sufficiency of an affidavit alleged to be faulty, or the effect of its total absence, have investigated the facts as to whether or not any creditor was defrauded or whether or not the mortgage was collusive and fraudulent in fact. The sole inquiry has been—and should be here—whether the statutes

have been substantially complied with. Whether, in fact, the mortgagor here received a copy and was therefore wholly protected under the law, is not material upon any issue here raised. We are asked to construe a statute and announce a rule which may have important bearing upon rights of property in the future. We are not to embark upon an investigation in each individual case to ascertain whether, in fact, a copy was delivered, or if not delivered, whether a fraudulent purpose lay in the background; it is our duty to give effect to the legislative mandate and the sole inquiry is whether the evidence—the receipt—of compliance with the statute, in statutory form, and in the statutory manner, was deposited in the office of the register of deeds. Our statute declares a mortgage void as against creditors, etc., unless filed and then provides it shall not be filed unless it be acknowledged or witnessed and have a receipt attached to it. If a mortgage is filed in violation of the statutory mandate, the legal effect is the same as if no mortgage had been filed—it is not notice to creditors, etc., under the statute and the filing is a nullity. This is the rule with respect to mortgages on real property. Jones, Mortg. § 494. The principle is applicable in this case and the rule should be the same.

The statutes of the state of Michigan require that the mortgagor must execute an affidavit and annex the same to the mortgage before filing it, setting forth certain facts. If such affidavit be not attached and filed, the mortgage is void as against creditors, etc. The statute further provides that the mortgage shall not be filed by any officer until such affidavit is made and annexed to the mortgage. In People use of Esper v. Burns, 161 Mich. 169, 137 Am. St. Rep. 466, 125 N. W. 740, the court held that when a mortgage was filed without such an affidavit as was required by the statute above described, the filing of the instrument would not give constructive notice to anyone. In that case the mortgage was complete upon its face, but the affidavit was not legal, not having had the necessary jurat affixed, though the affidavit was signed and sworn to in fact, by the person required to make it. The receipt of the mortgagor, required under our statute, is as much an integral part of the execution of the mortgage as is the affidavit required by the Michigan statute. The consequences following upon omission to file the one or the other, in the statutory form and manner, as far as constructive notice is concerned, should be the same.

The statute of Vermont 1906, § 2622, requires that the mortgagor and the mortgagee execute an affidavit to the effect that the debt secured is a just debt and owing from the mortgagor to the mortgagee. Without such affidavit the officer may not file the mortgage. The statute further requires that this affidavit shall be "appended to such mortgage and recorded therewith," to constitute a mortgage valid against any person but the mortgagor or his personal representative. In the case of Hunt v. Allen, 73 Vt. 322, 50 Atl. 1103, the supreme court of Vermont held that a chattel mortgage, not accompanied by this affidavit, was not entitled to record and that the recording of the same would not give constructive notice. The court further held that the affidavit and the mortgage constitute one instrument and that a mortgage "without these essentials is not executed in accordance with the statute." In our statute the receipt must be "attached," a word, under the circumstances, not distinguishable in meaning from "appended" in the Vermont act.

The appellant cites the case of Foss v. Van Wagenen, 20 S. D. 39, 104 N. W. 605. An examination of this case discloses the fact that it is not in point. The South Dakota statute, which was before the court in that case, is substantially different from the North Dakota statute. It provides that every chattel mortgage shall be void "unless it appears *upon* the mortgage instrument over the signature of the mortgagor that a true copy of the same has been delivered to and received by the mortgagor." This is § 2 of chapter 95, Session Laws of 1897. In the Foss Case, supra, the chattel mortgage contained in the body thereof a receipt and this was over the signature of the mortgagor. Of course, this was held to be a sufficient compliance with the statute.

The South Dakota statute was modified by the codifiers, and the modification was accepted by the legislature of 1903. Section 2092 S. D. Revised Code 1903, which appears in S. D. Revised Code, 1919 as § 1579, provides:

"No register of deeds shall receive or file any chattel mortgage which does not *contain* a receipt over the signature of the mortgagor to the effect that a copy of such mortgage has been received by him, and every chattel mortgage not containing such receipt shall be null and void."

While this statute has been many times either cited or considered by the South Dakota supreme court, no decision thereunder throws any light upon the issues in the case at bar. Under the South Dakota stat-

ute, inquiry into the effect of filing a mortgage without such receipt is wholly superfluous because the instrument is entirely void, even between the parties themselves. It must be clear that the language of the South Dakota statute is materially different from that found in our own. The words "upon" or "contain" in the South Dakota law cannot be considered synonymous with "attached" in § 6763, N. D. Comp. Laws, 1913.

This opinion was written after a rehearing and is the only opinion published.

The judgment of the trial court is affirmed.

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

L. O. WALL, Appellant, v. FIRST NATIONAL BANK OF CROSBY, a Corporation, Respondent.

(193 N. W. 51.)

Appeal and error — order denying motion for judgment on pleadings held not appealable.

An order denying plaintiff's motion for judgment on the pleadings held not appealable.

Opinion filed April 3d, 1923. Rehearing denied April 13, 1923.

Appeal and Error, 3 C. J. § 314 p. 487 n. 26.

Appeal from the District Court of Divide County, *Lowe*, J.

Appeal dismissed.

Leighton & Brace, for appellant.

A motion for judgment on the pleadings is, in substance, both a demurrer and a motion. It is a demurrer in so far as it objects to the pleading on the ground of insufficiency; and a motion in so far as it is an application for order for judgment in consequence of such defect. Power v. Gum, 6 Mont. 5, 9 Pac. 575; Floyd v. Johnson, 17 Mont. 469, 43 Pac. 631; Taylor v. Palmer, 31 Cal. 257.

A mortgagee as such has no interest in insurance procured by a

mortgagor. 14 R. C. L. 1367; Aetna Ins. Co. v. Thompson (N. H.) 40 Atl. 396; Reynolds v. L. & L. Ins. Co. 128 Cal. 16, 60 Pac. 467; Harvison v. Griffin, 32 N. D. 188, 155 N. W. 655; Krieger v. Schultz (N. D.) 188 N. W. 1021; Rawson v. Bethesda etc. 221 Ill. 216, 6 L.R.A.(N.S.) 448, 77 N. E. 560; 19 Cyc. 885.

Geo. P. Homnes, for respondent.

Respondent contends that judgment on the pleadings cannot be given when the pleadings of the defendant sets up a substantial and issuable defense. 23 Cyc. p. 769.

"The defendant after the foreclosure had the same interest in the dwelling house insured as before, and it still held the insurance policy, which insured, not its debt, but its interest in the house mortgaged. It is wholly immaterial whether the defendant, after the foreclosure, was technically a purchaser, and not a mortgagee, and that its lien and claim on and to the house secured its bid, and not its debt; for it continued to have an insurable interest in the house by virtue of its mortgage, precisely as it had before the foreclosure. It was this interest that was insured by the policy payable in case of loss to the defendant as its interest might appear, and a loss having occurred while the policy was in force and the interest still in existence, the insurance money was rightly paid to the defendant, subject to the equity of the mortgagor to have the amount thereof applied pro tanto in redemption of the premises." Carlson v. Presbyterian Bd. 67 Minn. 436, 70 N. W. 3; Haight v. Continental Ins. Co. 92 N. Y. 51; Eddy v. London Assur. Co. 143 N. Y. 311, 25 L.R.A. 686.

NUESSLE, J. This is an attempted appeal from an order of the district court of Divide county denying a motion for judgment on the pleadings. It appears to us that we cannot in any manner pass upon the merits of this appeal or determine the questions raised and discussed in the briefs; this for the reason that we have no jurisdiction to do so.

The order complained of is not appealable. It does not come within any of the five subdivisions of § 7841 Comp. Laws, 1913, providing what orders may be carried to the supreme court. Except as authorized by statute appeals will not lie, see Whitney v. Ritz, 24 N. D. 576, 140 N. W. 676, and cases cited. Appellant argues that the motion is in effect a demurrer. The answer is that whatever its effect, nevertheless

it is not a demurrer. In the absence of the statute subdivision 3, § 7841, an order overruling a demurrer is not appealable. 2 R. C. L. 43; 3 C. J. 481. It may be contended that the order here in question comes within the fourth subdivision of § 7841, providing that an order is appealable when it involves the merits of an action or some part thereof. We do not believe, however, that this contention is tenable. See McMahon v. Davidson, 12 Minn. 357, Gil. 232, where in passing on a statute providing that "an appeal may be taken from an order involving the merits of an action or some part thereof," it was held an appeal will not lie from an order made on a trial denying a motion for judgment on the pleadings. See also as to appealable orders Persons v. Simons, 1 N. D. 243, 46 N. W. 969; Olson v. Mattison, 16 N. D. 231 and note, 112 N. W. 994; Dibble v. Hanson, 17 N. D. 21, 114 N. W. 371, 61 Ann. Cas. 1210 and cases cited; Strecker v. Railson, 19 N. D. 677, 125 N. W. 560; Whitney v. Ritz, 24 N. D. 576, 140 N. W. 676; Thorp v. Lorenz, 34 Minn. 350, 25 N. W. 712; Clement v. Foster, 99 N. C. 255, 6 S. E. 186 and note; 3 C. J. 487; 2 R. C. L. 43.

For the foregoing reasons the appeal must be dismissed and it is so ordered.

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

JOHN W. MAHER, Respondent, v. OLE BOLSTAD and Minnekota Elevator Company, a Corporation, Appellant.

(193 N. W. 308).

Action for conversion.

This case is controlled by the decision of this court in Maher v. Boehmer, ante, 592.

Opinion filed April 14, 1923.

Appeal from District Court of Ramsey County, *Burr*, J.

Affirmed.

F. B. Lambert, for appellant.

It is well established in this state that, under circumstances such as shown in the case at bar, there must be a demand and a refusal to deliver. Sanford v. Duluth, 2 N. D. 6, 48 N. W. 434; Towne v. St. Anthony, 8 N. D. 200, 77 N. W. 608; First Nat. Bank v. Minneapolis, 11 N. D. 28, 91 N. W. 436; Skjerseth v. Woodworth Elev. Co. 35 N. D. 295, 160 N. W. 70; Catlett v. Stokes, 21 S. D. 108, 110 N. W. 84; Underwood v. Atlantic, 6 N. D. 274; Seymour v. Elevator Co. 6 N. D. 444.

"The chattel mortgage did not transfer the title to the wheat to the respondent, but was only a lien thereon as security for the debt it described, and, being only a lien, appellant could store or purchase it and does so subject to the lien of respondent's mortgage." Sanford v. Duluth, and Catlett v. Stokes, supra.

"Having taken it subject to such lien, a conversion does not take place until some affirmative act on the part of the appellant, like tortious detention thereof from the owner, or the party entitled to the possession thereof, or an exclusion or defiance of such party's right, or withholding of possession under claim of title inconsistent with that of the plaintiff or owner." Taugher v. Northern, 21 N. D. 111, 129 N. W. 474.

"As no such act was proved until *demand and refusal to deliver,* there was no proof of conversion as taking place prior to the 20th of December, 1908." Towne v. St. Anthony & D. Elev. Co. 8 N. D. 200.

"A chattel mortgage in this state does not convey title to the mortgagee, but is only a lien on the property covered thereby. Hence, the purchaser of the property covered by a chattel mortgage takes it subject to the lien of such mortgage, and a conversion does not take place until the purchaser does some affirmative act, like a tortious detention of such property from the party entitled to possession thereof under the mortgage, or the exclusion or defiance of such party's right, or the withholding of possession under claim of title inconsistent with that of the mortgagee." Citizens Bank v. McMillan, 21 N. D. 335, 131 N. W. 266.

Our statute on this point states that the measure of damages is "The value of the property *at the time of the conversion* with interest from that time." This law has been established in North Dakota almost

from the beginning of statehood, and the first case holding directly on the point is: Towne v. St. Anthony, 8 N. D. 200, 77 N. W. 806.

"All equitable defenses may now be interposed in actions at law under the reformed procedure." Pomeroy, Eq. Jur. §§ 85–88.

"Right of possession of a third party is a good defense." Riddle v. Lawrence (Mich.) 17 N. W. 60.

"The thresher has a lien against both the tenants and the landlord's share of the grain, and when the landlord reserves the title in himself, he does so knowing that it is subject to the holder of the thresh bill." Dahlund v. Lorentzen, 30 N. D. 279.

"There does not seem to be any limit to the use of such defenses other than is found in the very nature of equity jurisprudence itself. Whenever equity confers a right and the right avails to defeat a legal cause of action—that is, shows that the plaintiff ought not to recover in his legal action—then the facts from which such right arises may be set up as an equitable defense in bar." Pom. Code Rem. § 92.

Sinness, Duffy & Wheeler, for respondent.

JOHNSON, J. This is a conversion action. The facts are similar to those in the case of Maher v. Boehmer, ante, 592, 192 N. W. 723. The trial court had the same erroneous impression as to the law in both cases, and in this case directed a verdict for the defendant elevator company. In each case, on motion by the plaintiff, a new trial was ordered.

The decision in this case should follow that in the companion case of Maher v. Boehmer, supra. Appellant alleges that there was such defect of proof upon the question of quantity, demand and market value, that a new trial should have been denied. This contention cannot be sustained. We see no reason for questioning the correctness of the action of the trial court in ordering, in the exercise of its discretion, a new trial.

The order of the trial court is affirmed.

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

GEORGE STOSKOFF, Respondent, v. CARL A. WICKLUND, Appellant.

(193 N. W. 312.)

Appeal and error — unanswered question as to whether medical association protected physicians in malpractice actions held prejudicial error though objection sustained by court.

1. In an action for damages for malpractice, where the plaintiff in making his case, on cross-examination of the defendant under the statute, inquired whether defendant was a member of the Northwestern Medical Association, and being answered in the affirmative, he further asked whether defendant had reported the case in to the association, and again whether it was not one of the purposes of the association to protect doctors against malpractice actions, *held* prejudicial error even though the objections interposed to such questions were sustained by the trial court, and the witness not required to answer.

Physicians and surgeons — negligence of physician held for jury.

2. In an action for damages for malpractice, evidence examined and held that on the record as made there is presented a question of negligence as one of fact for determination by the jury.

Physicians and surgeons — injury must be proximate consequence of negligence of physician.

3. The mere fact of the loss of a leg under the care of a physician, although negligence on the part of such physician is established, is not in itself sufficient to sustain a verdict for damages in the absence of evidence tending to show that such loss was the proximate consequence of such negligence.

Opinion filed April 17, 1923.

Appeal and Error, 4 C. J. § 2939 p. 959 n. 84; Physicians and Surgeons, 30 Cyc. p. 1575 n. 51; p. 1588 n. 83.

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

Defendant, Carl A. Wicklund, appeals from the judgment.

Reversed.

Bosard & Twiford and *Craven & Converse*, for appellant.

Note.—On degree of care and skill which a physician or surgeon must exercise, see notes in 37 L.R.A. 830; L.R.A.1915C, 595.

On liability of physicians and surgeons for negligence and malpractice, see note in 93 Am. St. Rep. 657.

On liability of physicians and surgeons for negligence, see note in 48 Am. Dec. 481. See also 21 R. C. L. 381, 382; 3 R. C. L. Supp. 1152; 4 R. C. L. Supp. 1413.

A physician is only held to the exercise of ordinary skill, and in an action for malpractice the burden of proof is upon the plaintiff to show the want of ordinary skill and diligence and to show that the injury alleged resulted from a failure to exercise these requisites. McKee v. Allen, 94 Ill. App. 147.

"If in any case nonexpert testimony of the injury, of the method of treatment adopted, and of the resulting conditions may be such evidence of negligent treatment by an attending surgeon as a jury may act upon,—this case (malpractice) is not such an one." Neifert v. Hasley, 112 N. W. 705.

"This motion should have been granted. There is no proof in the case, other than a mere statement of the plaintiff, that the extraction of the tooth was made in a negligent or unskilful manner. No medical evidence of any sort was introduced. To entitle plaintiff to recover, she must show that the defendants failed to use that degree of professional skill or knowledge which the law requires of them. Nothing is shown in this case, except that the plaintiff suffered severely, was compelled to revisit the dentist for subsequent treatment, and that at some later period a physician was called in. This does not establish defendant's negligence. The judgment should be reversed, and new trial ordered." McCarthy v. Harvard Dental Parlors, 121 N. Y. Supp. 343; Miller v. Toles (Mich.) L.R.A.1915C, 595, 150 N. W. 118; Phoebus v. Mather, 181 Ill. App. 274; Barker v. Lane, 23 R. I. 224, 49 Atl. 963; Farrel v. Haze (Mich.) 122 N. W. 197; Adolay v. Miller (Ind.) 111 N. E. 313; Ewing v. Goode (Ohio) 78 Fed. 442; Zoterell v. Repp (Mich.) 153 N. W. 692; Lorenz Staloch v. Holm, 100 Minn. 276, 111 N. W. 264; State v. Housekeeper, 70 Md. 162; Friend v. Kramer, 236 Pa. 618, 85 Atl. 12.

"Where the evidence discloses no connection between the injury and the negligence charged, except a bare possibility that the former resulted from the latter, there is nothing for the jury, where it is also possible the injury may be due to other causes." Dame v. Laconia Car Co. Works, 71 N. H. 407, 52 Atl. 864; Reynolds v. Burgess Sulphite Fibre Co. 73 N. H. 126, 59 Atl. 615; McGraw v. Kerr (Colo.) 128 Pac. 870; Taylor v. Kidd (Wash.) 129 Pac. 406; Prestley v. Stafford (Cal.) 158 Pac. 776; Moore v. Teed & Seegarden, 3 Cal. 190; Sherwood v. Bab-

cock (Mich.) 175 N. W. 470; Hanson v. Harris (S. D.) 184 N. W. 262; Kelly v. Hollingsworth (S. D.) 181 N. W. 959.

Where the action is based upon alleged ignorance or want of skill on the part of the defendant, *the declaration must directly allege* that the defendant was negligent and unskilful. Barney v. Pinkham, 29 Neb. 350; Mayo v. Wright, 63 Mich. 52, 29 N. W. 832; Hills v. Shaw, 69 Or. 460, 137 Pac. 229; Baker v. Hancock, 29 Ind. App. 456; Martz v. Detweeter, 8 Watts & S. (Pa.) 376.

Frank E. Fisk and *Fisk, Murphy & Nash,* for respondent.

NUESSLE, J. The plaintiff, George Stoskoff, was an old man seventy years of age. He had a corn on the little toe of his right foot. He treated it himself for five or six weeks but it continued to get worse until it became so painful that finally on October 13th, 1919, he consulted the defendant, Carl A. Wicklund, a physician practising at Wildrose, North Dakota. The defendant, after examining the plaintiff's foot, told him that he had a soft corn on the inside of his little toe; that the condition had become so bad that it would be necessary to remove the toe. To this the plaintiff objected and went home. In a few days, however, he returned and submitted to the operation which was performed by the defendant. The defendant had the plaintiff removed to a hotel in the town of Wildrose where he was cared for by the landlord and his wife. The foot did not heal, and a few days afterward the defendant advised the plaintiff it would be necessary to submit to a further operation which the plaintiff agreed to. The defendant put the plaintiff under an anæsthetic and performed the operation, subsequently the plaintiff was again removed to the hotel.

It appears that at the time of the first operation, the plaintiff was suffering from arterio sclerosis and diabetes. The defendant after a cursory examination became aware of the arterio sclerosis, but gave no treatment to remedy the plaintiff's general physical condition prior or preparatory to the operations. The plaintiff remained in the hotel at Wildrose under the defendant's care and treatment from the 15th of October until the latter part of November. The foot refused to heal and gangrene developed. Finally the defendant advised the plaintiff that it would be necessary to amputate the foot, and suggested that as there were no proper facilities at Wildrose it would be necessary for him

to go elsewhere. The plaintiff went to Rochester, Minnesota, and entered the Mayo Clinic. There after receiving treatment on account of his diabetic condition, an operation was performed, but it was necessary at that time, in order to save the plaintiff's life, to amputate the leg above the knee.

The plaintiff testified that he was never at any time advised by the defendant as to his having arterio sclerosis or diabetes; that the defendant made no inquiries as to his age, weight, health, or physical condition either before or after the operations; that he was not advised by the defendant that it would be necessary to amputate the foot until a day or two before he went to Rochester; that the only treatment given to him by the defendant after the operation was an occasional dressing of his foot and the application of first, a black salve and later a powder; that no diet was prescribed for him, and no direction given for his care.

The defendant, on the other hand, testified, that he was aware of the arterio sclerosis prior to the first operation, and that when after the first operation the foot did not heal he made a further examination and further tests and learned of the diabetic condition of the plaintiff; that he prescribed necessary and proper medicine and attention; that he directed that the plaintiff be put upon the proper diet to remedy the diabetes; that at the time of the first operation there was necrosis of the tissue and bone of the little toe; that when after the operation the toe did not heal, the second operation was for the purpose of removing sloughing tissue so that there might be a better drainage and a process of healing begun; that he advised the plaintiff of his condition generally and specifically, told him within a day or two after the operation that it might be necessary to amputate the foot, and gave the plaintiff careful and prompt attention in every respect.

The plaintiff brings this action to recover on account of the negligence of the defendant as a physician in not properly treating, caring for, and prescribing for the plaintiff; he alleges that by reason of such negligence he suffered great physical pain and was compelled to and did submit to an operation for the amputation of his leg, and he prays damages on account of such negligence. The defendant denies any negligence on his part, pleads contributory negligence on the part of the plaintiff, and that the result complained of arose because of the plaintiff's physical condition prior to consulting the defendant. The

cause was tried to a jury; submitted on these issues; and the jury returned a verdict for the plaintiff in the sum of $5,748.60.

At the close of the plaintiff's case the defendant moved for a dismissal because of the asking of certain questions by the plaintiff, which defendant contended would necessarily result in a mistrial, and at the close of the whole case, defendant moved for a directed verdict on the ground of the insufficiency of the evidence to warrant a verdict for plaintiff. After the verdict was returned, the defendant moved for a new trial or for judgment notwithstanding the verdict, which motion was denied.

The matter is here on appeal from the judgment. The plaintiff specifies as grounds for reversal, first, the action of the trial court in denying his motion to dismiss; and second, the insufficiency of the evidence to sustain the verdict, contending that there is no evidence showing or tending to show any negligence on the part of the defendant in connection with his treatment of the plaintiff; that it affirmatively appears that the defendant used the ordinary and reasonable skill and judgment used by practitioners in practising medicine at that place under conditions as disclosed; and that the undisputed testimony shows that the results which the plaintiff has obtained and of which he complains were caused by his own physical condition prior to his consulting the defendant, and not by reason of any negligence or lack of skill or care in the treatment of his ailments.

The matters which the defendant relies upon as justifying his motion for a dismissal at the close of the plaintiff's case, and on account of which he predicates error by reason of the denial of that motion by the trial court, are based upon this portion of the record made just prior to the closing of the plaintiff's case, the defendant being on the stand for cross examination under the statute, Mr. Nash, attorney for the plaintiff, examining:

Q. Are you a member of the Northwestern Medical Association?

A. Yes, sir.

Q. Did you report this case in?

Objected to by the defendant as incompetent, irrelevant, and immaterial.

The court: Sustained.

Q. One of the purposes of that association is to protect doctors against malpractice actions.

Objected to by the defendant as incompetent, irrelevant, immaterial, highly prejudicial, and an attempt to bring prejudicial matters before the jury.

The court: Sustained.

Mr. Nash: I want the record to show that the question was a preliminary question to a perfectly competent question touching the credibility of this witness.

The court: Overruled.

The defendant contends that by the asking of the questions as set out above, the defendant was prejudiced in the eyes of the jury, even though objections to those questions were sustained; that the matters to which the inquiry was directed were clearly inadmissible, and that the sole purpose of the inquiry was to prejudice the defendant. There is much force to this contention on the part of the defendant. We are unable to conceive of any proper purpose that could have been attained thereby. The matter of the propriety and prejudicial effect of an examination or attempted examination of this character has been considered and passed upon by this court on several occasions heretofore. See First Nat. Bank v. Davidson, 48 N. D. 944, 188 N. W. 194; and Beardsley v. Ewing, 40 N. D. 375, 168 N. W. 791. In the case of Beardsley v. Ewing, this Court said:

"Where a fair trial of the issues in a damage suit is likely to be prejudiced by questions such as those pointed out, we are of the opinion that their correction lies largely in the discretion of the trial court. The trial judge, who has the advantage of the atmosphere of the trial, can best determine the extent of the threatened prejudice, and can take the necessary precautionary measures to insure a proper determination of the issues, even to the extent of granting a new trial. Then, too, the defendant, should not be given a free rein to speculate upon the verdict. If it is thought that the jury is prejudiced by reason of improper suggestions made during the trial, steps should be taken at once to secure another trial before another jury. That the interjection of such improper matter during the course of the trial is not, under all circumstances, reversible error, see Edwards v. Burke, 36 Wash. 107, 78 Pac.

610, 17 Am. Neg. Rep. 384; Shoemaker v. Bryant Lumber & Shingle Mill Co. 27 Wash. 637, 68 Pac. 380; Hammer v. Janowitz, 131 Iowa, 20, 108 N. W. 109, 20 Am. Neg. Rep. 324; Johnson v. Devoe Snuff Co. 62 N. J. L. 417, 41 Atl. 936, 5 Am. Neg. Rep. 191; De Mars v. Glen Mfg. Co. 67 N. H. 404, 40 Atl. 902."

The suggestion as therein made with respect to the proper course to be followed by the party aggrieved by such examination was exactly followed in this particular case. The defendant, immediately following the asking of the objectionable questions, directed the matter to the attention of the trial court, asked that a mistrial be declared, that the jury be dismissed, and that the cause be retried to a new jury. There was no attempt at speculation on his part. It cannot be urged that he has in any way waived his right to take every exception to the conduct of the plaintiff's counsel. Thereby this case is distinguished from the Ewing Case.

While it is true that the objections interposed to the questions complained of were sustained, yet by reason of that very fact they may have been and probably were the more prejudicial to the defendant. By objection the matter was particularly called to the attention of the jury. On the other hand, a party should not be deprived of his privilege to urge a valid objection because a greater prejudice might follow. He should not be subject to a possible penalty for insisting upon a proper regard for his rights. Rather the penalty, if penalty there be, should be visited upon the real party at fault. There is no question but that very wide latitude and discretion must be permitted the trial court, but not withstanding the trial court's determination in this particular matter we believe that the examination in question may have been so prejudicial in its effect that on account of the same a mistrial should have been declared.

There remains for consideration the second specification relied upon by the defendant, that is, the question of the insufficiency of the evidence to sustain the verdict. The defendant's contention is, in the first place, that there is no evidence sufficient to warrant the jury in finding negligence on account of the treatment accorded the plaintiff by the defendant; and second, that even though there is evidence to warrant such a finding that there is no evidence anywhere in the record which will warrant a finding that the proximate result of that negligence was the

loss of the plaintiff's leg by amputation; that for all that appears in the record it might have been necessary for the plaintiff to have had his leg amputated, even though he had received proper treatment from the instant that he first consulted the defendant.

We believe that on the whole record there is evidence which might warrant the jury in making its finding of negligence. Both plaintiff and defendant in the instant case are agreed upon the rule that a physician is held only to the exercise of the skill and learning of the profession generally in the community in which he practises. Applying that rule under the facts as shown, if the jury saw fit to give credence to the testimony of the plaintiff and his witnesses rather than to that of the defendant, they would be warranted in making such a finding of negligence. So far as our consideration of this matter goes, the rule is, and we must follow it, that where there is a conflict in the testimony as to those matters having a bearing upon the verdict of the jury, this court must, for the purpose of the appeal, regard the plaintiff's version as being the true one. See Beardsley v. Ewing, supra. On the record the question of negligence is one of fact for the jury, and their finding in that respect is conclusive.

As to the second contention of the defendant, that is, that even though there was negligence on the part of the defendant, nevertheless there is no evidence in the record to warrant a finding that the loss of the plaintiff's leg was the proximate consequence of that negligence, a different situation presents itself. The burden was upon the plaintiff to establish by a fair preponderance of the evidence those things essential to the recovery of a verdict. He must establish not only negligence on the part of the defendant, but also that the result obtained was the proximate consequence of that negligence. Has he sustained the burden?

After a careful consideration of the whole record we are of the opinion that neither the jury, the trial judge, nor this court could or can say from the evidence in the case that the loss of the plaintiff's leg is established to have been the proximate consequence of the defendant's negligence. Therefore, if the failure to establish that matter is vital to the plaintiff's verdict, there must be a reversal of the judgment.

The plaintiff predicates his claim for damages upon, first, the pain and suffering that he was caused by reason of the treatment administered to him by the defendant; and second, that as a consequence of

that treatment he was required to submit to the amputation of his leg. We believe as to the element of pain and suffering, that the record may justify a finding by the jury that the same was caused or enhanced by the negligence of the defendant. In that respect at least the plaintiff may have met his requirement as to proofs. The damages were fixed by the jury in the amount of $5,748.60. There is no claim on the part of the defendant that the damages so found are excessive. His contention is that the plaintiff is entitled to no damages on the record. Our view of the matter is that he may be, but we are doubtful if the evidence is sufficient to sustain the verdict as returned. We are certain that if the jury based their finding on the loss of the leg and the pain and suffering thereby entailed, the evidence is insufficient. In his charge to the jury the trial judge did not particularly specify the various elements of damage relied upon, or distinguish one from the other. Can we now say, the plaintiff, having been permitted to show that he in fact suffered the loss of his leg, and the jury having heard that testimony and made a general finding and fixed the plaintiff's damages, that the defendant was so prejudiced thereby as to warrant a reversal? It appears to us that we can and must do so. The jury were not advised that the proofs in this respect were not sufficient and that they might not assess damages on account of the loss of the leg. It is certain that, having heard the testimony as to the amputation of the plaintiff's leg, they must have taken the fact that he lost the leg and the pain and suffering necessarily attendant upon the amputation into consideration when fixing the damages. It was impossible for the trial court to say, and it is impossible for us to say, how much the jury, when reckoning the damage which the plaintiff suffered, apportioned on account of the various matters which they took into consideration or what matters they took into consideration when reckoning damages. Having the evidence of the loss of the leg before them, the only reasonable inference that can be drawn is that the loss of the leg was one of the elements of damage considered by them, and a very substantial one. It may have been the only one.

We must reverse the judgment for the reason as stated. Although defendant is not entitled to a judgment notwithstanding the verdict, he is entitled to a new trial. Judgment reversed and new trial ordered. Defendant to recover costs.

BIRDZELL, CHRISTIANSON, and JOHNSON, JJ., concur.

BRONSON, Ch. J. (specially concurring). I agree that the judgment should be reversed and a new trial granted only upon the grounds stated in paragraph 1, of the syllabus. I concur in the holding of the court as stated in paragraph 2 of the syllabus.

JACOB DOERR and T. M. Buchholz, Doing Business under the Firm Name and Style of Doerr and Buchholz, a Partnership, Respondents, v. HENRY HUETHER, SR., Appellants, and Wilbur Johnson, Garnishee.

and

T. M. BUCHHOLZ, Respondent, v. HENRY HUETHER, SR., Appellant, and Wilbur Johnson, Garnishee.

(193 N. W. 307.)

Appeal and error — separate action submitted below at same time and disposed of by one order not considered, unless consolidated below.

Two separate and distinct garnishment actions, which have not been consolidated either by stipulation of the parties or order of the court, will not be treated as consolidated so as to permit them to be brought up for appellate review by one appeal merely because they were submitted to the trial court at the time, and by the same counsel, and the trial court disposed of both actions by one order.

Opinion filed April 18, 1923.

Appeal and Error, 3 C. J. § 108 p. 354 n. 55, 56.

Appeal from the District Court of McIntosh County, *McKenna*, J.

Defendant appeals from an order entered denying motions to dissolve and dismiss two separate and distinct garnishment actions.

Appeal dismissed.

I. A. Mackoff, and *Curtis & Remington*, for appellant.

W. S. Lauder, for respondents.

PER CURIAM. A motion has been made to dismiss the appeal on the

ground of duplicity. The material facts are as follows: In December, 1922, T. M. Buchholz instituted an action in a justice's court in McIntosh county in this state against Henry Huether, Sr., to recover upon a certain promissory note in the sum of $80.60, claimed to have been executed and delivered by said Henry Huether, Sr., to said T. M. Buchholz. A garnishment action was, also, instituted in said justice's court, naming one Wilbur Johnson as garnishee. At or about the same time, an action was instituted in the district court of McIntosh county by Jacob Doerr and T. M. Buchholz, copartners, as plaintiffs against Henry Huether, Sr., as defendant. This action was brought to recover the balance claimed to be due upon a certain promissory note in the sum of $349.50, alleged to have been executed and delivered by the said Henry Huether, Sr., and one Rosina Huether, to one Hildenbrand as administrator, and by him, in due course, sold, indorsed and delivered to the plaintiffs. A garnishment action was also instituted in the district court of McIntosh county, ancillary to this latter action, against said Wilbur Johnson as garnishee.

The defendant served an affidavit or answer containing a schedule of his property, and claimed his exemptions both in the justice's and the district court. The record does not disclose what, if any, action was taken in the justice's court. Upon the oral argument it was stated that, through an understanding of the parties, no ruling was made by the justice of the peace, but the papers were presented to the district court and treated as an action commenced in that court. The record further contains claims of exemption made in both actions by the wife of the defendant, wherein she states that she makes the same, because her husband had neglected to make proper claims for exemption. Thereafter, the defendant made a motion in the district court in each of said actions that the garnishment be dissolved, and dismissed, and the moneys in the hands of the garnishee set aside as exempt. The trial court signed and filed a memorandum decision, and also, an order denying the motions. Both the memorandum decision and the order were fully entitled in each of said garnishment actions. The defendant seeks to review the correctness of the trial court's ruling in each of said garnishment actions by one appeal.

In our opinion the motion to dismiss the appeal on the ground of duplicity must be granted. It is true the court filed a memorandum

opinion entitled in both actions; and later signed an order (apparently prepared by counsel for defendant) entitled in both actions, and denying the motions in each of them. It is significant, however, that both the memorandum decision and the order is fully entitled in both causes, and the separate character of the two causes is preserved.

The record contains no stipulation or order for consolidation of the causes. The motions to dismiss were separate. The two main actions relate to entirely different transactions. The parties plaintiff in such actions and in the garnishment actions are not the same. Upon the record it is not at all clear that the decision in one of the garnishment actions necessarily will be controlled or affected by the decision in the other. In the circumstances the order must be deemed an order in each case. It cannot be treated as an order entered in two cases which have been consolidated and become one for the purpose of determination. The great weight of authority is to the effect that in the circumstances here existing two separate and distinct causes cannot be brought up for appellate review by one appeal. 3 C. J. 354, 355.

Appeal dismissed.

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

C. F. BRATTON, Appellant, v. W. G. HOERR, Respondent.

(193 N. W. 308.)

Principal and agent — neither agency nor its powers can be established by declarations of agent.

1. An agent's powers or the fact of his agency cannot be established by his own declarations.

Principal and agent — acts and admissions of agent in contract for labor held inadmissible.

2. While the rule is that where a substantial showing amounting to prima facie proof as to the fact of the agency has been made, an agent's acts and admissions may be admissible under proper instructions, evidence examined and held not to warrant the application of that rule in this particular case.

Opinion filed April 18, 1923.

Agency, 2 C. J. § 692 p. 935 n. 25, 27; p. 938 n. 31, 32; p. 939 n. 43.

Appeal from the District Court of Burleigh County, *Coffey*, J.
Reversed.
J. N. McCarter and *W. L. Smith*, for appellant.
F. E. McCurdy, for respondent.

NUESSLE, J. This action is brought to recover for work and labor done by the plaintiff as a farm laborer for the defendant between the fifth day of October, 1915 and the tenth day of October, 1919. The defendant denies any employment of the plaintiff, and further denies that he is indebted to the plaintiff on any account whatsoever.

It appears that the defendant owned certain farm lands near McKenzie, Burleigh county, North Dakota. One Coffin was farming these lands under a lease. In October, 1915, Coffin hired the plaintiff as a farm laborer. Coffin died in 1917. His widow continued in occupation of the lands. The defendant lived in Mankato, Minnesota. He visited the farm occasionally and knew that the plaintiff was working there. His contention is that the plaintiff was working for the Coffins. Plaintiff contends he was working for defendant. Various sums were paid to the plaintiff on account of his services from time to time, such payments sometimes being made by Coffin in cash or by his personal check, sometimes by Coffin turning over the check of the defendant, and sometimes by the defendant directly to the plaintiff. After Coffin's death his widow sometimes paid the plaintiff.

The plaintiff contends that Coffin was the agent of the defendant and that he, the plaintiff, was hired by Coffin to work for the defendant, and was to be paid by the defendant for such labor as he might perform. The questions in the case when the matter was presented to the jury were whether plaintiff was hired by and for defendant and whether or not Coffin was the agent of the defendant in hiring the plaintiff.

At the close of the plaintiff's case and again at the close of the whole case, the defendant made a motion for a directed verdict. In accordance with the statute, Laws 1921, chap. 133, these motions were denied The case was submitted to the jury. A verdict was returned for the plaintiff. Thereafter the defendant moved for judgment notwithstanding the verdict. This motion was granted. From the judgment entered thereafter in favor of the defendant, this appeal is taken.

The appellant's contention is, first, that on the record as made there was sufficient evidence to warrant the jury in making a finding that the employment of the plaintiff was an employment by and for the defendant, and that such contract of employment was entered into with and through Coffin as the agent of the defendant; second, that even though this is not the case, that there was such error during the course of the trial by reason of rulings on questions of evidence as to prejudice the plaintiff; and that in any event he is entitled to a new trial.

After a careful consideration of the record, we are of the opinion that it is not necessary for us to pass upon the question of the sufficiency of the evidence to warrant the verdict; this, on account of prejudicial error during the course of the trial.

It appears that subsequent to the death of Coffin the defendant came to McKenzie and entered into some arrangement with Mrs. Coffin as to her continuing upon the farm. Thereafter a controversy arose between them, and they arranged and had a conference for the purpose of adjusting their differences. It is the contention of the plaintiff that during such conference the question arose as to who was responsible for the obligations owing to the plaintiff on account of his work and labor done during the time that he worked upon the Hoerr farm; that there was more or less talk about this matter between defendant and Mrs. Coffin and others present at the conference; and that the defendant there made certain statements as to his responsibility for and his undertaking to pay such indebtedness to the plaintiff. On the trial of the case the plaintiff sought, on cross-examination of the defendant, to show such conversations and also produced his own witnesses by whom he sought to make proof as to what was said by the defendant with reference to the matter at the conference. The trial court sustained the objections of the defendant to this line of examination, and on account of this ruling the plaintiff predicates error.

It appears to us that a matter vital to the determination of the controversy was as to what relationship existed between the parties, that is, beween plaintiff, Coffin and Hoerr. Whether plaintiff's wages were in the first instance to be paid by Coffin or Hoerr, and whether plaintiff was the employee of Coffin or Hoerr. That being the case, any acts of, or statements or admissions made by, Hoerr at any time touching these questions were properly admissible, and there was prejudice in

sustaining objections to this line of inquiry. This matter was admissible, not for the purpose of establishing responsibility on the part of Hoerr by reason of any oral promises made by Hoerr to Mrs. Coffin at the time of settling any differences between him and Mrs. Coffin, but for the purpose of throwing such light as it might upon his relationship with and his responsibility to the plaintiff.

As we have indicated above, we do not believe it is necessary to pass upon the question of the sufficiency of the evidence to sustain the verdict. It is impossible for us to say what the plaintiff might have shown had he been permitted to offer evidence as to the defendant's statements with reference to the matter of the employment of the plaintiff and the payment of the plaintiff's wages. On the other hand, an examination of the record discloses error with respect to the admission of testimony prejudicial to the defendant. At the opening of the plaintiff's case, the plaintiff sought and was permitted to show the statements of Coffin to the plaintiff that the defendant was to pay him for his work and labor. These statements were not in the presence and hearing of the defendant, and so far as the record shows, were not communicated to him. This was objected to by the defendant on the ground that plaintiff could not establish Coffin's agency or authority by Coffin's declarations or statements. The plaintiff to justify the offer and admission of this line of testimony urged that it was corroborative of the plaintiff's theory and evidenced his good faith in the matter. However, it seems apparent to us that the real purpose of the inquiry was to establish Coffin's agency. This, of course, could not be done by declarations of the alleged agent. An agent's powers or the fact of his agency cannot be established by his own declarations. Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Gordon v. Vermont Loan & T. Co. 6 N. D. 454, 71 N. W. 556. We recognize the rule laid down in Lake Grocery Co. v. Chiostri, 34 N. D. 398, 158 N. W. 998, that where a substantial showing amounting to prima facie proof as to the fact of the agency has been made, the agent's acts and statements may be admissible under proper instructions; but we do not believe that the state of the record in this case is such as to warrant the application of that rule so as to justify the admission of the testimony complained of. The rule should be applied with caution. An agent's acts and statements cannot be made use of against the principal for the purpose of establishing, en-

larging or renewing his authority until the fact of the agency has been shown by other evidence. Mechem, Agency, 2d ed. ¶ 285.

Reversed and remanded for a new trial. Costs to abide the result.

In this case a rehearing was ordered and a reargument had. This opinion is written after such reargument, and is substituted for the former opinion. No other will be printed.

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

KAROLINA OSTER, Respondent, v. PETER OSTER and Barbara Oster, Appellants.

(193 N. W. 316.)

Husband and wife — instruction as to exemplary damages for alienation of husband's affections not error in view of instruction that actual malice must be shown.

Where, in an action brought by the wife for the alienation of the affections of her husband, the court instructs the jury that they can in no event return a verdict in favor of the plaintiff unless they find that the acts of the defendants on which the suit is predicated were occasioned by actual malice towards the plaintiff, no error was committed by the trial court in further instructing the jury that in event they find plaintiff entitled to recover, under the evidence and instructions, exemplary damages may also be awarded.

Opinion filed April 20, 1923.

Husband and Wife, 30 C. J. § 1023 p. 1148 n. 95, 97.

From a judgment of the District Court of Emmons County, *McKenna*, J., defendants appeal.

Affirmed.

Lynn & Lynn (*A. T. Faber*, of counsel), for appellants.

Note.—On allowance of punitive or exemplary damages in action for alienation of affections or criminal conversation, see note in 16 A.L.R. 1316.

On allowance of exemplary damages in action by wife for alienation of husband's affections, see notes in 46 Am. St. Rep. 477; 130 Am. St. Rep. 426.

See also 13 R. C. L. 1482, 1483; 3 R. C. L. Supp. 151; 4 R. C. L. Supp. 864.

Where the concurrent negligence of two or more persons contribute to the harm, but where the torts are individual and independent of each other, their combined influence may result in injury. It seems that the liability is not joint. Barton v. Barton, 119 Mo. App. 507, 94 S. W. 574; Haisler v. Haisler (Ia.) 127 N. W. 821.

Giedt & Merkle (*Scott & Cameron,* of counsel), for respondent.

This matter is not properly reviewable by this court. Jensen v. Clausen, 34 N. D. 637; State v. Glass, 29 N. D. 620.

Where an instruction relative to punitive damages is erroneous, the appellant can claim no error unless punitive damages were actually allowed. Mikelson v. Snyder, 43 N. D. 416.

CHRISTIANSON, J. The plaintiff brought this action to recover damages from the defendants for the alleged alienation of the affections of her husband, Jacob P. Oster, and the consequent loss of his society, support, and protection. The two defendants are husband and wife and are the parents of plaintiff's husband.

The answer is, in effect, a general denial. The case was tried to a jury and resulted in a verdict in favor of the plaintiff in the sum of $2,500. The defendants have appealed from the judgment entered on the verdict.

The defendants moved for a new trial on the grounds of excessive damages appearing to have been given under the influence of passion or prejudice; insufficiency of the evidence to justify the verdict; errors of law occurring at the trial and duly excepted to, and newly discovered evidence. In the order denying the motion, the trial court said that it was satisfied "that the verdict was not excessive; that it was not given under the influence of passion or prejudice; that there is ample evidence to sustain the verdict; that there is no substantial error either in the admission or rejection of evidence or the court's instructions to the jury; and the court also having carefully examined the affidavits in reference to the newly discovered evidence is not satisfied that this evidence, if given on a new trial, would in any manner change the result, for the reason that much of it is impeaching testimony, much of it relating to times not material and there being no sufficient showing that much of it could not have been produced on the former trial."

The only error assigned, which is argued and relied upon, on this

appeal is predicated upon the instruction to the jury authorizing the allowance of exemplary damages. The instruction complained of was to the effect that if the jury, under the evidence and instructions given, found the plaintiff entitled to any damages, they might in its sound judgment assess such exemplary or punitive damages, if any, as they believed the defendants ought to pay, not exceeding in all the amount claimed in the complaint. It is contended that this instruction is erroneous within the rule announced by this court in Lindblom v. Sonstelie, 10 N. D. 140, 86 N. W. 357. In our opinion the contention is not well founded in view of the other instructions given in this case.

Under our statute exemplary damages may be given "in any action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud or malice, actual or presumed." Comp. Laws, 1913, § 7145. In Lindblom v. Sonstelie, supra, oppression, fraud, or malice did not inhere in plaintiff's cause of action. In other words, in that case plaintiff might be entitled to recover and the jury might have found that the plaintiff had sustained detriment through the wrongful acts of the defendant so as to entitle plaintiff to recover compensatory damages, even though it did not find that the defendant was guilty of oppression, fraud, or malice. Yet, under the instructions in that case the jury was permitted to return a verdict for exemplary damages in case they found for the plaintiff. In other words the jury was instructed that exemplary damages could not be given unless they found the existence of a condition prescribed by the statute as a necessary prerequisite for the allowance of such damages. In the instant case, however, that situation did not exist. For, in this case the court, at the request of the defendants, specifically instructed the jury that inasmuch as the defendants were the parents of plaintiff's husband, that the jury could not find for the plaintiff at all in any amount unless they first found that the defendants in alienating the affections of the plaintiff's husband, were guilty of actual malice and ill will toward the plaintiff. That is, the court by specific instructions given at the request of the defendants, made actual malice an essential element of plaintiff's cause, so that under the instructions, the jury before finding in favor of the plaintiff at all must find the existence of the very condition which under the statute justifies the award of exemplary damages. Elsewhere in its instructions the court fully defined

the terms malice, actual malice, wilful and maliciously. The instructions defining these terms were eminently fair and no error has been predicated thereon.

In these circumstances, it seems to us too clear for controversy that the case is not within the rule announced by this court in Lindblom v. Sonstelie, supra, and that the defendants were not prejudiced by the instruction which permitted the jury to award exemplary damages. It will also be noted that the amount of the verdict in this case is quite reasonable. In the answer in this case the defendants specifically admitted that they were worth at least $50,000. The jury by its verdict found that the defendants wilfully and maliciously had alienated from the plaintiff the affections of her husband and deprived her of his society, support, and protection. It indeed seems quite unlikely that any portion of the verdict was imposed by way of example or punishment.

Judgment affirmed.

BRONSON, Ch. J., and BIRDZELL, NUESSLE, and JOHNSON, JJ., concur.

THE STATE OF NORTH DAKOTA, Respondent, v. CHARLEY MITCHELL, Appellant.

(193 N. W. 310.)

Criminal law — law that instructions be first reduced to writing unless given orally by consent and taken down in shorthand held mandatory.

Section 10,822 of the Compiled Laws of North Dakota for 1913, which requires that "all instructions must first be reduced to writing, unless by consent of both parties entered in the minutes, the instructions are given orally and taken down by the stenographer of the court, in shorthand," is mandatory.

Opinion filed April 21, 1923.

Criminal Law, 16 C. J. § 2467 p. 1031 n. 95, p. 1032 n. 97.

Appeal from the District Court, Williams County, *Lowe*, J.

Reversed and remanded.

W. G. Owens and *A. J. Knox,* for appellant.

There is no statute of any character in this state which provides that the purchaser of liquor is not an accomplice of the seller, and the Laws of 1921 for the state of North Dakota, chapter 97 practically makes the purchaser an accomplice of the seller. Mareno v. State, 84 Tex. Crim. Rep. 660, 145 S. W. 156; People v. Kinsey, 51 Cal. 278.

The jury on the second trial found the defendants guilty of manslaughter, but failed to find on the issues raised by the plea of former acquittal, and were discharged without a verdict on these issues. A judgment having been entered against the defendants on the verdict, convicting them of manslaughter, they have appealed from the judgment and from the order denying a new trial, if there be a plea of not guilty and a plea of former conviction or acquittal, the defendant is entitled to a verdict on each plea, and until there is such a verdict there can be no judgment of conviction. People v. Kinsey, 51 Cal. 278; People v. Halbing, 58 Cal. 567; People v. O'Leary (Cal.) 16 Pac. 884; People v. Fuqua, 61 Cal. 577; State v. Kieffer, 17 S. D. 67, 95 N. W. 289.

That where pleas of not guilty and former jeopardy have been interposed in a criminal action, there must be a verdict on both pleas before a judgment can be entered against the defendant.

F. W. McGuiness, State's Attorney, and *U. L. Burdick,* Special prosecutor, for respondent.

In construing this statute, it has been repeatedly stated by this court that keeping intoxicating liquor for sale, or the selling of intoxicating liquors, contrary to the provisions of law, or both the keeping for sale and the selling, do not constitute the maintenance of a common nuisance within its terms. They are but evidences of the offense. The keeping of the place where the prohibited act or acts are done by the defendant is what the statute inhibits in this form of action. State v. Dellaire, 4 N. D. 314, 60 N. W. 988; State v. Thoemke, 11 N. D. 386, 92 N. W. 480; State v. Rozum, 8 N. D. 558, 80 N. W. 477.

State v. Kelly, 13 N. D. 122, 99 N. W. 1077.

In liquor cases purchasers are not accomplices. See 16 C. J. p. 683; 15 R. C. L. § 167, p. 400.

Where the defendant raises no objection to the failure of the court to comply with some very technical rule, such as the obtaining of oral

consent of parties entered in the minutes to the giving of an oral charge instead of a written one, and it appears that the parties and counsel were present at the giving of the charge and raised no objection thereto, and the charge is, in fact, not prejudicial in any way to the party making the objection, the objection is not well taken. See 17 C. J. p. 353, § 3712 (B); 1 N. W. 291; 11 Enc. Pl. & Pr. p. 266.

The defense of former jeopardy, like any other affirmative defense, must be proven, to some extent at least. The authorities submitted by appellant no doubt state the law, but they are not applicable, as there is no evidence in this case in support of the plea. See R. C. L. p. 120; State v. Webb, 36 N. D. 235, 162 N. W. 358; State v. Dewees, 76 S. C. 72, 11 Ann. Cas. p. 991 and note p. 994, citing California, Iowa, and many other states. People v. Ammerman, 118 Cal. 53, 50 Pac. 15; State v. Keifer, 17 S. D. 67, 95 N. W. 291.

BIRDZELL, J. This is an appeal from a judgment convicting the defendant of keeping and maintaining a nuisance. A number of errors are assigned, but, inasmuch as the record clearly shows a mistrial in the matter of the instructions to the jury, it will not be necessary to refer to any of the other assignments.

The certified transcript contains the following:

"Counsel having finished argument to the jury, the attorney for the defendant being present at all times and making no objection or suggestion and the court overlooking the obtaining of consent to the giving of an oral charge, the following oral charge was given by the court to the jury."

The giving of the oral charge is assigned as error. Section 10,822, Comp. Laws, 1913 reads:

"In charging the jury, the court shall only instruct as to the law of the case, and all instructions must first be reduced to writing, unless by consent of both parties entered in the minutes, the instructions are given orally and taken down by the stenographer of the court, in shorthand." . . .

This statute is clearly mandatory in its requirements that the instructions first be reduced to writing. The defendant on trial has a right to assume that the statute will be complied with and his silence can not be construed as consent. In the absence of inquiry it could not

be known whether or not he was willing to assent to an oral charge being given. The court makes it clear in the transcript that such consent was not obtained. It follows that there was a mistrial and that the judgment must be reversed. See People v. Sanford, 43 Cal. 29; Gile v. People, 1 Colo. 60; State v. Potter, 15 Kan. 302; Hopt v. People, 104 U. S. 631, 26 L. ed. 873, 4 Am. Crim. Rep. 365; 2 Thomp. Trials, 2d. ed. § 2375.

Reversed and remanded for a new trial.

BRONSON, Ch. J., and JOHNSON, CHRISTIANSON, and NUESSLE, JJ., concur.

GEORGE A. BAHNEMANN, Respondent, v. ADOLPH A. LEHMANN, Lillian Lehmann, Paul Lehmann and R. S. Brookings, Appellants.

(193 N. W. 477.)

Depositions — improper to take, return and submit in evidence deposition after trial and filing of briefs without order of court or consent of other party.

1. After a trial has occurred and briefs have been filed, it is irregular and improper for one party, upon his own notice and without action of the court or consent of the other party to take, return, and submit in evidence, a deposition.

Mortgages — evidence held sufficient to sustain judgment for plaintiff in foreclosure of mortgage.

2. Where defendant, after conviction of murder and while pending an appeal, repurchased certain farm personalty from his brother-in-law, the plaintiff, and, with his wife, executed notes and mortgages for an expressed consideration of $24,300, and where, thereafter, in an action to enforce the notes, and foreclose the mortgages, defendant, being an escaped convict, and his wife, through an attorney, assert through answer and evidence that the transaction was affected with fraud, duress, and undue influence, was usurious, and for a real consideration of $14,300 only, it is held, for reasons stated in the opinion, that the findings and judgment of the trial court in plaintiff's favor are sustained by the evidence.

Opinion filed April 21, 1923.

Depositions, 18 C. J. § 73 p. 634 n. 39; Mortgages, 27 Cyc. p. 1132 n. 47.

In District Court, Stark County, *Pugh*, J.

Action to foreclose realty and personalty mortgages.

Defendants have appealed from a judgment on foreclosure.

Affirmed.

T. D. Casey, for appellants.

Every deposition intended to be read in evidence on the trial must be filed at least one day before the trial. Comp. Laws, 1913, § 7905.

Exceptions to a deposition on the ground of incompetency or irrelevancy may be made at the time the same is offered in evidence; other exceptions to deposition must be made in writing, specifying the grounds of objections and filed in the cause before the commencement of the trial. Comp. Laws, 1913, § 7906.

While the time to object to the admissibility of a deposition in evidence may depend upon the nature of the objection urged and the opportunity for previous objection, and is usually regulated by statutes or rules of court, it may be stated as a general rule that objection should always be taken at the earliest opportunity. 18 C. J. 754, § 381.

When the relationship of a certain character is shown, or the circumstances of weakness, necessity, or distress are proved, equity will regard the agreement as procured by undue influence. 13 C. J. 405, § 330.

The plaintiff must show that the transaction was had in the most perfect good faith on his part, and was equitable and just between the parties, or as some of the authorities say, that it was beneficial to the other party. Thomas v. Whitney, 57 N. E. 808; Shevlin v. Shevlin, 105 N. W. 257; Peckham v. Van Bergen, 10 N. D. 43.

We confess our inability to say that we are positive that these things are so; but the probability is overwhelming we think that, if there ever was a case where the parties should be relegated to their original positions and made to deal with each other under the broad principles of equity, this is the case. Dibert v. Peterson, 145 Pac. 589; Brummond v. Krause, 8 N. D. 573.

Standing alone (consideration) it is not evidence of fraud or undue influence; but where the party was under the influence of another and was not a free agent, the fact that the consideration was inadequate is a material element in determining a court of equity to set the contract aside. 13 C. J. 410, § 338.

The surety who executes a note and mortgage to secure the payment

of the price is the person most injured by the vendor's fraud and may sue for cancelation of the note and mortgage. 9 C. J. 1227, § 130.

All that is required to establish a case of usury is a fair preponderance of the evidence, and there is no shift or device on the part of the lender to evade the statute under or behind which the law will not look to ascertain the real nature of the transaction. Phelps v. Montgomery, 60 Minn. 303, 62 N. W. 260; France v. Munro (Iowa) 115 N. W. 577; Drinkall v. State Bank, 11 N. D. 10; Brown v. Skotland, 12 N. D. 445; 39 Cyc. 958, 1054.

A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates. Putnam v. Prouty, 24 N. D. 517.

Since the borrower under a usurious loan is considered to have been forced against his will into the transaction by the oppressive conduct of the lender, the borrower is regarded as not in pari delicto with the lender, and therefore, so long as any part of the usurious debt remains unpaid, he may set up usury as a defense in an action brought by the lender to enforce payment of the debt. 39 Cyc. 1018.

The statutes of usury bind courts of equity as well as those of law. The usurer seeking the aid of a court of equity will be given only such relief as is consistent with the statute. 39 Cyc. 1016.

Courts of equity will not ordinarily require the defense of usury to be set forth with such particularity in the answer as in special pleas either at law or in equity. This is especially true when usury is pleaded for the purpose of avoiding a deed, or other collateral purpose. In such case the bare fact of usury only is material, while in actions for money the extent and character of the alleged usury are of the first importance. 39 Cyc. 1045.

T. F. Murtha (*Sullivan, Hanley,* and *Sullivan,* of counsel), for respondent.

Before a mortgage which is valid and regular upon its face can be set aside by a court of equity for the reason that its execution was obtained by fraud and duress, there must be clear and convincing proof of such facts. Englert v. Dale, 25 N. D. 587.

Statement.

Bronson, Ch. J. This is an action to foreclose both realty and per-

sonalty mortgages. Defendants have appealed from a judgment of foreclosure and have demanded a trial de novo.

The facts are: In 1917 Adolph Lehmann, a single man then aged thirty-one years, was possessed of some 800 acres of land in Stark county. There he was engaged in farming, cattle and sheep raising. He had considerable stock and machinery. On May 20th, 1917, he killed one Wetzstein. On May 22nd, 1917, he gave a mortgage upon his land to his counsel for $3,500. He was arrested and confined in jail. While there, on June 8th, 1917, he gave to plaintiff a bill of sale covering his horses, cattle, sheep, machinery, and household furniture situated on his farm, for a consideration of $9,000; also, a lease of the land from June 8th, 1917, to December 31st, 1919, for a consideration of $1,000; $500 payable immediately and $500 in November, 1918. The plaintiff is the brother-in-law of Adolph. Plaintiff's mother married Adolph's father. Plaintiff paid the consideration of $9,500 and took possession of the property. Later, in September, 1917, bail was fixed for Adolph at $20,000. His brother and plaintiff became his bondsmen. Adolph gave to them a mortgage upon the land to secure $20,000. Adolph was released from custody. Adolph went to Beach, North Dakota, and lived there most of the winter following. In January, 1918, after trial he was convicted of murder in the second degree and sentenced to serve twenty years in the penitentiary. After the trial he went to his farm where plaintiff was living and remained there a month or so. Plaintiff and Adolph had negotiations concerning the return or resale of the personal property so sold and concerning the cancelation of the lease. Adolph contemplated a period of about two years during which he might remain without the penitentiary, go back upon his farm, and rehabilitate his property interests. On March 18th, 1918, Adolph married his present wife whom he had met while at Beach. On March 25th, 1918, Adolph and plaintiff signed a written agreement for sale of the personal property upon the farm including a threshing machine; also the cancelation of the lease, for a total consideration of $24,000 to be secured by a mortgage upon the land and all personal property. Plaintiff therein agreed to assume the mortgage of $3,500 to Adolph's counsel and a mortgage of $1,200 against the land. This agreement provided for execution of the papers on March 30th, 1918. On that day in a bank at Richardton, North

Dakota, Adolph and his wife made ten promissory notes aggregating $24,430 payable, respectively, $1,430 and $3,000, on July 1st and November 1st, 1918; and $3,000 and $1,000, respectively, on July 1st and November 1st, 1919, 1920, 1921, and 1922. They made also a realty mortgage upon the land and a chattel mortgage upon the personalty to secure the same. On the same date they also made to plaintiff and Adolph's brother another mortgage upon this land to secure $20,000, the amount of plaintiff's bond for his freedom during the course of an appeal to the supreme court. After these papers were executed, plaintiff and his wife took possession of the farm and personalty; there they lived throughout the summer and in 1919. Plaintiff paid the mortgage to Adolph's counsel and the $1,200 mortgage upon the land. For a time and until about May 11th, 1918, he remained on this farm where Adolph and his wife were. Later he went to California. The notes that fell due in 1918 and 1919, as well as the interest upon the whole indebtedness at 10 per cent up to October 27th, 1919, were paid. On November 15th, 1919, this court affirmed the judgment of conviction rendered in the trial court. See State v. Lehman, 44 N. D. 572, 175 N. W. 736. Later, Adolph became an inmate of the state penitentiary to serve his sentence. Subsequently, while a trusty, he escaped. His whereabouts, of course, are unknown. In 1920 the wife remained upon the farm. In 1921, it was in the possession of the wife's tenant. Poor crops upon the farm resulted in 1919. No payments have been made upon the principal of the notes due since 1919 excepting two items amounting to $162.50. In June, 1921, this action of foreclosure was instituted.

An answer in behalf of Adolph and his wife was interposed which alleges that the notes and mortgages were given pursuant to an agreement to loan them $24,430 with interest at 10 per cent, of which they had received only $14,430; that plaintiff retained $10,000 as interest; that defendants are entitled to be relieved upon payment of $14,300 to plaintiff; that such agreement, furthermore, was executed for such amount, $24,430 with interest at 10 per cent, in order to secure plaintiff against any loss upon the bail bond and with the understanding that when defendants had paid $14,430 with interest at 10 per cent plaintiff would satisfy the mortgages and debt. Otherwise, the answer alleges relations of trust existing between the parties and fraud, duress, and

undue influence by plaintiff upon Adolph by reason of his arrest, conviction, and the necessity of having a bail bond. As a counterclaim the answer further demands double the amount of excess payments upon the ground that the transaction was usurious. Trial was had in the lower court in December, 1921.

Pursuant to the testimony of Adolph's wife, when the notes and mortgage were executed plaintiff agreed to satisfy the mortgage and debt upon payment of $14,430; that pursuant to an oral agreement, Adolph possessed the right to repurchase the personal property at the same price plaintiff paid therefor after allowing plaintiff 10 per cent interest on his money and $50 per month while he remained on the place. That, in addition, there was the agreement that plaintiff should assume the mortgage given to Adolph's counsel and the mortgage on the land for $1,200; and that Adolph should pay for the threshing outfit $2,000.

There was also testimony to the effect that this deal was thus made to protect plaintiff upon the bail bond and Adolph against the greed of his counsel.

Pursuant to the testimony of Adolph's brother, who had signed his bond, plaintiff told him that he had it fixed so that the lawyers could not get any more money from Adolph; that plaintiff, out of the personal property purchased, sold cattle, calves, and wool from the sheep receiving therefor substantial amounts.

Pursuant to the testimony of Adolph's father, when the personal property was sold by Adolph to plaintiff, plaintiff told Adolph he could buy the property back at the same price plaintiff paid for it; that if plaintiff sold any of the property it would, accordingly, lessen the price therefor; that plaintiff further told him that the mortgage was for about $14,000; that when Adolph paid that amount he would remit the $10,000.

Another witness testified to the effect that the plaintiff told him that Adolph had given him a note for $10,000 additional so that Adolph's counsel could not get everything Adolph had.

Pursuant to the testimony of plaintiff, he bought this personal property only after inspection and consideration; it was a good deal. He had sold his farm and was planning on going away. He cropped the land in 1917 and secured only 92 bushels of wheat; when Adolph came there after the trial, he was not anxious to sell, but Adolph was so anx-

ious to buy that he finally made a contract with him. Then, the land was all prepared and, through a rising market, prices had accordingly increased; he made out an inventory of the property which figured up in the aggregate $17,233. It was before them in the negotiations. Then, Adolph desired also to purchase the threshing machine. Finally, they agreed on a total consideration of $19,000. The agreement to assume the mortgage given to Adolph's counsel and the mortgage on the land were additional items. On the agreed date, March 30th, 1918, they went to the bank and there the itemized account was present and a statement then was had including additional items such as taxes paid, cash loan to Adolph, interest paid, and other expense items which made up the total amount, $24,430. These items were all written down there in the bank by one Kern in the presence of plaintiff and Adolph and they were then added up on an adding machine and the amount determined.

The assistant cashier of the bank testified that he made out the papers; they advised him what they desired, he wrote it down and then typed the papers. He did not hear any conversation in regard to the notes and mortgages.

When the testimony was closed in December, 1921, plaintiff stated that he wanted to take the deposition of Kern. Later, on March 23d, 1922, he served upon defendant's counsel notice for the taking of the deposition of Kern in Los Angeles, California.

The trial judge in his memorandum opinion states that this deposition was taken upon the suggestion of the court. The record does not disclose any court order in that regard. Upon motion made, he refused to suppress the deposition although he offered to defendants the right to cross-examine Kern at some subsequent hearing. The trial court made findings to the effect that there was no fraud, undue influence, or misrepresentation in securing the execution of the notes and mortgages; that no usurious interest was retained or agreed to be retained by plaintiff; that defendants, Adolph and his wife, executed such notes with full knowledge of their contents and that such notes represented the amount due plaintiff on March 30th, 1918. Judgment of foreclosure was accordingly ordered for $19,633.04, costs included.

Decision.

The defendants maintain that the deposition of Kern should have been suppressed. The manner in which this deposition was taken, assuredly, was irregular and improper. After trial and submission of briefs, it conduces neither to orderly procedure nor judicial expedition to permit one party, upon his own initiative and notice, to cause a deposition to be taken without order of court or consent of opposing counsel. The purpose of the statute requiring depositions, taken upon notice, to be made and returned before the trial, is clear, Comp. Laws, 1913, § 7905. In the instant case, however, the deposition of Kern afforded simply cumulative evidence. The action is in equity and triable de novo. For purposes of considerations given herein, this deposition may be disregarded.

The defense is grounded upon an oral agreement for resale made at the time of the original sale by Adolph in 1917 and, upon an oral agreement, accompanied by fraud and undue influence at the time of the resale in 1918 to Adolph, to the effect that upon payment of $14,300 and interest thereon, plaintiff would satisfy the debt and mortgages. Upon these oral agreements usury is predicated. The defendant is seeking equitable interposition to enforce these oral agreements. The questions presented are largely questions of fact. No extended discussion of the evidence is deemed necessary. The record has been fully considered.

Were these oral agreements made? If made, do the circumstances invoke principles of equity so as to require their enforcement? It may be noted that the defendants seek to revise, not to cancel, the contract of sale; to have the true consideration ascertained and to enforce that consideration alone.

The trial court found that these alleged oral agreements were not made. At the time of the original sale, plaintiff and Adolph evidenced the sale by a written contract. It is not sought to set aside this written contract. At the same time, a written lease of Adolph's land was given. The validity of this lease is not questioned. Prior to this time Adolph had given to his counsel a mortgage upon this land. Plaintiff had not yet become a bondsman. The evidence is insufficient to establish that these written instruments were given for purposes of security or to

evidence a loan. When Adolph was admitted to bail, plaintiff and Adolph's brother, his bondsman, received the mortgage for $20,000 to secure them. After Adolph's conviction and appeal to this court his bondsmen, again for the new bond, received security by a similar mortgage. Thus, plaintiff, his bondsmen, received security. When the resale was made, a written agreement was again made between plaintiff and Adolph expressing a consideration of $24,000 which included the assumption and payment of certain mortgages by plaintiff. This agreement was dated March 25th, 1918. Later, on March 30th, 1918, the notes and mortgages, now questioned, were executed by Adolph and his recent wife in fulfilment of the prior agreement. Now it is claimed that the real consideration for this resale was only $14,300 and that an oral agreement was made to satisfy the mortgages and return the notes when this real consideration was paid. Further; that the price so fixed upon the resale was so grossly disproportionate to the original sale price as to corroborate the testimony of the witnesses concerning these oral agreements and to establish, under the circumstances existing, fraud, duress, undue influence, and abuse of confidential relations. Plaintiff demanded upon a resale, $19,000 for his personalty and the cancelation of Adolph's lease. He made an itemized statement of the property and his price therefor. The existence of this statement at the time of the negotiations between plaintiff and Adolph on March 25th, 1918, is not disproved. This statement indeed shows high values placed upon property that he purchased from Adolph for $9,000, but it included seed wheat, seed flax, seed potatoes, and hay and wheat on hand, presumably, not included in the original bill of sale. It also included $1,500 for the cancelation of a lease and also a threshing machine. When the notes and mortgages were executed this $19,000 sale statement was supplemented by another statement including the mortgages to be assumed by plaintiff, a cash loan, and other items whereby the amount of $24,430 was determined.

The contract was harsh, even improvident. But, is the evidence sufficient to establish that the true consideration was $14,430 and sufficient to overturn the written contract of the parties? We are not prepared to so hold or that the findings of the trial court should be reversed. This record involves a family affair. Adolph complains that the plaintiff, his brother-in-law, imposed upon him at a time when he was helpless

and was compelled to comply with his wishes; yet, Adolph, after his conviction of murder, had no hesitancy in entering the marriage state, in engaging in business like any other free citizen, and in contemplating an evasion of the penalty of his crime through law delays for a period of some two years. While thus free, Adolph, upon the record of his payments and his conduct, did not seek to question this contract or the amount thereof. Later, his wife, while in possession, personally or through a tenant, did not seek to question this contract. When his appeal in his criminal case came to this court it was placed promptly upon the calendar, heard and determined within one month after filing of briefs and argument. After his incarceration to serve his sentence and while a trusty, he escaped and since has been at large.

By proxy, he is before this court again, now seeking the interposition of equity to aid him; whilst he in person, somewhere in hiding, evades the mandate of this court, jests at the majesty of the law, and refuses to conform to its sanction. The property involved was Adolph's property. The wife is concerned to the extent of her personal liability upon the notes. There was no homestead existing when the mortgages were executed. Neither Adolph nor his wife was then living on the land. Upon the record, the wife is in no position stronger than that of her husband. Disregarding the evidence contained in the deposition, we are satisfied that the evidence is insufficient to set aside the written agreements of the parties, to establish fraud, duress, or undue influence, or to characterize the agreements of the parties as a loan transaction. The judgment is affirmed with costs.

CHRISTIANSON and JOHNSON, JJ., and BURR, Dist. J., concur.

BIRDZELL, J. (dissenting). As I view this case it presents a single issue of fact, namely, what was the consideration for the mortgages and notes given by Adolph and Lillian Lehmann to the plaintiff in this action? I am aware that the consideration is stated not only in the mortgages, but in memoranda that were made at the time of the negotiations, and I agree that this statement of the consideration should not be considered as legally impeached unless the evidence is of a satisfactory character. In a case where the evidence of witnesses is conflicting, and where the trial court has had the superior opportunity to weigh their

testimony, the appellate court should be reluctant to disturb the findings. However, this being a trial de novo, it is the duty of this court on appeal to retry the issues on the record as best it can in the light of the foregoing considerations.

It seems to me that there are a number of circumstances to be considered in weighing the evidence in this case to which there has not been attributed the weight which would ordinarily attach to their existence. Among these circumstances may be mentioned the following: Within two days after Adolph Lehmann's crime was committed, he gave a mortgage to his attorney for $3,500, and within three weeks of that same date, through negotiations conducted partly by the same attorney, he had realized in cash $9,000 for personalty sold to his brother-in-law Bahnemann, and $500 for a lease upon the land which carried with it a growing crop of more than 200 acres, all of this money being deposited in a bank to the credit of the same attorney. The record shows that this was a fair approximation of the value of the property purchased. There is testimony to the effect that at the time the sale contract was made it was agreed that Adolph might repurchase at the same figure, plus interest and compensation for care of the property. In the nine months intervening the original sale and the resale, the plaintiff had realized about $2,500 from the property sold. When the resale was agreed upon the valuation of all items was approximately double that at which they had been purchased by Bahnemann a short while before. Witnesses testified to the effect that Bahnemann admitted the valuation did not represent the real amount Lehmann was obliged to pay; that it was $10,000 in excess of his real obligation and that the amount was placed high to protect him against the further rapacity of lawyers. Whether or not this reflection on the profession or upon any particular counsel is warranted is wholly beside the issue here, but, taken in connection with the promptness with which counsel apparently had been paid $13,000 before the trial of the defendant in this action, it would appear that there were grounds for apprehension in the Lehmann family, and it is only reasonable to expect that they would have contemplated some preventative measures of this character. Another circumstance is the uncertainty of Adolph being permitted to remain upon the farm long enough to successfully carry the heavy burden that he was assuming. Whatever abandon he might have manifested by his rash

criminal act, this record abounds with evidence, largely circumstantial in character, of his business ability and thrift. Though being approximately thirty-one years of age, he held in his own right 800 acres of land almost clear and personal property valued conservatively at $9,000 to $10,000. Furthermore, the business ability manifested in the making of the large payments after the repurchase contract is not to be ignored. Altogether it seems highly improbable that such an improvident contract would have been made. The explanation, in accordance with the admissions testified to by the various witnesses, seems to me to give a much more reasonable account of the stated consideration than the testimony of Bahnemann in support of his exaggerated valuations. Furthermore, it may be remarked here that if such be the proper explanation, it is not likely it would have been discussed with the assistant cashier of the bank who made out the papers. The valuation of the property moreover, appearing in the memoranda, is a lump valuation. The property is not itemized nor appraised save in Bahnemann's own book.

Evidence to establish that the true consideration for a contract is other than the consideration stated in the agreement itself, does not need to be as strong as that required to establish fraud, duress, undue influence or unfair dealing; because, as is commonly known, a false consideration is frequently stated between parties to a transaction when neither has any fraudulent purpose in mind with respect to the other and when such false consideration is entirely consistent with fair dealing.

Taking into account all the circumstances disclosed on this record and weighing the testimony in the light of the situation of the parties, I am of the opinion that it satisfactorily establishes that the notes and mortgages to the extent of $10,000 were not based upon any consideration; that the contract between the parties was one whereby the property involved was sold by Bahnemann to Lehmann at substantially what Bahnemann had paid for it, which, together with indebtedness assumed by Bahnemann, made up the total of $14,430. The plaintiff should be permitted to foreclose for this amount, crediting the defendant with the payments actually made.

P. J. JACOBSON and Charles Dunn, Copartners Doing Business as Jacobson and Dunn, Respondents, v. A. HORNER, Appellant.

(193 N. W. 327.)

Pleading — complaint assailed for first time at trial, as failing to state cause of action by objection to evidence, liberally construed.

1. A complaint assailed for the first time at the trial by an objection to the introduction of evidence on the ground that the complaint fails to state facts sufficient to constitute a cause of action will be liberally construed.

Pleading — complaint in action by seller to recover damages for nonacceptance held good as against general objection to evidence as not stating cause of action.

2. In the instant case, a complaint in an action by the seller against the buyer to recover damages for nonacceptance of goods *held* not vulnerable to such general objection.

Sales — measure of damages for buyer's breach of contract for purchase of personal property states.

3. In an action by the seller against the purchaser of personal property for damages for nonacceptance of such property, the seller is entitled to recover such damages as naturally resulted from the purchaser's refusal to carry out the contract, that is, the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract. (Uniform Sales Act, Laws 1917, § 64, chap. 202.)

Sales — measure of damages for breach of contract to buy personal property where available market for goods states; method of determining damages for breach of contract to buy personal property where no available market for goods stated.

4. Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market price or current price at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptance, then at the time of the refusal to accept (Uniform Sales Act, Laws 1917, § 64, chap. 202) where there is no available market at the place where the goods ought to have been accepted, then, for the purpose of computing damages for breach of contract occasioned

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Note.—The general rule seems to be that where a vendee of personal property refuses to accept it the vendor may resell it, taking proper measures to secure as fair and favorable sale as possible, and the difference between the contract price and the proceeds of the sale will be the proper measure of damages for breach of the contract of sale, in the absence of other evidence upon the subject, as will be seen by an examination of the cases collated in notes in 52 L.R.A. 249; 42 L.R.A. (N.S.) 680. See also 24 R. C. L. p. 114.

by the refusal of the buyer to accept and pay therefor, the market value may ordinarily be ascertained by taking the value at the nearest available market, less the cost of delivery at such market.

Appeal and error — may be restricted to question affected by error.

5. Where the error committed upon the trial of an action relates solely to a question which is separable from the other issues determined by the first verdict, the new trial may be restricted solely to the question affected by the error.

Opinion filed April 7, 1923. Rehearing denied April 30, 1923.

Appeal and Error, 4 C. J. § 3234 p. 1194 n. 86, p. 1195 n. 90; Pleading, 31 Cyc. p. 82 n. 11, p. 759 n. 93; Sales, 35 Cyc. p. 591 n. 41, 42; p. 592 n. 53; p. 594 n. 57; p. 599 n. 4.

Appeal from the District court of Emmons County, *McKenna*, J.

Defendant appeals from a judgment and from an order denying a motion for judgment notwithstanding the verdict or for a new trial.

Reversed and remanded for a new trial on the issue of damages alone.

Lynn & Lynn, and *Scott Cameron*, for appellant.

E. T. Burke, for respondent.

CHRISTIANSON, J. This action involves a contract for the sale of cattle. In their complaint the plaintiffs allege: That plaintiffs are copartners; that the defendant is engaged in the business of buying, shipping, and selling cattle; that at the times mentioned one J. A. Horner, a son of the defendant, was defendant's agent, authorized to purchase cattle for him and in his name and to issue checks in defendant's name upon his account in the Farmers State Bank of Linton; "that on or about the 27th day of August, 1919, the said defendant acting by and through his agent J. A. Horner bought from the plaintiffs herein ten cows and sixty-one steers and then and there agreed to pay to the order of these plaintiffs the sum of nine thousand dollars ($9,000), of which sum $200 was to be in cash and the balance was to be paid to the plaintiffs from the proceeds of said cattle as soon as they were shipped by the defendant, which was to be within a period of ten days. That in pursuance of said contract, said defendant through his agent aforesaid caused to be executed and delivered to this plaintiff two certain checks in words and figures as follows, to wit:

Linton, N. Dak., Aug. 27, 1919.
FARMERS STATE BANK
Pay to———Charley Dunn——or order———$100.00.
A. Horner,
By H. A. H.

Linton, N. Dak., Aug. 27, 1919.
FARMERS STATE BANK
Pay to————P. J. Jacobson or order————$100.00.
One Hundred and no/100ths dollars————
A. Horner,
By H. A. H.

"That shortly thereafter the price of cattle in the open market declined and the said defendant in violation of his contract wrongfully refused to pay the balance due upon said contract and refused to take the cattle from the premises of the plaintiffs according to his agreement and notified the plaintiffs that he would not further abide by the said contract, and went to the said Farmers State Bank at Linton, North Dakota, and ordered it to stop payment upon said checks; that pursuant to said order, the said Farmers State Bank of Linton, North Dakota, dishonored said checks and the plaintiffs were obliged to pay the sum of six & 20/100ths ($6.20) dollars protest fees thereon. That immediately upon being notified by the defendant of his refusal to abide by the contract, the plaintiffs proceeded to sell said cattle for the benefit of the said defendant and obtained therefor the highest obtainable market price at said date which was the sum of $7,000 which these plaintiffs have credited upon the said account. That plaintiffs have demanded and caused to be demanded of the defendant the payment of the balance due upon the purchase price aforesaid prior to the commencement of this action, but defendant has refused and still refuses to pay the same or any part thereof." The prayer for judgment was for $2,000 and interest and costs. The answer consisted of general and specific denials, placing all of the averments of the complaint in issue.

The case was tried to a jury upon the issues thus framed. After the jury had been empaneled and sworn to try the case and the first witness placed upon the stand to testify the defendant made a general objec-

tion to the introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. The objection was overruled.

The evidence adduced by the plaintiffs was to the effect that on August 27, 1919, they sold seventy-one head of cattle to J. A. Horner, as agent of the defendant, for the sum of $9,000, and received from him the two checks set out in the complaint. Shortly prior to this, the plaintiffs had ordered cars for the purpose of shipping their cattle to market. Upon making the sale to defendant, they canceled the orders for cars. At the time of the transaction between said J. A. Horner and plaintiffs, he (J. A. Horner) stated that his father would be over in three or four days and take the cattle and pay the balance due plaintiffs on the contract. On or about September 1, 1919, the defendant did come over and he went out and examined the cattle. There is a square conflict in the evidence as to what was said between the parties while he was there, but it is undisputed that he was unwilling to take the cattle at the price agreed upon. The defendant claimed throughout the entire trial that J. A. Horner was not his agent, and had no authority to purchase cattle in his own name, or draw checks on his account in payment thereof. The evidence adduced by the plaintiffs was to the effect that after defendant refused to take the cattle they ordered cars and shipped the cattle to Chicago as soon as possible, and that the cattle were sold in the usual and open cattle market in Chicago, and that plaintiffs received therefor slightly less than $7,000.

At the close of plaintiffs' case and again at the close of all the evidence, defendant moved for a directed verdict on the following grounds: That there is a material and fatal variance between the cause of action alleged and the facts proven, and that upon the facts proven the plaintiff has shown no right of recovery; that the facts proved show that the right of recovery, if any, was a personal right, and not a partnership right; that there has been no notice of intention to rescind the contract by the seller after the repudiation by the buyer and before the resale, as required by the Sales Act of 1917; that the complaint does not state a cause of action; that there is no evidence to substantiate the allegation of partnership of the plaintiffs; that there has been no evidence admitted which could justify a verdict for the plaintiffs. The motion was denied, and the cause submitted to the jury. The jury returned

a verdict in favor of the plaintiffs for $2,000. Defendant moved for judgment notwithstanding the verdict, or for a new trial. The motion was denied, and defendant has appealed.

It is well to state at the outset that the sufficiency of the evidence to sustain the verdict has at no time been questioned by any specification of insufficiency. In other words, the legal sufficiency is questioned only on the grounds stated in the motion for a directed verdict. The appellant rests his case squarely upon the errors of law claimed to have been committed by the trial court. He contends that the court erred in overruling his objection to the introduction of any evidence and his motions for a directed verdict. He further contends that the court erred in its instructions to the jury.

It will be noted, that in the motion for a directed verdict it was asserted that the cause of action did not belong to the plaintiffs as a copartnership. It is true the evidence shows that some of the cattle belonged to the two plaintiffs individually although the greater portion of the cattle sold belonged to the plaintiffs jointly under a partnership arrangement. The evidence, however, clearly shows that the plaintiffs jointly sold all the stock, that is, that Jacobson and Dunn sold to the defendant the entire seventy-one head of stock and that they stood ready and willing to deliver them to the defendant in accordance with the original agreement; that the only reason the cattle were not so delivered was because the defendant refused to take them. In the circumstances we do not believe that the defendant is in a position to urge that the plaintiffs may not bring this action as they did. In any event, the point may well be deemed waived as it is not supported by any argument in the brief.

All the other contentions advanced by the appellant on this appeal are predicated upon certain provisions of the Uniform Sales Act (Laws 1917, chap. 202).

Appellant contends that the cause of action set forth in the complaint is one for the recovery of the balance due on the purchase price; and he asserts that under the provisions of § 60, chap. 202, Laws 1917, the seller in case a resale is made is not entitled to sue for the balance of the purchase price, but is entitled to recover only the loss occasioned by the breach of the contract of sale. He further contends that if the action be deemed one for damages for nonacceptance of the cattle it

must fail for the reason that the measure of damages set forth in the complaint is incorrect under § 64, chap. 202, Laws 1917, which provides that in such case:

"(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptance, then at the time of the refusal to accept."

In our opinion these contentions are not well founded. In this state all forms of actions and of pleadings have been abolished. Comp. Laws, 1913, §§ 7355, 7439. A plaintiff is only required to set forth in his complaint a plain and concise statement of the facts constituting his cause of action and a demand for the relief to which he supposes himself entitled, and, if the recovery demanded is money, to state the amount demanded. Comp. Laws, 1913, § 7440. The complaint under consideration here sets forth a contract for the sale of the cattle and a breach of the contract by the defendant. The complaint further sets forth what the plaintiffs did following the breach and the net loss resulting to them and demands judgment against the plaintiff for the amount of such loss. It is immaterial whether the plaintiffs' attorney, at the time he drew the complaint, had an erroneous theory as to the measure of damages. The question is whether the facts alleged show a cause of action and in our opinion that question must be answered in the affirmative; because, as already stated, the complaint does show a contract, a breach of the contract, and resulting damages to the plaintiffs. The failure to state the measure of damages did not render the complaint vulnerable to the objection made to the introduction of any evidence thereunder, Guild v. More, 32 N. D. 432, 451, 155 N. W. 44.

But it is contended that the court erred in its instructions to the jury upon the measure of damages. The instructions given on this question were as follows: "I charge you that in a breach of obligation arising from contract, the measure of damages is the amount which will compensate the party aggrieved for all the detriment approximately

caused thereby, or which in the ordinary course of things would be likely to result therefrom. Detriment is a loss or harm suffered in person or property. I charge you then that the measure of damages in this case, if you find from the evidence that the plaintiffs are entitled to any damages, would be the difference between the contract price of the cattle, namely, $9,000, and the market or current price of the cattle at the time and place when the cattle should have been accepted and shipped by J. A. Horner or his father A. Horner. *That if you believe from the evidence that the defendant did in fact buy the cattle through his duly authorized agent J. A. Horner on the 27th day of August,* 1919, *that he then refused to accept the cattle and so notified the plaintiffs, that the plaintiffs within a reasonable time thereafter and as soon as they could secure cars, shipped the cattle to the open market at Chicago, Illinois, and there sold them to the highest bidder, at public market, the measure of damages would be the difference between the contract price and the price which said cattle brought on the open market at the time of the sale, it having been shown here that there was no public market for the sale of said cattle at Fort Yates, North Dakota, or in the vicinity of the place where the plaintiffs lived.* But in no event can you allow the plaintiffs here a greater sum in damages than that asked for in their complaint, namely, $2,000, but it is for you, gentlemen of the jury, to determine from all the evidence in this case what damage, if any, the plaintiffs suffered by reason of the failure of the defendant, A. Horner, to accept the cattle, if you believe from the evidence that the defendant, A. Horner, actually bought the cattle through his agent J. H. Horner."

Appellant does not complain of the first part of the instruction just quoted, but asserts that the part which is printed in italics is erroneous. In our opinion the instruction complained of was not erroneous under the facts in this case. It will be noted that the instruction assailed is merely a part of the instructions relating to the measure of damages. Of course, the instructions must be considered as a whole, and viewed in the light of the facts of the case. The undisputed evidence here is to the effect that there was no market for live stock at Fort Yates and that it was essential to ship the cattle from that point to some available market. The evidence in this case does not disclose what place or places were available stock markets, or that there was any market for this stock

more readily accessible than the Chicago market. We have a situation where the current or market price at Fort Yates must necessarily be determined by the market price elsewhere less the necessary cost of transporting the cattle to the market. In considering the measure of damages prescribed by the Uniform Sales Act (Laws 1917, § 64, chap. 202) in an action for damages for nonacceptance of the goods, Williston (Williston, Sales, pp. 967, 968) says:

"The amount of the plaintiff's recovery in an acttion for breach of contract should be such a sum of money as will put him in as good a position as he would have been in had the defendant performed his legal obligation by carrying out the promise sued upon. The application of this rule to the law of sales is generally easy. If the buyer had accepted and paid for the goods as he was bound to do by his contract, the seller would have been obliged to incur all the expense of delivering the goods at the time and place agreed on, and he would on the other hand have received the price or become entitled to it. The buyer's wrong leaves him still in possession of the goods and frees him from any expense of delivering them, and on the other hand, deprives him of the price. His loss then is the difference between the value of the goods and the price which he was to receive for them. If he is saved any expense by not being obliged to put the goods in deliverable condition or to transport them to a particular place, this also must be taken into account. But the essential element of damage is conveniently expressed by the formula—the difference between the contract price, that is, the amount of the obligation which the buyer failed to fulfil, and the market price—that is the value of the goods which the seller has left upon his hands. As the market price varies, with time and place, it is essential to fix upon the market price at the time and place provided in the contract. The matter may, therefore, be summarized—that the measure of damage is the difference between the contract price and the market price of the goods at the time and the place when the contract should have been performed. If the market value for the goods equals or exceeds the contract price, though a legal wrong has been committed, the plaintiff has suffered no damage thereby, and, though entitled to judgment, can only get nominal damages. As the burden is upon the plaintiff to show what damage, if any, he has suffered, it is incumbent upon him, in damages to show that the market value of the goods is less

than the contract price. Though the market value at the time and place where delivery should have been accepted under the contract is the exact matter to be determined, that value sometimes cannot be determined directly. There may be no available market at that place. In such a case the value at the nearest available market will be accepted, taking the expense of transportation into account."

The same question was considered by the supreme court of Massachusetts in Barry v. Cavanagh, 127 Mass. 394. There the purchaser had failed to take paving stones when they were tendered him for acceptance at a designated place. In considering the amount of damages to which the seller would be entitled the court said:

"Now, if, when they were brought to Dover street bridge, where there was no market for them, it would cost all they would sell for at a market to carry them to the market, they were valueless there, and they would be entitled to recover the contract price in order to be made whole. If they (the stones) could be conveyed to a market for a part of what they would sell for, they were worth at the bridge the market price less the cost of getting them to the market, and the true rule would be the difference between what they were so worth and the contract price. Stated otherwise, if they were salable where they lay, to be delivered elsewhere at a price larger than the cost of delivery, the excess of such price above the cost of delivery was the market value, which should have been deducted from the contract price, in order to get at the damages."

See also Morrell v. Northern P. R. Co. 46 N. D. 535, 179 N. W. 922.

Under the evidence in this case it is not apparent that the plaintiff was prejudiced by the instruction of which he complains. The undisputed evidence is to the effect that there was no available market for the cattle at Fort Yates, and that this fact was known to the parties when the contract was made. At the time the contract was made, the plaintiffs had ordered cars in which to ship the cattle. When the defendant breached the contract he knew that by this act he left in the hands of the plaintiffs, and compelled them to keep stock for which there was no available local market. He also knew that some time would elapse before the necessary cars could be obtained for transporting the cattle. There is no evidence as to any available cattle market for the kind of cattle in controversy nearer than Chicago. Even if we

assume (as has been suggested we should) that there was an available market for the cattle at South St. Paul, there is nothing to indicate that that was a more favorable market than the Chicago market. In the circumstances it does not appear that the instruction was prejudicial. Morrell v. Northern P. R. Co. supra.

After the jury had retired they asked the court for further instruction upon the question whether the jury should fix the amount of damages in case they found in favor of the plaintiffs. The court, in response to such request, instructed the jury as follows: "Gentlemen of the jury, in case you find for the plaintiffs and against the defendant on all the issues under the evidence and the instructions heretofore given you by the court I will answer yes to your question as to whether the jury shall fix the amount of damages which you may deem the plaintiffs entitled to, qualified, however, to this extent, that the evidence as to what the plaintiffs received on the Chicago market for the seventy-one head of cattle it is undisputed that that amount was slightly under $7,000, and the contract price of the cattle being $9,000, then the plaintiffs, if you find them entitled to recover at all under the evidence, are entitled to recover at least $2,000, nor can they recover more than that amount. Does that answer your question?"

As already stated, the sufficiency of the evidence was not challenged in any manner in the trial court, except by the motion for a directed verdict. And an examination of the record shows that the trial court was correct in stating that there was no dispute in the evidence as to the amount which the cattle brought upon the Chicago market. It is also undisputed that the defendant refused to accept the stock; and that thereupon, the plaintiff shipped the cattle to the Chicago stock market and sold them at the earliest possible moment. And there is no contention but that the sale was fairly made in the open market and that the cattle were sold to the highest bidder, and brought all they were actually worth at the then prevailing prices. In the circumstances, the writer is of the opinion that the defendant was in no manner prejudiced by the instruction last quoted. A majority of the court, however, are of the belief that the court in giving that instruction, invaded the province of the jury. They are further of the opinion that, under the evidence as a whole, the jury was not required to return a verdict in the sum of $2,000, but might have returned a verdict in a lesser amount if

in their judgment the plaintiffs, in fact, sustained a lesser loss. Hence, the verdict must be set aside and a new trial had.

It is apparent, however, upon the record before us that the parties to this action received an eminently fair trial of all the questions in issue therein, excepting alone, the question as to the amount of damages plaintiffs are entitled to recover. This being so, we are all agreed that the new trial should be limited solely to the question of damages. See 4 C. J. 1194, 1195; Scandinavian American Bank v. Westby, 41 N. D. 276, 172 N. W. 665; and authorities cited.

The judgment and order appealed from are therefore reversed and the cause is remanded with directions to retry the issue of damages, and that issue alone. Appellant will recover the costs of this appeal.

BRONSON, Ch. J., and JOHNSON, BIRDZELL, and NUESSLE, JJ., concur.

O. T. SANDO, Respondent, v. J. E. BURKE, Appellant.

(193 N. W. 252.)

Chattel mortgages — evidence held insufficient to sustain counterclaims of mortgagor in foreclosure.

Where defendant purchased a tractor and gave a note and mortgage thereupon to secure the unpaid purchase price and immediately transferred, by bill of sale, this tractor to his wife, and where, thereafter, in an action to foreclose the mortgage, defendant set up various counterclaims for damages sustained in failing to get possession of the tractor and, also, concerning an agreement to reduce the price of such tractor, it is *held*, for reasons stated in the opinion, that such counterclaims have not been established.

Opinion filed April 14, 1923. Rehearing denied April 30, 1923.

Chattel Mortgages, 11 C. J. § 548, p. 726 n. 46.

In District Court, Ward County, *Lowe*, J.

Action to foreclose a chattel mortgage upon a Fordson tractor.

From the judgment of foreclosure, defendant has appealed.

Affirmed.

Palda & Aaker, and *J. E. Burke,* for appellant.

J. J. Coyle and *O. B. Herrigstad,* for respondent.

The right of a mortgagee to declare a mortgage due where he feels himself insecure has been passed on in this state and upheld in the case of Englund v. Southers, 22 N. D. 261, 133 N. W. 301.

In some jurisdictions a provision in the mortgage that the mortgagee may take possession of the chattels and foreclose whenever he deems himself insecure confers on him an arbitrary right which he may exercise without showing ground for deeming himself insecure. Werner v. Bergman, 28 Kan. 60; Klein v. Lippe, 46 Wis. 123, 49 N. W. 832, and Thorpe v. Flemming, 78 Kan. 237, 96 Pac. 470.

Circumstances such as the sale of the mortgagor of part of the encumbered property has been enumerated as affording reasonable grounds for the mortgagees taking advantage of the insecurity clause. Allen v. Cerny, 68 Neb. 211, 94 N. W. 151.

Giving the mortgagee permission to take possession if he deems himself unsafe is equivalent to giving him the right to possession whenever he chooses to demand the property. Gage v. Wayland, 67 Wis. 566.

If the mortgage authorizes the mortgagee to take possession when he deems himself insecure, he may do so even if no reasonable ground exists therefor. Werner v. Bergman, 28 Kan. 60, 42 Am. Rep. 152.

The mortgagee's right to take possession is not to be measured or determined by the fact that he deemed himself unsafe, but is absolute, at least, in the absence of anything to show bad faith or an express purpose to oppress the mortgagor. Richardson v. Coffman (Iowa) Jan. 31, 1923.

Statement.

BRONSON, Ch. J. This is an action to foreclose a chattel mortgage. Defendant has appealed from a judgment of foreclosure. The facts, necessary to be stated, are: On April 5th, 1919, at Minot, North Dakota, defendant purchased from plaintiff a Fordson tractor, for a consideration of $950. Defendant paid $300 in cash and gave his note for $650 due October 1st, 1919, secured by a chattel mortgage upon the tractor. At the same time, plaintiff made to defendant a bill of sale of the tractor. This bill of sale was not filed. On the same day, de-

fendant gave a bill of sale covering the tractor to his wife, and immediately filed the same in the office of the register of deeds. On April 6th, when plaintiff went to file his mortgage, he found that defendant's bill of sale to his wife had been filed. On April 7th, at defendant's office, plaintiff made inquiries about the filing of this bill of sale. Pursuant to plaintiff's testimony he advised defendant that, since the tractor and defendant's farm lands were in his wife's name, she should also sign the note; that defendant told him that his wife had nothing to do with this business; he refused to secure her signature upon the note; that thereupon he advised defendant that he would expect him to pay before he delivered the tractor. Pursuant to defendant's testimony, when plaintiff called, he told him that he would fix the matter by having his wife sign a waiver of priority. On April 10th, 1919, the wife did sign a written statement, acknowledging the priority of the mortgage over the bill of sale to her. This waiver was filed in the office of the register of deeds on April 17th, 1919. Pursuant to plaintiff's testimony, he never received this waiver of priority and first knew about it when he was advised that it had been filed. Plaintiff filed his chattel mortgage on April 11th, 1919. Pursuant to defendant's testimony, after he bought this tractor he went to his farm to have the men come and get the tractor; that on April 7th, 1919, he called plaintiff over the phone; told him his men were there; thereupon, plaintiff refused to permit delivery of the tractor for the reason assigned, that he could not sell defendant's note. The chattel mortgage contained a provision to the effect that if the mortgagee at any time should deem himself insecure, he would be authorized to foreclose the mortgage. On April 17th, 1919, plaintiff, as mortgagee, issued a notice of foreclosure upon the assigned ground that default existed in the terms of the mortgage in that the mortgagee deemed himself insecure. This notice was sent to a newspaper for publication. Pursuant to plaintiff's testimony, he had three reasons for deeming himself insecure, namely, plaintiff claimed to be the owner of a half section of land which plaintiff found he did not own; he gave a bill of sale to his wife and did not want, nor get, his wife to sign the note. On the same date, April 17th, 1919, defendant's wife instituted claim and delivery proceedings against the Moore Motor Company, in whose possession the tractor was stored, and secured possession of the tractor. The attempted foreclosure was re-

strained. On April 19th, 1919, the plaintiff in this action sought to intervene in the claim and delivery proceedings. On April 22nd, 1919, the attempt to intervene was denied. On April 22nd, 1919, the sheriff certified in a return that he delivered the tractor to the plaintiff (defendant's wife) in the claim and delivery proceedings.

Pursuant to defendant's testimony, he was farming, in the season of 1919, approximately one-half section of farm lands. He intended to use the tractor on this land. He had deeded this half section to his wife as a wedding present; but he was farming it. Plaintiff knew that the tractor was to be given to his wife. In fact, the bill of sale was drawn in the name of his wife; defendant's name was substituted through objections made by plaintiff involving the fact that the mortgage was executed by defendant. Defendant received the tractor on April 23, 1919. He did work during that summer with the tractor.

Further, pursuant to defendant's testimony, plaintiff represented that this was a 1919 tractor whereas it was a 1918 tractor; the plaintiff promised to give to defendant any drop in the price that would be effective in 1919; there was a drop in the price of the Fordson tractors to the extent of $200 in 1919; by reason of the delay that defendant suffered in not securing possession of the tractor between April 5th and April 23d and being compelled to hire work done on the farm he suffered damages in the sum of $513.50; the tractor was defective; he was compelled to expend moneys in the claim and delivery action; his total damages, consequently, amounted to $1,060.95.

In the summer of 1919 plaintiff placed this note and mortgage as collateral security to indebtedness at a bank in Berthold, North Dakota. On October 5th, 1919, defendant herein secured an injunctional order restraining such bank in Berthold and the plaintiff herein from interfering with plaintiff's possession of the tractor and restraining any foreclosure proceedings excepting by proper action. On October 17th, 1919, this action was started to foreclose the mortgage. Theretofore plaintiff had become repossessed of the note and mortgage. In this action a warrant of seizure was issued and the tractor was taken into possession of the sheriff through defendant receipting for the possession thereof.

In this action, defendant in its answer has set up various counterclaims for damages through failure to secure possession of the tractor,

for expenses and legal proceedings involved in connection with securing and repairing the tractor and also to recover for the difference in the purchase price of the tractor in 1919 and 1918.

Upon findings the trial court ordered judgment against the defendant upon the note and for foreclosure of the chattel mortgage.

Opinion.

The proceedings and evidence adduced by the parties have been set forth somewhat at length. These proceedings, in connection with the evidence, determine, upon fundamental grounds, this law suit. Defendant's wife is not a party nor has she sought to intervene in this action so far as the record discloses.

On April 5th, 1919, defendant transferred by bill of sale all interest that he possessed in the tractor to his wife. Ever since that time she has possessed, through defendant's own acts, all possessory rights and title in the tractor. Since that time, defendant has no right, title, nor interest in the tractor. Manifestly, he cannot complain of deprivation of possessory rights nor of any damages occasioned thereto after the transfer to his wife. The counterclaims and evidence in support thereof establish no cause of action whatsoever against the plaintiff. With respect to the alleged agreement to reduce the price of the tractor, we find the evidence insufficient to establish any such agreement. The judgment of the trial court is accordingly affirmed with costs.

BIRDZELL, NUESSLE, JOHNSON, and CHRISTIANSON, JJ., concur.

MANDAN NEWS PUBLISHING COMPANY, a Corporation, Respondent, v. THE BOARD OF CITY COMMISSIONERS OF THE CITY OF MANDAN, NORTH DAKOTA, and H. L. Henke, as President of, and C. E. Edquist, Thomas Conroy, J. B. Fredericks, and N. H. Romer, as members of the said Board of City Commissioners of the City of Mandan in the State of North Dakota, and W. H. Seitz, as City Auditor of said City, Appellants.

(193 N. W. 608.)

Newspapers — unnecessary and unauthorized composition to legal notice not proper basis for computing publication fee.

Where, in publishing a legal notice, a printer departs widely from the copy and from directions given, adding useless and unnecessary composition, such composition is not a proper basis for computing the legal publication fee under chapter 93 of the Laws of 1921.

Opinion filed May 1st, 1923.

Newspapers, 29 Cyc. p. 703 n. 79 New.

Appeal from the District Court of Morton County, *Lembke*, J.

Reversed and remanded.

C. F. Kelsch, for appellants.

The verdict of the jury upon controverted issues of fact is conclusive and binding upon the court in mandamus proceedings. 26 Cyc. 482, note 68.

The verdict of the jury is sustained by substantial evidence, and that the court has no power or authority in law to vacate and set aside such a verdict. 16 N. D. 546; 20 N. D. 443; First State Bank v. Kelly, 30 N. D. 84.

The verdict of the jury upon an issue of fact upon which the evidence is contradictory and upon termination of which the credibility of the witnesses must be determined, is binding upon the court. Drinkall v. Movius State Bank, 11 N. D. 10; Casey v. First Bank, 20 N. D. 211; Montana R. Co. v. Lebek, 32 N. D. 162; Senn v. Steffan, 37 N. D. 491.

T. J. Krause and *C. L. Crum*, for respondent.

"Where the county clerk delivers to a publisher a mass of material

from which to publish an election notice and intrusts him with the responsibility of publishing such notice, the publisher, in order to charge the county for the work, is not required to employ such language or form as will occupy the least possible space and still comply with the law." People v. Alleghany County, 105 App. Div. 629, 93 N. Y. Supp. 1143, 105 App. Div. 40, 93 N. Y. Supp. 426.

"He (the judge) is a constituent part of the organization, but he is not the court. Nor is the court room the court, nor the jury room, nor the petit jury. The court is the totality of the constituent parts. It consists of the entire judicial organization for the trial of causes, and it is immediately present whenever and wherever—from the opening to the adjournment of the sitting—these constituent parts are actually performing the functions devolving upon them by law." 15 C. J. 715; Re Choate, 18 N. Y. Civ. Proc. Rep. 180, 186, (aff'd in 56 Hun, 351, 9 N. Y. Supp. 321, 18 N. Y. Civ. Proc. 230, 24 Abb. N. C. 430, 8 N. Y. Crim. Rep. 13 affd. in 121 N. Y. 678, 24 N. E. 1095).

A change of judges after verdict and before final decree does not change the court. For all judicial purposes it remains the same. See Hedrick v. Hedrick, 28 Ind. 291.

The court says it is not error to direct the entry of judgment notwithstanding the verdict when it is established by the evidence, as a matter of law; that a verdict should have been directed, and it further appears from the evidence that it is not probable that a different state of facts would be shown on another trial and a different result reached than that reached by directing judgment, notwithstanding the verdict. Richmire v. Andrews & G. Elevator Co. (N. D.) 92 N. W. 819.

The court is not bound to render judgment according to the verdict. See People ex rel. Dunkirk v. Batchelor, 53 N. Y. 128, 13 Am. St. Rep. 485. The syllabus in part reads as follows:

"B2, R. S. 587 § 37, it is provided that in case a verdict shall be found for the person suing out an alternative writ of mandamus, a peremptory mandamus shall be granted to him without delay.

"Held, that the relator is not entitled to a peremptory mandamus after verdict in his favor, where the record shows no legal right in respect to matters of fact."

A judgment of dismissal notwithstanding a verdict for plaintiff should be granted where the evidence precludes any right of plaintiff

to recover. McVeety v. Harvey Mercantile Co. 24 N. D. 245, 139 N. W. 586; L.R.A.1916E, 828.

Richman v. Muscatine County (Iowa) 42 N. W. 422. There was a change of judges in the same case and the supreme court in the sixth paragraph of the syllabus says: "Where a demurrer to a petition for certiorari was overruled and defendants made a return and at the further hearing a different judge presided, and in ruling upon the issues presented by the return, some of which were the same as those raised by the demurrer, held a different view of the law from that held by the former judge and made rulings opposed thereto. The latter rulings are the controlling ones in that court." Seery v. Murray (Iowa) 77 N. W. 1058.

BIRDZELL, J. The plaintiff applied to the district court of Morton county for a writ of mandamus commanding the officers of the city to issue a warrant in the sum of $862.27, which amount is alleged to be owing to the plaintiff for the publication of a special assessment notice in sewer district No. 1. The petition alleges the publication of the notice, the quantity of composition and that the legal fee, computed according to chapter 93 of the Session Laws of 1921, is $862.27. It also alleges a pretended audit of the claim and its allowance in the sum of $465.30, and further alleges that the audit was illegal and made with the intent to cheat and defraud the plaintiff out of the full payment of its fee. Upon presentation of the petition to the district court, an order was made directing the issuance of an alternative writ of mandamus. To the alternative writ the defendants make a return alleging that the publication should have contained a lesser number of lines and that the use of additional lines was unnecessary and not a proper basis for a legal charge against the defendant. The issues of fact were tried before a jury and a verdict rendered in favor of the plaintiff for $488.12 with interest. Thereafter a motion for judgment non obstante was made by the plaintiff and the court set aside the verdict and entered a judgment requiring the defendants to issue a warrant in the sum of $862.27. From this judgment the defendants appeal. No question is raised concerning the propriety of the remedy.

The specifications of error challenge the correctness of the trial court's ruling in setting aside the verdict of the jury and ordering judgment

directing the payment of the amount claimed. It is claimed that there was not a reasonable compliance with the directions of the special assessment commission in the matter of the publication and that, in pursuing its own judgment in the matter, the plaintiff inserted much additional and useless composition for which it is not entitled to compensation at the legal rate. The city engineer, who acted as clerk of the assessment commission, testified that he took the assessment list to the plaintiff for publication and gave directions to the plaintiff's manager with reference to the printing of the subdivision at the head of a column so that a single line of type would ordinarily suffice for each description; that plaintiff's manager said it would not make any difference in the cost whether he got it all in one line or two; that thereupon the witness stated, if it would not cost any more, it would not make any difference; that after leaving plaintiff's office he went back for further information, took a paper out of his pocket to show plaintiff's manager how such notices were published elsewhere; whereupon plaintiff's manager said: "My boy, I have been in this business twenty years; I know my business and know what I am doing."

The copy submitted is typed in form as follows:

Subdivision	Description		Benefit	Assessment
HEART VIEW	Lot	Block		
do	1	5	$53.58	$53.58
do	2	5	53.58	53.58
do	3	5	53.58	53.58
etc.				

In the printed notice the same descriptions appear thus:

Subdivision	Description	Benefit	Assessment
	Block		
Heart View Addition, lot 1, ...	5	$53.58	$53.58
Heart View Addition, lot 2, ...	5	53.58	53.58
Heart View Addition, lot 3, ...	5	53.58	53.58
etc.			

In the case of one addition, known as Helmsworth & McLean's Addi-

tion, the name was long enough to warrant, if not require, the use of three lines of print and the name of the subdivision was composed in full for each description. In other instances where the name of the subdivision was so short that the full description would clearly not occupy more than one line, the word "lot" was repeated in each description instead of being placed at the head of the column (as in the copy submitted) similar to the word "Block"; so that by the repetition of this word in each individual description there was not left sufficient room on the line for placing the lot number. In this scheme of economy two lines are made to do the work of one. To illustrate, as it is printed it runs:

Subdivision	Description Block	Benefit	Assessment
Mandan Proper, lot 1, ...	1	$107.16	$107.16
Mandan Proper, lot 2, ...	1	107.16	107.16
Mandan Proper, lot 3, ...	1	107.16	107.16

etc.

As it would have been had the printer followed the copy:

Subdivision	Description Lot	Block	Benefit	Assessment
MANDAN PROPER				
do	1	1	$107.16	$107.16
do	2	1	107.16	107.16
do	3	1	107.16	107.16
etc.				

An examination of the printed notice makes it perfectly apparent that the composition served the purpose of making a wasteful maximum a basis for the legal fee, the printer assuming the privilege and the responsibility of departure from the directions afforded by the copy. There can be no warrant for so wide a departure from the copy and the resultant excessive bill rendered. The verdict of the jury was clearly right. The trial court erred in setting it aside. The order of this court is that the judgment of the trial court be, and the same is, hereby re-

versed and the cause remanded with directions to enter judgment on the verdict.

BRONSON, Ch. J., and NUESSLE, CHRISTIANSON, and JOHNSON, JJ., concur.

HANNAH HULTBERG, et al., Plaintiffs and Contestants, v. WILLIAM O. HULTBERG, Defendant and Proponent.

(193 N. W. 605.)

Wills — evidence in case involving competency and undue influence held sufficient to support finding that instrument was not true will.

In a will contest it is *held*, for reasons stated in the opinion:

1. The finding of a jury to the effect that the will offered for probate is not the true will of the testator is not contrary to, but has substantial support in, the evidence.

Wills — contention that will is contractual as well as testamentary presented for first time on appeal not considered.

2. The contention that a will is contractual as well as testamentary will not be considered when presented for the first time in the appellate court.

Trial — instructions must be considered as a whole.

3. Certain errors assigned upon instructions considered, and held without merit.

Opinion filed April 9, 1923. Rehearing denied May 3, 1923.

Trial, 38 Cyc. p. 1778 n. 73; p. 1779 n. 75, 76; Wills, 40 Cyc. p. 1023 n. 29; p. 1165 n. 87; p. 1352 n. 15.

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

William O. Hultberg appeals from a judgment refusing to admit a will to probate, and from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

Affirmed.

Note.—On evidentiary force of circumstances that one benefited by a will was the draftsman thereof, or was active in procuring its execution, see note in 28 L.R.A. (N.S.) 270.

See also 28 R. C. L. p. 145; 5 R. C. L. Supp. 1517.

Geo. P. Gibson and *J. A. Hyland,* for appellant.

The request to make a will does not constitute undue influence. Re Cressicks (Iowa) 156 N. W. 415.

"By no unprejudiced construction of the testimony can the facts of this case be brought under any subdivision of said section." Ingwaldson v. Skrivseth, 75 N. W. 772.

In order to make out a case of undue influence, the facts must show by clear and satisfactory evidence, (1) that the testator was subject to such influence, (2) that the opportunity to exercise it existed, (3) that there was a disposition to exercise it, and (4) that the result appears to be the effect of such influence. Re Skrinsrud (Wis.) 147 N. W. 370.

Mere appeals to the affections, or the impulse of gratitude, however importunate, are not sufficient. Fjone v. Fjone, 16 N. D. 100, 112 N. W. 70.

As a contract this will would be good and valid even if the same should be invalid as a will. Torgerson v. Hauge (N. D.) 159 N. W. 6.

"A will executed under an agreement founded upon a valuable consideration is contractual as well as testamentary. In the latter aspect it may be revoked without consent of the beneficiary, but not in the former." Nelson v. Schoonover, 89 Kan. 388, 131 Pac. 147.

Undue influence to invalidate a will must be something which destroys the free agency of the testator at the time the instrument is made, and which in effect substitutes the will of another for that of the testator. Schmidt v. Schmidt (Minn.) 50 N. W. 598; Stockton v. Thorn (Minn.) 39 N. W. 143; Seebrock v. Fedwa (Neb.) 46 N. W. 650; Mitchel v. Mitchel (Minn.) 44 N. W. 885.

McCulloch & McCulloch and *Newton, Dullam & Young,* for respondents.

In Re Hess, 51 N. W. 615, wherein the court says, quoting from Re Storer, 8 N. W. 827:

"From the nature of the case the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly in the presence of others so that it can be directly proved but the circumstances relied on to show it must be such as taken all together point unmistakably to the fact that the mind of the testator was subjected to that of some other person so that the will is that of the latter and not the former."

"That a fiduciary relation exists between testator and the chief beneficiary of the will who prepared and drew the instrument, establishes undue influence on the part of the beneficiary.

"Any relation existing between parties to a transaction wherein one of the parties is in duty bound to use the utmost good faith for the benefit of the other, is a confidential or fiduciary relation."

Johnson v. Shaver (S. D.) 172 N. W. 676; Busch v. Delano (Mich.) 71 N. W. 628; Dusley v. Gates (Mich.) 86 N. W. 959; Hughes v. Meideith (Ga.) 71 A. D. 127; Tyled v. Gardner (N. Y.) 35 N. E. 559; 40 Cyc. 1153.

"It is reversible error to exclude all the evidence and direct a verdict in a will contract where there is evidence tending to establish undue influence on the part of the beneficiary." Abbott v. Church, 288 Ill. 91, 4 A. L. R. 975; Poier v. Mfg. Co. 18 N. D. 556; McLean v. Nurnberg, 16 N. D. 144; Van Gordon v. Goldamer, 16 N. D. 323; French v. Hail Ins. Co. 29 N. D. 426.

"A contract to leave by will can be proved only by clear and satisfactory evidence, especially where the contract is oral." 20 Cyc. 1072.

CHRISTIANSON, J. This is an appeal from a judgment of the district court of McLean county, denying the probate of a will. The will in question was executed by Peter P. Hultberg on June 17th, 1908. He died April 12th, 1921, leaving surviving him his widow, one son and three daughters. He was possessed of property aggregating in value about $15,000. By the terms of the will all of this property was given to the son William, subject to a life estate to the mother (who is over seventy-five years of age) and legacies to the three daughters, aggregating $675. William was named executor without bond. In October 1921, William petitioned for the probate of the will. The surviving widow and three daughters contested such probate, asserting: (1) that the testator was mentally incompetent to make the will; (2) that the testator did not know the provisions of the will at the time he signed it and that the provisions therein were misrepresented to him; (3) that at the time he executed the will, the decedent was under undue influence, exerted by his son William. The county court admitted the will to probate. The surviving widow appealed to the district court and the case came on for trial in the district court before a jury. The

jury returned a verdict in favor of Hannah Hultberg, the surviving widow, to the effect that the will offered for probate was not the true will of the deceased. Subsequently, the proponent, William O. Hultberg, moved for judgment notwithstanding the verdict or for a new trial. The motion was denied and William O. Hultberg appeals.

On this appeal it is contended that the evidence is insufficient to sustain the verdict and that the court erred in denying the motion for a directed verdict and the subsequent motion for judgment notwithstanding the verdict, or for a new trial. It is further contended that the court erred in its instructions to the jury. These propositions will be considered in the order stated.

The decedent and his surviving widow were married in Sweden some fifty-three years ago. They came to America and settled in Minnesota about forty years ago. In 1905 they became residents of McLean county in this state. The son William accompanied his parents to North Dakota. He was at that time about seventeen years of age. He lived with his parents on the farm and was active in the management thereof. Evidence was adduced on the part of the contestants to the effect that shortly before the will in controversy was executed, William approached his father and insisted that he execute a will devising and bequeathing all his property to him (William), and that during such conversation he stated to his father, "You got to make the property over to me or I will quit you." The evidence shows that before coming to America the deceased was assaulted and robbed; that his assailant hit him on the head with a club and severely injured him and that he never fully recovered from such injury. The evidence further shows that before coming to North Dakota he was injured in an accident in Minnesota, at which time he received severe injury in and about his head. While the evidence shows that the decedent in a sense handled his own affairs, it also shows that he was a man of rather weak mind, who, in the management of his affairs, leaned largely, if not wholly, upon his son William. The decedent could neither speak nor read the English language.

According to the testimony of the appellant, the decedent was not present at the time the will was prepared. The appellant testified that he went to the city of Washburn and procured the services of the then county judge in the preparation of the will. The county judge who pre-

pared the will testified,—and his testimony is undisputed,—that he received no directions whatsoever from the testator and so far as he knew the testator was not present at the time the will was prepared, but that he prepared the will entirely from the directions which he then received from the appellant. After the will had been prepared, appellant took it home. He testified that he read it to his father and mother, translating its provisions into Swedish. On this point, he was contradicted by his mother, who stated that he did not read or explain the will to them.

Some time afterwards, the testator accompanied by the appellant, went to a neighboring town, where the will was signed by the testator in the presence of the subscribing witnesses. The subscribing witnesses did not understand Swedish and it is undisputed that the testator did not have a sufficient knowledge of English so that he, personally, could read or understand the will which he signed. There is no contention that any conversation was had between the testator and the subscribing witnesses. According to their testimony, it was the appellant and not the testator who asked them to sign as subscribing witnesses. In other words, so far as the execution of the will is concerned, it is undisputed that the son William, the proponent of the will, was the dominating factor from the beginning to the end. And there is no evidence, aside from the testimony of the appellant, tending to show that the testator knew the contents of the will, or even knew that he was executing a will, at the time he signed the instrument in controversy here.

In these circumstances, we are not prepared to say that the evidence here did not justify the submission of the case to the jury, or that the verdict is contrary to the evidence. We have a situation here where the testator at the time of the execution of the will and for a long time prior thereto had been in a large measure, if not wholly, dependent upon the advice and guidance of the proponent; where the proponent was the principal actor in procuring the preparation and execution of the will, and was the principal beneficiary under it; where the testator was an old man of subnormal rather than normal mental power, and unable to speak or read the language in which the will was written. The authorities are generally agreed that circumstances like these cast upon the proponent of a will the burden of showing that the testator knew the contents of the will at the time he signed it. See authorities col-

lated in note in 28 L.R.A.(N.S.) 271; Keller v. Reichert, ante, 74, 189 N. W. 692. The only evidence adduced by the appellant in this case tending to show that the testator knew the contents of the will at the time he executed it, was appellant's own testimony. On this question, however, appellant was contradicted by his mother. The credibility of witnesses and the weight of their testimony were questions for the jury. Keller v. Reichert, supra. The jury by its verdict determined these questions adversely to the appellant. The trial judge, who saw the parties and witnesses and heard their respective stories, refused to interfere. This court may not substitute its judgment for the judgment of either the jury or the trial judge, but is limited to a review of the correctness of the rulings made below. And we are agreed that upon the record here it cannot be said that the verdict was contrary to or without substantial support in the evidence.

It is contended that the will under consideration was contractual as well as testamentary; that William O. Hultberg would have left his parents if the will had not been made; that the execution of the will and the benefits conferred upon William O. Hultberg by the provisions thereof induced him to remain at home and aid his parents in operating the farm. In our opinion the appellant is not in position to raise that question. He elected to enforce the instrument as a will and not as a contract. He instituted a proceeding to have the instrument probated as a will. The theory now suggested that there was a contract to make a will, and that the instrument should be enforced as a contract even though denied validity as a will was in no manner presented in the trial court. The appellant must adhere to the theory on which the case was tried in the court below, and cannot present the question now urged for the first time in the appellate court. Ugland v. Farmers & M. State Bank, 25 N. D. 536, 137 N. W. 572; 3 C. J. 718, et seq.

The trial judge, among others, gave the following instructions to the jury:

"With reference to the second question, gentlemen, and that is, as I have heretofore explained to you, was the testator Peter P. Hultberg at the time of the making of such will free from fraud or from undue influence? *Did the deceased Hultberg make and execute the allowed will in all its provisions of his own free will and volition so that it now expresses his own wishes and intentions, or was he constrained or coerced*

through the undue influence, restraint or coercion of another or others in making his will to act against his own desire and intention as regards the disposition of his property or any part of it? Did he at the time that he signed the alleged will and executed the same know what it contained, and did he intend that which the said will did with the property disposed of by him by means of the will?

"I charge you, gentlemen of the jury, that upon this second question, that is, as to the matter of the freedom of the testator from fraud or from undue influence, the burden is upon the plaintiffs and contestants to show that the making of the will was obtained by undue influence or that it was made by Peter P. Hultberg under a misapprehension and mistake as to the contents of the will, and that he executed it at the time it was executed believing it to be other than that which it really was; and in order to defeat the will and to find for the plaintiffs and contestants in this case it must appear to your satisfaction by a fair preponderance of the evidence that there was such misapprehension or fraud or that there was undue influence employed. To constitute undue influence it must appear to be such influence or restraint as caused the execution of the will by the decedent against his own preference or desire in the matter.

"*I charge you, gentlemen, that no general rule can be laid down as to what constitutes undue influence in a case of this kind further than this; that in order to make a good will a man must be a free agent and feel at liberty to carry out his own wishes and desires, and any restraint, force or intimidation brought to bear upon the testator which he has not the strength of mind or will to overcome, so as to coerce him against his desire and purpose in the making of the will or any of its provisions, is undue influence within the meaning of the law;* and whether such undue influence existed in this case must be determined by you gentlemen from a consideration of all the evidence in the case in view of the law which I am laying down with reference to that matter for your guidance."

Error is assigned on the italicized portions of these instructions. It will be noted that the instructions so assailed are merely portions of instructions dealing with the particular subject to which they relate. In fact the instructions quoted above are merely a portion of the charge dealing with these particular subjects. Elsewhere in the charge explicit

instructions were given on the subject of undue influence, the force of the implication resulting where the beneficiary under a will is active in the preparation and execution thereof, and the effect of such implication upon the "burden of evidence." No complaint is made of these other instructions, and they appear to be eminently fair to the appellant. It is elementary that the charge to the jury must be considered as a whole. It is not apparent that the instructions above quoted are erroneous, if considered by themselves alone: and when considered as a whole, the charge seems eminently fair to the appellant.

The judgment and order appealed from are affirmed.

BRONSON, Ch. J., and BIRDZELL and JOHNSON, JJ., and BURR, Dist. J., concur.

Mr. Justice NUESSLE, being disqualified, did not participate, Honorable A. G. BURR, Judge of the Second Judicial District, sitting in his stead.

F. A. CALKINS, Respondent, v. O. C. STEVENS, and Matt Schneider, W. F. Mahowald, and A. Auerbach, Appellant.

(193 N. W. 733.)

Chattel mortgages — evidence held to support finding that mortgagee by consenting to sale of mortgaged property waived lien.

Where a chattel mortgagee authorized the mortgagor to sell a certain pool hall outfit, to receive the proceeds, and, thereafter to pay such proceeds to the mortgagee, and, where the trial court, in an order for judgment, found that such mortgagee had consented to the sale of such property by the mortgagor, and, by so doing, had waived the lien, it is *held*, for reasons stated in the opinion,—

(a) That the finding is supported by the evidence, is determinative, and is sufficient.

(b) That the lien was waived.

Opinion filed May 5, 1923.

Appeal and Error, 4 C. J. § 3044 p. 1059 n. 5; Chattel Mortgages, 11 C. J. § 339 p. 624 n. 35, p. 625 n. 47; Trial, 38 Cyc. p. 1969 n. 99.

In District Court, McLean County, *Nuessle*, J.; *Jansonius*, J.

Garnishment proceedings involving proceeds of property upon which intervener had a chattel mortgage. From a judgment in plaintiff's favor, intervener has appealed.

Affirmed.

R. L. Fraser and *Nevin & Greenberg*, for appellant.

E. T. Burke and *J. E. Nelson*, for respondent.

BRONSON, Ch. J. In a police court, plaintiff sued defendant to recover $200 due for rent. Garnishment proceedings were also instituted. The garnishees, who had purchased a certain pool hall outfit from defendant, disclosed $200 due. The appellant herein, claiming a right to the money through a chattel mortgage upon the outfit, was permitted to intervene. After trial, the police magistrate found that the intervenor had consented to the sale of the mortgaged property and entered judgment in plaintiff's favor against the defendant and also the garnishees for $200. An appeal was taken to the district court. There a trial was had to the court without a jury. In the evidence it appears that defendant sold to the garnishees the pool hall outfit for $200 and gave to them a bill of sale therefor. The appellant, who had a chattel mortgage upon this outfit, testified that he had authorized defendant to sell this property provided defendant turned over the money to him to apply on defendant's indebtedness to appellant; that he did not know anything about the bill of sale. The district judge, in an order for judgment, found that appellant had consented to a sale of the outfit by defendant and, by so doing, waived his lien. The appeal, accordingly, was dismissed. Appellant made a motion for a new trial. This was denied. He has appealed from the judgment. He contends that the trial court erred in not making full and formal findings of fact and in holding that the lien was waived. The trial court did make a finding of fact that appellant consented to a sale of the property by defendant, and, a conclusion of law, that appellant waived his lien. The evidence is here. The finding is supported by the evidence. It determines all issues presented by the record. The judgment accordingly will not be reversed for failure to make findings upon other issues. Chaffee-Miller Land Co. v. Barber, 12 N. D. 478, 483, 97 N. W. 850. The conclusion of the trial court was proper. The authorization given by appellant to

defendant to sell the property, to receive the proceeds, and, thereafter, to pay the same to appellant, operated, upon this record, to substitute the promise of the defendant to pay for the lien right of appellant to enforce payment. New England Mortg. Secur. Co. v. Great Western Elevator Co. 6 N. D. 407, 71 N. W. 130; Shortridge v. Sturdivant, 32 N. D. 154, 159, 155 N. W. 20. Thus, the lien was waived.

The judgment is affirmed with costs.

CHRISTIANSON, JOHNSON, and BIRDZELL, JJ., and BURR, Dist. J., concur.

Mr. Justice NUESSLE, being disqualified, did not participate, Honorable A. G. BURR, Judge of Second Judicial District, sitting in his stead.

FRANKLIN D. TONNE, Respondent, v. HORACE STATE BANK OF HORACE, NORTH DAKOTA, a Corporation, Appellant.

(193 N. W. 934.)

Pleading — where party not misled by allegations nor unprepared to meet proof, variance not material.

T., cashier of the A. bank, partially reimbursed it for losses sustained in carrying paper drawn by or on behalf of the H. bank and paying a draft representing the amount of credit balance in favor of the H. bank so obtained. T. took an assignment from the A. bank of items unpaid by the H. bank aggregating the amount of his payment to the A. bank. In an action by T. to recover the amount paid to the A. bank to reimburse it, it is *held:*

1. Where it is apparent on the record that the defendant was not misled by the allegations in the complaint nor unprepared to meet the proof offered it is not prejudiced by any variance there may be between the allegations and the proof.

Banks and banking — no failure of proof in action by cashier for reimbursement.

2. The plaintiff having pleaded, as the occasion for the loss sustained by the A. bank, the payment of a certain draft and his partial reimbursement of the A. bank on account of such payment and the taking of an assignment from the A. bank of its claim against the H. bank, and the evidence showing

that the draft so paid represented items for which the H. bank had taken credit by remittance through a correspondent and that T. had an assignment from the A. bank of these items aggregating the amount of his reimbursement, it is held that there is no failure of proof under § 7480, Comp. Laws, 1913.

Bills and notes — one not entitled to presentment and notice of dishonor on worthless checks and drafts used in kiting process.

3. Where worthless checks or drafts are used as instrumentalities in a "kiting" process with a view to swelling the apparent assets of a bank, the bank in whose interest they are thus used having no right to expect or require their payment, is not entitled to presentment and notice of dishonor under §§ 79 and 114 of the Negotiable Instruments Law, §§ 6964 and 6999, Comp. Laws, 1913.

Bills and notes — payment of worthless checks and drafts by drawee bank in kiting process held not to discharge liability.

4. If such instruments be paid by the drawee bank through remittance to a correspondent, the payment does not discharge the liability of the bank of origin.

Opinion filed May 8, 1923.

Banks and Banking, 7 C. J. § 569 p. 757 n. 53; Bills and Notes, 8 C. J. § 827 p. 592 n. 13; § 849 p. 612 n. 11 New; § 959 p. 684 n. 95 New; § 962 p. 686 n. 24 New; Pleading, 31 Cyc. p. 703 n. 38; p. 713 n. 47.

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

Affirmed.

Wood & Nuchols, and *Divet, Holt, Frame & Thorpe*, of Counsel, for appellant.

W. S. Lauder, for respondent.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff and from an order denying a motion for a new trial in an action by the plaintiff as assignee to recover certain moneys alleged to be owing by the defendant. The action was tried in the district court of Cass county before the Honorable A. T. Cole, judge, a jury trial having been waived.

The plaintiff at the time the controversy arose was cashier of the First National Bank of Abercrombie, holding stock in that bank and also in the defendant bank. O. N. Hatlie was vice president of the First National Bank of Abercrombie and president of the defendant bank.

One A. C. Johnson was cashier of the latter bank. The defendant bank, hereinafter referred to as the Horace Bank, carried an account in the First National Bank of Abercrombie, hereinafter referred to as the Abercrombie Bank. In October, 1916, Hatlie contracted with one Dickson to sell to him his stock in the Abercrombie Bank. About October 23d, Dickson gave Hatlie a check for $1,000 drawn on the Horace Bank for the first payment on the stock. Hatlie deposited the check to his credit in the Abercrombie Bank and when it reached the Horace Bank in due course there were no funds there to pay it; but Johnson, the cashier of the latter bank, who was a brother-in-law of Dickson, nevertheless honored the check. To cover the overdraft, he immediately drew on Dickson at Abercrombie a sight draft for $1,007.73 and sent it to the First National Bank of Fargo, which in turn credited the amount to the Horace Bank and forwarded it to the Abercrombie Bank. It appears that this draft was held in the Abercrombie Bank a few days without payment or presentation to Dickson. Soon after its receipt by the Abercrombie Bank, Dickson and Johnson had occasion to stop in Abercrombie and while there told Tonne that $1,000 had been placed on deposit in the First National Bank of Fargo to meet the draft. This statement was later found to be false. Between November 1st and the end of the year 1916, Dickson drew checks on the First National Bank of Abercrombie payable to A. C. Johnson and sight drafts were drawn in varying amounts, which checks and drafts were used by the Horace Bank or by Johnson on its behalf in such a way as to reflect a credit on its books of the amount of these checks and drafts. Similar credits would be shown in its account upon the books of the First National Bank had the latter bank honored the items. In addition to the item of $1,007.73 mentioned above, there were items of $551.30, $252.50, $810, $515, $615, $650, $207 and $210.83, the last two apparently being the same item, the difference in amount being accounted for by protest fees. Some of these items were returned to the Horace Bank, some settled for by the latter bank, one settled by the surety on Johnson's fidelity bond, and others are in controversy here as will subsequently appear.

On January 6, 1917, Johnson drew a draft on the Abercrombie Bank for $3,377.55, which amount, according to the books of the Horace Bank, was the amount of its credit in the Abercrombie Bank. When

this draft came in regular course to the latter bank Tonne called Hatlie on the telephone to inquire what should be done, advising him that the Horace Bank did not have sufficient funds to meet the draft and that he would dishonor it; whereupon Hatlie told him in substance that the Horace Bank was good for it and that it should be paid to avoid embarrassment; thereupon the draft was paid. As a matter of fact the Horace Bank, under Johnson's management, was undergoing some embarrassment at the time and Dickson apparently was not able to make good on the paper bearing his name and which was responsible for the credit balance its books showed that it had with the Abercrombie Bank. After the honoring of this large draft in January, Tonne procured an accommodation note from one Helgeson, which was made to represent a loan and discount on its books and which stood as an asset in lieu of $2,014.63 of the worthless Dickson paper in the Abercrombie Bank. The items in excess of this were made good. Subsequently, in August, 1917, Tonne called a meeting of the board of directors of the Abercrombie Bank to consider certain criticisms made by the comptroller of the currency as a result of the examination of the Abercrombie Bank on June 4th. Pursuant to this notice, Hatlie, Tonne and Ingval Johnson, president of the Abercrombie Bank, met and considered the shortage due to the worthless paper which had been received from the Horace Bank. An agreement was reached whereby Hatlie would pay $1,000 and Tonne, $1,014.63. This would wipe out the Horace-Dickson paper except one item of $615, for which the Abercrombie Bank held Dickson's note. This note was later paid. Tonne drew his personal check for $1,014.63 and it was paid to the Abercrombie Bank. At the same time he drew up an assignment which was executed by Ingval Johnson as president of the Abercrombie Bank, which is, in part, as follows:

"That whereas party of the first part now holds in its own right and now has possession of said sight drafts issued and drawn by the Horace State Bank of Horace, North Dakota, through its cashier at that time and whose name was A. C. Johnson and known as such at that time on W. E. Dickson then a resident of Abercrombie, North Dakota, and whereas the First National Bank of Abercrombie, North Dakota, is about to sustain or has sustained a loss of the sight drafts amounting and aggregating to $1,014.63 being three in number, now whereas the

party of the second part, Franklin D. Tonne has paid the said sight drafts amounting to $1,014.63, now therefore for and in consideration of the payment of the said sight drafts (by?) the said party of the second part the party of the first part assigns all its right title and interest and hereby grants, bargains, sells, assigns, transfers and conveys to the party of the second part his heirs and assigns all their rights and choses in action of every name and description to the said before mentioned sight drafts . . ."

The contract between Hatlie and Dickson for the sale of the stock to the latter was rescinded, Hatlie retaining the $1,000 credited to him in the Abercrombie Bank upon a check which though honored had never been paid in fact to the crediting bank. Thus his payment of the $1,000 to the Abercrombie Bank merely restored the status quo. This action is brought to recover the amount paid by Tonne in the circumstances stated above.

The cause of action is alleged substantially as follows: That on January 6, 1917 the defendant bank drew its draft on the Abercrombie Bank for $3,377.55, which draft reached the Abercrombie Bank in due course and at a time when the Horace Bank had on deposit therein the sum of $28; that when the draft was presented, plaintiff notified the Horace Bank, through Hatlie, its president, that there were insufficient funds and that the draft would be returned, whereupon the defendant, through its president, agreed that if the Abercrombie Bank would pay the draft the defendant would reimburse it; that relying upon this promise the Abercrombie Bank paid the draft; that subsequently the Abercrombie Bank was reimbursed in the sum of $1,362.92. That after the partial reimbursement by the defendant, Hatlie paid to the Abercrombie Bank, on account of moneys advanced in the payment of said draft, the sum of $1,000 and at the same time the plaintiff paid out upon said draft the sum of $1,014.63 and took an assignment from the Abercrombie Bank of its claim against the defendant bank for the money paid out by it on account of said draft to the extent of the sum of $1,014.63.

On this appeal the appellant advances two main contentions: First, that there is a fatal variance between the allegations in the complaint and the proof offered in support of the cause of action therein alleged;

and second, that the evidence is insufficient to support the findings and judgment of the trial court.

It will be seen that the complaint predicates the liability of the defendant upon the payment by the Abercrombie Bank of the draft for $3,377.55 at a time when the Horace Bank had practically no funds on deposit in the drawee bank and upon the promise of the defendant bank to make the draft good. The assignment executed by Ingval Johnson, president of the Abercrombie Bank, purports to assign to the plaintiff the three items, making in all $1,014.63, and its rights and choses in action incident to these items.

From the allegations in the complaint it was apparent that a trial of the issues would involve the relations between the two banks. On the record it is also quite apparent that the defendant was neither misled by the allegations nor unprepared to meet the proof offered in their support. But it is contended that the allegations of the complaint are unproved in their entire scope and meaning so as to amount to a failure of proof under § 7480, Compiled Laws of 1913. We think this contention is not well founded. The evidence shows that the Abercrombie Bank did not, in fact, give the Horace Bank credit on its books for the various items heretofore mentioned as they were received from time to time and that, according to its books, the Horace Bank had but a few dollars on deposit when the draft for $3,377.55 was drawn and presented. It also shows that some of these items, in the aggregate more than $2,000, had been received by it from the Horace Bank and that they remained unpaid. Had the large draft not been paid at all, the Horace Bank would have received no credit for those items until they were paid. When, therefore, the Abercrombie Bank paid the draft it in effect credited the Horace Bank on the unpaid items to the extent that they already appeared as a credit on its books. In other words, the honoring of the $3,377.55 draft, pleaded in the complaint, was the occasion for the loss to the Abercrombie Bank, but the items that measure that loss are the items that were thus in effect credited. From the standpoint of the Horace Bank, these were the original considerations for the large draft, for it must be remembered that the latter purports to exhaust the balance carried at Abercrombie and obtained as above indicated. This legal result is not destroyed by the existence of the verbal contract alleged whereby the Horace Bank agreed to make the

large draft good. For in making this draft good it would also ipso facto make good the drafts which made up the credit balance on its own books. Hence, the proof of the allegation with respect to the draft for $3,377.55 likewise proves a cause of action on the unpaid items entering into the shortage of the Horace Bank. The evidence satisfactorily establishes the assignment to the plaintiff of these items and all causes of action incident thereto. We are of the opinion that the evidence as a whole proves a cause of action arising out of the payment of the large draft and that the assignment of the three small items to the plaintiff sufficiently evidences his right to pursue that cause of action.

The contention that the evidence is insufficient to support the judgment is based on testimony which establishes that the items going to make up the credit balances in favor of the defendant bank were held by the Abercrombie Bank an unreasonable length of time without dishonor or protest or were carried as cash and that no proceedings upon dishonor sufficient to charge parties secondarily liable were had. It is also shown that these items came to the Abercrombie Bank through another bank or banks with remittance letters showing that they had been credited to the Horace Bank on the books of the correspondent and that remittance was made in turn by the Abercrombie Bank to the correspondent as though the items were all good, thus, it is claimed, discharging the defendant from all liability thereon. The evidence shows that some of the items thus forwarded to the Abercrombie Bank were returned by the latter to the Horace Bank and that they were later forwarded again by the Horace Bank in the same way as before. The evidence as a whole further shows that "kiting" was going on between the two banks with a view to swelling the apparent assets of the Horace Bank. The names that were used for this purpose were those of A. J. Johnson, cashier, and his brother-in-law, Dickson, and it is apparent on this record that when drafts were drawn and used in favor of the drawer bank they were drawn in circumstances that would not justify an expectation on its part that they would be paid. Further, if they were paid, the evidence mades it clear that they were paid for the accommodation of the Horace Bank. In this situation the bank was not entitled to presentation for payment under § 79 of the Negotiable Instruments Law, § 6964, Compiled Laws of North Dakota for 1913, nor is it entitled to notice of dishonor under § 114, ¶ 4, § 6999, Comp. Laws,

1913. The evidence in the record is convincing that the Horace Bank never had any right to require the Abercrombie Bank to pay the items in question and neither was it in a position to expect that they would be paid. On the contrary, the burden of finding funds to meet these bills was at all times upon the Horace Bank. In these circumstances the Horace Bank stands in a situation, with respect to the Abercrombie Bank, analogous to that of the maker of a promissory note toward the person who has discounted it. It is clearly not in the position of an indorser of third party paper which it has discounted and credited and forwarded through correspondents. See Taylor v. Vossburg Mineral Springs Co. 128 La. 363, 54 So. 907; 8 C. J. 285, 532.

The judgment appealed from is affirmed.

BRONSON, Ch. J., and NUESSLE, JOHNSON, and CHRISTIANSON, JJ., concur.

EMBDEN STATE BANK, a Domestic Corporation, Respondent, v. A. W. SCHULZE, Appellant.

(193 N. W. 481.)

Appeal and error — motion to dismiss appeal sustained where notice, undertaking, and specifications of errors served and filed more than six months after judgment.

1. Where the notice of appeal from a judgment, undertaking and specifications of errors are served on the respondent and filed with the clerk of the district court more than six months after the notice of entry of judgment, and motion is made to dismiss the appeal from such judgment upon the ground that it is not timely made, under § 7820, Comp. Laws 1913, such motion must be granted.

Appeal and error — when notice of denial of motion for judgment notwithstanding, or for new trial served on adverse party by mail, time for appeal extended to one hundred twenty days.

2. When the order of the trial court denying motion for judgment notwithstanding the verdict, or for a new trial, is served on the adverse party by mail,

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Note.—On effect of possession of paper purporting to be indorsed in blank by payee or by a special indorsee, as prima facie evidence of plaintiff's title to the paper, see note in 11 A.L.R. 952; 21 R. C. L. p. 871; 5 R. C. L. Supp. p. 1176.

the time within which an appeal may be taken therefrom, which is sixty days under § 7820, Comp. Laws 1913, is doubled, as provided in § 7954 Comp. Laws 1913, following More v. Western Grain Co. 31 N. D. 369, 377.

Bills and notes — principal and agent — possession of notes payable to order does not entitle holder to enforce it against maker without proof of indorsement by payee; burden on possessor of note indorsed by agent to prove agent's authority.

3. Mere possession of a promissory note, payable to order, does not entitle the holder to enforce it against the maker without proof of indorsement, or transfer by the payee, if such indorsement and transfer are denied by the maker, although a purported indorsement appears on the back of the instrument. In such a case the duty devolves upon the plaintiff to prove title to the note; and if such indorsement is made by an agent or employee of the payee, the plaintiff must prove the authority of the agent to transfer title by indorsement.

Principal and agent— mere possession by agent raises no presumption of authority to transfer title by indorsement; authority of agent to indorse negotiable instruments not implied from fact of agency unless necessary to carry out express authority.

4. Mere possession of a promissory note by an agent of the payee gives rise to no presumption of authority in such agent to indorse such paper so as to transfer title thereto. Authority in an agent to indorse negotiable instruments will not be implied from the fact of agency, unless it be necessary in order to carry out the express authority conferred on the agent by his principal.

Evidence — testimony as to advice by another as to agent's authority to indorse notes held inadmissible as hearsay.

5. The testimony of the cashier of the plaintiff to the effect that before the note in suit was indorsed to the plaintiff bank, he talked with the president of the payee, and was advised by the president of the payee that the person who had possession of the note in suit had authority to indorse notes belonging to the payee, is hearsay and incompetent upon the question of authority of the agent to transfer title by indorsement and, if properly objected to, should be excluded.

Trial — general objection after specific objection held sufficient.

6. Where counsel specifically objects to testimony on the ground that it is hearsay, and later objection to the same line of testimony is made on the ground that it is incompetent, irrelevant, and immaterial, it is *held*, for reasons stated in the opinion, that the general objection is sufficient.

Trial — objection to incompetent testimony not waived by cross-examination on same subject.

7. Where incompetent testimony is admitted over objection and where coun-

sel thereafter cross-examines the witness upon the same matter, the objection is not waived.

Trial — objection need not be repeated after proper objection when evidence of same class offered.

8. Where evidence is properly objected to, the objection need not be repeated when other evidence of the same class is offered.

Opinion filed April 21, 1923. Rehearing denied May 8, 1923.

Appeal and Error, 3 C. J. § 734 p. 823 n. 33; § 1061 p. 1060 n. 58; § 1074 p. 1067 n. 28; § 1336 p. 1232 n. 98; Agency, 2 C. J. § 280 p. 636 n. 21, 22; § 665 p. 925 n. 25; Bills and Notes, 8 C. J. § 1316 p. 1010 n. 53, p. 1011 n. 58; Evidence, 22 C. J. § 166 p. 199 n. 36; Trial, 38 Cyc. p. 1385 n. 46; p. 1386 n. 50; p. 1399 n. 82, 83.

Appeal from an order of the District Court, Cass County, North Dakota, *Cole*, J.

Reversed.

W. J. Courtney, for appellant.

Plaintiff's rights depend upon these facts each of which is not to be presumed, but must be proved. Vickery v. Burton, 6 N. D. 245.

It is very doubtful if there was any proper delivery—if it were not to be delivered until compliance with all the conditions alleged to have been agreed upon by the parties, a delivery in violation of such agreement would be no valid delivery and the note would not, under the circumstances, be a binding obligation, and would be, in fact, nullity. See Marlatt v. Coutre, 41 N. D. 133; Cline v. Guthrie, 13 Am. Rep. 357; Palmer v. Poor, 121 Ind. 135; Hall v. Wilson, 16 Barb. 548, 56 Am. Rep. 596; Roberts v. McGrath, 38 Wis. 52; Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1; Andres v. Thayer, 30 Wis. 228, 11 A.L.R. 944, 947, 949; 12 A.L.R. 119; Emerson Branthon Co. v. Brennan, 35 N. D. 94; Mee v. Carlson (S. D.) 117 N. W. 1033, 29 L.R.A.(N.S.) 351; Wilson v. National Bank, 47 Ind. App. 689, 95 N. E. 269.

A. C. Lacy, for respondent.

The courts have even held that a person could be asked if he had any power or authority to change a contract, and that it was not objectionable as calling for a conclusion. Joseph v. Struller, 54 N. Y. Supp. 162.

A party who asserts error on appeal must show the existence thereof

clearly and affirmatively from the record itself. Raad v. Grant, 44 N. D. 389, 169 N. W. 588.

The payee having held out William Crowley as its duly authorized agent to indorse, sell, assign, and deliver the note in question, the maker of the note could not dispute that fact. Grant County State Bank v. Northwestern Land Co. 28 N. D. 749, 150 N. W. 737–741.

An answer responsive to the question ought not to be stricken out if the question was not objected to. State v. Hughes (S. D.) 66 N. W. 1076.

All plaintiff had to do in the first instance was to make out a prima facie case and then after plaintiff had rested, if defendant offered evidence of fraud, want of consideration or such other evidence as to show an infirmity in the note sued on (providing the answer contained the proper allegations), then the burden would shift on plaintiff to show that it was a purchaser of the note in question, in good faith, before maturity for value and without notice of any defenses, if any, in regard thereto. First Nat. Bank v. Flath, 1 N. D. 281, 86 N. W. 867.

Objections to evidence that it is incompetent, irrelevant, and immaterial is too general for consideration on appeal. Kolka v. Jones, 6 N. D. 461, 71 N. W. 558; Bank v. Laughlin, 4 N. D. 391–402, 61 N. W. 473; F. Meyer Boot & Shoe Co. v. Ferguson, 19 N. D. 496, 126 N. W. 110.

"It is urged, however, by the appellants that the court admitted proof upon this question over plaintiff's objection that it was not within the pleadings, and that plaintiff not having taken an appeal from such ruling it should not be heard now to sustain the judgment upon a theory held against it on the trial. Morgan v. Southern P. R. Co. 95 Cal. 510, 17 L.R.A. 71, 29 Am. St. Rep. 143, 30 Pac. 603, and Wangler v. Swift, 90 N. Y. 38 are cited to support this position. *But how could plaintiff appeal from an adverse ruling on the testimony? Appeals, of course, lie only from final judgments and that judgment was in its favor. The defendants were notified by repeated objections on the trial —their brief says,* 'something like one thousand'—*that the plaintiff relied among other things upon defects in the pleading.* Indeed one of the grounds of plaintiff's very motion to instruct, which the court sustained, was that 'the defense is not *admissible under the state of the pleadings* and does not conform thereto and the issues which have been

raised thereby are not issues which have been raised by the pleadings.' This was a further and definite notice that inadequacy in the pleadings was claimed as against defendants' contentions. *The latter therefore in failing to amend proceeded at their peril and cannot now be heard to complain because of terms of their answer failed to justify* the submission to the jury of an issue upon which defendants desired the jury's judgment. *The rule that proof must be based upon pleadings is too well established to be made to yield to the contention here made."*

A motion to direct a verdict must state specifically the grounds upon which it is based. Tanderup v. Hanson (S. D.) 66 N. W. 1073.

The delivery of a promissory note to an agent of the payee is a delivery to the payee, and such note is binding, though the conditions on which it is to take effect are not performed. Scott v. State Bank, 9 Ark. 36; Murray v. W. M. Kimball Co. (Ind.) 37 N. E. 736; Porter v. Andrus, 10 N. D. 558, 88 N. W. 569; First Nat. Bank v. Flath, 10 N. D. 286, 86 N. W. 867.

Evidence of an agreement between the makers and the agent of the payees of a note that it was not to be delivered to the payees until the happening of certain conditions is not admissible in an action by a bona fide holder for value against the makers. Cooper v. Merchants & Mfrs. Nat. Bank (Ind. App.) 57 N. W. 569.

The fact that the indorsement purports to have been made by a corporation, which could act *only through agents, is immaterial.* In the absence of anything in the charter to the contrary, *the general principles applicable in case of agents of a corporation are the same as in case of agents of a natural person.* First Nat. Bank v. Layhed (Minn.) 10 N. W. 422.

No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency. Grant County State Bank v. Northwestern Land Co. (N. D.) 150 N. W. 741; American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99; McPherrin v. Tittle (Okla.) 129 Pac. 721, 44 L.R.A.(N.S.) 395, and extensive note; Bank of Monette v. Hale (Ark.) 149 S. W. 845; Grant County State Bank v. Northwestern Land Co. 28 N. D. 479, 150 N. W. 736.

Note obtained by original payee through fraud is valid in the hands of an indorsee, unless he had actual knowledge of fraud or knowledge

of such facts as amounts to bad faith. American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99; Dunham v. Peterson, 5 N. D. 418, 67 N. W. 293; First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867.

"Usually the appellant is sufficiently informed as to the defects by the notice of motion, or of exceptions, and will be required to supply the defects at the hearing of the motion, or exceptions, or to present a good reason for a failure to do so." 2 Spelling, New Tr. App. § 665, p. 1401.

"Where two appeals are taken,—one from the judgment and the other from an order refusing a new trial,—and an undertaking is given 'on the appeal,' without designating which appeal, both will be dismissed." Weil v. Sutter (Idaho) 44 Pac. 556; Sebree v. Smith (Idaho) 16 Pac. 477; Schiller v. Small (Idaho) 40 Pac. 53; Motherwell v. Taylor (Idaho) 9 Pac. 417; Cronin et al v. Bear Creek Gold-Min. Co. (Idaho) 32 Pac. 53; Eddy v. Van Ness (Idaho) 6 Pac. 115.

"The undertaking recites that *the appellants are about to appeal from the judgment made and entered against them, and also from the order denying a new trial, and then undertakes to pay all costs and damages which may be awarded against them on the appeal or dismissal thereof, not exceeding $300.*"

"It is evident that such an undertaking covers but one appeal and it is impossible, upon an inspection of it, to determine to which appeal it applies. This being the case, we must hold that neither the appeal from the judgment nor from the order is well taken." Kelly v. Leachman (Idaho) 51 Pac. 408.

"A party who asserts error on appeal must show the existence thereof clearly and affirmatively." Raad v. Grant, 44 N. D. 389, 169 N. W. 588.

"Grounds not stated in the motion or written statement will not be considered at the hearing of the trial court. And similarly it is held that on appeal the reviewing court will not consider any grounds other than those specified in the motion. A party making a motion for new trial is bound by the reasons assigned therein and can urge no other on appeal." O'Dell v. Heinry (N. D.) 190 N. W. 774.

JOHNSON, J. This is an appeal from a judgment and from an order denying a motion for a new trial.

At the outset we are confronted with a motion by the respondent to dismiss this appeal upon two grounds; first, that the appeal was not perfected within the statutory time, and second, that the undertaking of the appellant is insufficient.

The judgment was docketed on February 1, 1922, and personal service of notice of entry of judgment was made and admitted on February 1, 1922. On February 11, 1922, a motion for a new trial was argued before the trial court and was on that date fully submitted. The trial court held this under advisement for over six months and until September 1, when the order denying the motion for a new trial was made. This order was served on the defendant and appellant by mail on September 1, 1922, and on that date the affidavit of mailing was filed. Notice of appeal from the judgment and the order, bond, and specifications of errors were personally served upon the respondent's counsel November 3, and were filed in the office of the clerk of the district court on November 6, 1922.

It is clear that the appeal from the judgment was not perfected within six months, the time prescribed in § 7820, Comp. Laws, 1913, and that the motion to dismiss the appeal from the judgment must, therefore, be granted.

With reference to the motion to dismiss the appeal from the order of the trial court denying the motion for new trial, a different question arises. This motion was made and fully submitted before the trial court lost jurisdiction over the judgment. The defendant had sixty days to appeal from this order (§ 7820, Comp. Laws, 1913) unless, because of service of the order and the notice of the making of the same by mail, the respondent became entitled to double time under § 7954. In the case at bar, unless the appellant is entitled to double time within which to appeal from the order of the trial court, the appeal is not timely taken and the motion to dismiss the same must be granted.

Section 7954 provides as follows: "When the service is by mail it shall be double the time required in cases of personal service, except service of notice of trial which may be made sixteen days before the day of trial including the day of service."

We believe that this question has been settled in this jurisdiction against respondent's contention. It is true that the supreme court of South Dakota in Landstad v. McClellan, 42 S. D. 263, 173 N. W. 747,

has held that service of notice of the making of such an order by mail does not double the time within which to appeal therefrom. This court, however, arrived at a contrary conclusion in More v. Western Grain Co. 31 N. D. 369, 377, 153 N. W. 976. The construction put upon § 7954 in that case is the same as the New York court put upon an identical section of the New York Code—our § 7954, Comp. Laws, 1913 was adopted from New York—in Dorlon v. Lewis, 7 How. Pr. 132.

The grounds on which the sufficiency of the undertaking is challenged have been removed by the appellant who with the permission of this court, has filed a new and amended undertaking which conforms with the statute. The objection made to the amended undertaking is without merit. A single undertaking is sufficient on an appeal from a final judgment and from an order denying a motion for a new trial, and in the instant case the undertaking is given on appeal from both and specifically refers to both. Sucker State Drill Co. v. Brock, 18 N. D. 598, 120 N. W. 757.

The motion to dismiss the appeal from the order denying the motion for a new trial must be denied.

This is an action brought by the indorsee of a promissory note. The complaint is in the usual form. The plaintiff and respondent alleges that it received this note as indorsee of the payee for value, before maturity, and without notice or knowledge of any defense thereto. The note was dated December 27, 1919, made payable to the Grain Belt Manufacturing Company, a corporation, as payee, and was signed by the defendant and appellant A. W. Schulze. The note is given for the sum of $1,750 with interest at the rate of 8 per cent per annum and due one year after date. The note was given in connection with a stock and tractor agency contract, signed by the maker of the note at the time the note was made, Exhibit 100 in the case, and recited that the maker of the note had the right to cancel the contract within a specified time from the date of the contract. The following is written in long hand at the bottom of the agreement:

"The above note for $1,750 is to be held and returned in the event of cancelation of the contract within one year." This is signed "Wm. Crowley."

The defendant, Schulze, wrote the payee in the note, the Grain Belt Mfg. Company on December 29, 1919, canceling the contract and asking

that the note in suit be sent to a bank at Casselton. The registry return receipt shows that this letter was received by the payee named in the note on December 30, 1919. The plaintiff and respondent alleges and the evidence shows that it purchased the note on December 30, 1919.

The answer of the defendant and appellant admits the making of a note of about the date mentioned in the complaint, but denies the negotiation and indorsement thereof. The answer is in the form of a general denial, coupled with which are specific denials of matters of fact, as if such matters of fact had been alleged in the complaint. This part of the answer is in the following form:

"Defendant admits making a note of about the date mentioned, in the said complaint, *but denies that it was ever delivered to the Grain Belt Manufacturing Company, and denies that the said company ever had such note delivered to them, or were ever in legal possession of or owners of said note, for the purpose of collection, sale, or transfer, or that they were ever the holders of said note for any purpose, other than to turn back to this defendant.*

"Defendant denies that the plaintiff purchased the said note before maturity, or at all for value, *and denies specifically that the said plaintiff is an innocent purchaser in good faith,* and denies that the plaintiff is the owner of said note."

In point of fact, no such specific allegations as those italicized in the denials above appear in the complaint, and it is doubtful if the answer, properly construed, is more than a general denial, coupled with a specific admission of the making of a note similar to the one in suit. Whether or not the answer alleges affirmative defenses sufficiently to entitle the appellant to introduce evidence thereof at the trial is not necessary at this time to determine. The trial court seems to have considered the answer sufficient to admit evidence of such defenses.

The plaintiff offered the note in issue as Exhibit 1, together with the indorsement thereon. Objection was thereupon made to the introduction of the note in evidence, upon the ground that there was no indorsement or proof of indorsement, assignment, or sale of the note to the plaintiff. Before ruling on this objection, the trial judge examined the cashier of the plaintiff and respondent and elicited from him the information that the name of the payee was indorsed upon the note before the same was delivered to the plaintiff by one W. J. Crowley;

but the evidence indicates that Crowley was not an officer of the corporation. On this point the record is as follows:

Examination by the court.

Q. Who put that indorsement there?

A. Mr. Crowley.

Q. And you at that time do you know whether he was representing the Grain Belt Manufacturing Company?

A. The president of the company told me he was.

Mr. Courtney: Objected to as hearsay.

Q. Mr. Buck, this note has never been paid has it, this exhibit "1"?

A. No, sir.

Q. I believe I understood you to testify that on the 30th day of December 1919, it was indorsed and assigned by the Grain Belt Manufacturing Company to the Embden State Bank?

A. Yes, sir.

Q. On that date?

A. Yes, sir.

Q. And was it delivered to the Embden State Bank on that date also?

A. Yes, sir.

Q. And was the payment made on that date also by the Embden State Bank to the Grain Belt Manufacturing Company?

A. Yes, sir.

Mr. Courtney: The same objection and we move to strike the answers out on the ground and for the reason that the question elicits and calls for and receives an answer which is merely a conclusion of the witness where he says the money was paid to the Grain Belt Manufacturing Company.

The Court: The objection is overruled and the motion denied; but your objection to this line of testimony may stand.

The indorsement is simply as follows: "Grain Belt Mfg. Co. by Wm. Crowley." The note was thereafter admitted in evidence over defendant's objection and it is claimed by the appellant that this was error.

The theory of the defendant and appellant is that inasmuch as the indorsement was denied in the answer, it was incumbent upon the plaintiff to prove title to the note, i. e., the indorsement, see Commercial Secur. Bank v. Jack, 29 N. D. 67, 74, 150 N. W. 460, like any other fact essential to recovery; and that since the indorsement was made by an agent or employee of the payee, it was necessary for the plaintiff to prove the authority of the agent to transfer title to the note by indorsement.

The only evidence in the record tending to show authority in Crowley to indorse and negotiate the note is the testimony of the witness Buck, cashier of the plaintiff and respondent. The witness testified that he knew that Crowley was employed by the payee, the Grain Belt Manufacturing Company, because he had seen him in their offices. This answer the defendant moved to strike out as not responsive, which motion the court denied. The answer should have been stricken. Witness was asked if he knew whether or not Crowley was an officer of the payee. The answer was not responsive and was a conclusion. Upon this ruling the fourth specification of error is predicated.

The cashier Buck further testified that on the day when the bank purchased the note, the witness Buck telephoned the president of the payee, and was advised by the president of the payee that Crowley had authority to transfer by indorsement notes belonging to the payee. The testimony of the witness Buck to the effect that he was informed by the president of the payee that Crowley represented the payee was objected to as hearsay, and his testimony to the effect that the president of the payee told him that Crowley was authorized to indorse and deliver and sell notes on behalf of the Grain Belt Manufacturing Company, was objected to by the attorney for the defendant and appellant as follows:

"Mr. Courtney: That is objected to on the ground and for the reason it is incompetent, irrelevant, and immaterial; the authority not being in the president or any other executing officer of the corporation to authorize the indorsement of negotiable paper."

In each instance the objections were overruled and the evidence went to the jury. It is claimed that this was error.

Mere possession of a negotiable promissory note payable to order does not entitle the possessor to enforce it against the maker without proof of indorsement or transfer by the payee, if such indorsement and trans-

fer are denied by the maker, although a purported indorsement appears on the instrument. Vickery v. Burton, 6 N. D. 245–251, 69 N. W. 193; Capitol Hill State Bank v. Rawlins Nat. Bank, 24 Wyo. 423, 11 A.L.R. 937, 160 Pac. 1171.

As heretofore indicated, the evidence in this case shows that the purported indorsement on the back of the note in the name of the payee was put there by one William Crowley and that said Crowley was not an officer of the payee corporation. He was, at most, an agent of the payee, in possession of the note, according to the evidence.

Mere possession of a negotiable instrument by the agent of the payee gives rise to no presumption of authority in such agent to indorse such paper so as to transfer title thereto. 21 R. C. L. p. 871. The mere fact, therefore, that Crowley was in possession of this note creates no presumption whatever that he had authority to transfer the same by indorsement. It was incumbent upon the plaintiff to prove the authority of the agent Crowley to transfer this note by indorsement. Authority in Mr. Crowley to indorse and negotiate notes will not be implied from the fact of agency unless it be necessary in order to carry out the express authority conferred on the agent by his principal. Power to indorse and negotiate commercial papers is not implied from an express authority to transact other business for the principal, unless such power be necessary to execute the express authority. Jackson v. National Bank, 92 Tenn. 154, 18 L.R.A. 663, 668, 36 Am. St. Rep. 81, 20 S. W. 802; Jackson v. Commercial Nat. Bank, 199 Ill. 151, 59 L.R.A. 657, 93 Am. St. Rep. 113, 65 N. E. 136; Parsons, Contr. 9th ed. p. 62; 1 Mechem, Agency, §§ 969, 971; Dan. Neg. Ins. 4th ed. §§ 292, 293.

This brings us to a consideration of the evidence offered to prove the authority of Crowley to transfer the note by indorsement. The only evidence of authority which appears in the record is found in the testimony of the cashier of the plaintiff who testified, over objection, that he was told over the telephone by the president of the corporation which is payee in the note, that Crowley had authority from the corporation to transfer negotiable instruments by indorsement. The note in suit was not specifically mentioned. This evidence was given by the cashier on direct examination by the plaintiff's attorney and also to some extent upon examination by the trial judge. On cross-examination by defendant's counsel, the fact was developed that the only basis of the knowl-

edge of the cashier of the extent and scope of Crowley's authority, with reference to negotiable paper, was derived from information given the cashier by the president of the payee.

It is clear that this testimony was hearsay, and therefore incompetent. It was adduced in order to establish a fact material to plaintiff's right to recover, namely, its title to the note in suit. Objection that his evidence was hearsay was made when the trial court drew out of the cashier that he was informed by the president of the payee that Crowley was representing the corporation. It is true the objection was made after the answer was given, but the question was so framed that this answer could not be anticipated. The trial court overruled the objection to this evidence and told the defendant's attorney that it would be permitted to stand. Thereafter, this was gone into more fully and objection again made, but then upon the ground that this evidence was immaterial, incompetent, and irrelevant, which objection was overruled. It is elementary that hearsay evidence is not competent when proper objection is made. With this hearsay evidence out of the case, there is no proof whatever, no testimony of any kind, tending to establish authority in Crowley to indorse the note in suit and transfer the same to the plaintiff so as to give it title thereto.

It is urged by the respondent that the objection made to this testimony was too general to be considered. As has been stated heretofore in this opinion, the first objection made when the trial judge himself was examining the cashier of the plaintiff and drew out of him that he knew that Crowley was representing the payee because the president of the payee had told him so, was that it was hearsay. This was overruled and the court ordered the testimony in. The attention of the court at the outset was thus directed to the fundamental and specific vice in this testimony. The next time objection was made to this kind of testimony, the objection was simply that it was irrelevant, immaterial, and incompetent. The rule undoubtedly is that this form of objection is so general that error cannot be predicated upon any ruling thereon. This rule is elementary and has been affirmed many times by this court. To this rule, however, there are exceptions as well established as the rule itself. The reason for requiring specific objection is to enable the opposing party to obviate, if possible, the objection made, and to enable the trial court under the pressure of the trial, to appre-

ciate the real objection without searching the record or scanning the entire case to discover it. This being the reason for the rule, it is clear that when the reason does not exist, the rule does not apply. If, therefore, notwithstanding the general character of the objection, the real objection is apparent and if it is impossible for the opposing party to obviate the objection, the courts have held that a general objection is sufficient. "General objection to evidence which is clearly hearsay is sufficient. It is incumbent on the party offering the evidence to show that it is admissible in spite of its hearsay character." 9 Enc. Ev. 80, 63; 38 Cyc. 1385; Huston v. Johnson, 29 N. D. 546, 151 N. W. 774; Cunningham v. Cochran, 18 Ala. 479, 52 Am. Dec. 230; State v. Bartlett, 170 Mo. 658, 59 L.R.A. 756, 761, 71 S. W. 148; Sparf v. United States, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168. The objection was sufficient in this case.

It is true that later some or most of this testimony was admitted without objection by defendant. The rule, however, is well established that where evidence is properly objected to, the objection need not be repeated when other evidence of the same class is offered. The court had ruled adversely to defendant. It was not necessary to repeat the objection. American Mortg. Co. v. Mouse River Live Stock Co. 10 N. D. 290, 86 N. W. 965.

Counsel for the defendant cross-examined the cashier of the plaintiff as to the conversation he testified he had with the president of the payee over the telephone with reference to the authority of Crowley to indorse and transfer negotiable paper. It is contended by the respondent that if there was any error in receiving this testimony, it was waived when the defendant cross-examined the witness upon the same subject. This court has had occasion to consider this question before in the case of the First State Bank v. Kelly, 30 N. D. 84, 96, 152 N. W. 125, Ann. Cas. 1917D, 1044, and in that case arrived at a contrary conclusion. This court, in that case, adopted the more reasonable and the majority rule in this country that objection to improper evidence is not waived by cross-examination of the witness on the same subject. There was, therefore, no waiver of the objection.

It follows that there was no proof of the indorsement of the note in suit and of the title of the plaintiff thereto, and it was error to admit the same with the indorsement in evidence over defendant's objection.

The defendant in his sixth specification of errors complains of the following instruction:

"When plaintiff introduced the note in evidence showing its indorsement, its claimed indorsement in behalf of the Grain Belt Manufacturing Company, and the claimed delivery thereof, it rested its case and made what is called a prima facie case."

The part objected to is a portion of a sentence. The remainder of the sentence is as follows:

"And in this connection I will read to you some of the sections covering negotiable instruments and the instrument sued on in this case is what is called a negotiable instrument. Now, the indorsement on the back, or claimed indorsement, is made by a party claiming to be the agent of the Grain Belt Manufacturing Company. Section 6904 of the negotiable instruments law reads as follows:—'The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.'"

We have quoted these portions of the instructions so that the import of the part to which objection is made may be more clearly seen. The court, thereafter, read to the jury §§ 6907, 6916, 6931, 6937 and 6945 of the Comp. Laws, 1913, being a part of the negotiable instruments law. The court, in its instructions, except as quoted heretofore, never referred to the issue made upon the indorsement and transfer of the note in suit or the authority of William Crowley to indorse and transfer the same in behalf of the payee corporation. The jury was not advised by the court upon any rule of law governing agency, the authority of agents with reference to negotiable paper in their possession belonging to their principals, the necessity of proving authority in an agent to indorse negotiable paper belonging to his principal, the manner in which such authority might be established, or the legal duty of the plaintiff endorsee to prove that the note was duly endorsed to it by the payee.

The fair import of the instructions given is that the court, in effect, told the jury that when the plaintiff introduced the note in evidence, the plaintiff had made out a prima facie case; in view of the issue made upon the indorsement and transfer of the note to the plaintiff, the effect of the instructions is the same as if the court had said to the jury that the plaintiff had proved the indorsement of the note by Crowley and the

authority of Crowley to indorse the same in behalf of the payee and that the burden thereupon devolved upon the defendant to establish affirmatively any defenses that he might have. The fact that the court in this connection read § 6904 to the jury, could not but enhance the impression that the indorsement had been proved by calling attention to the fact that a note might be indorsed by an authorized agent and that no particular form of appointment was necessary for the purpose. The vice of the instructions lies principally in the assumption that plaintiff's title had been proved and the indorsement, including the authority of the agent to make the same, established by competent evidence. It must be borne in mind that when this instruction was given, the only evidence before the jury with reference to the authority of the agent was hearsay and incompetent. The instruction is further objectionable in view of the subsequent assertion by the court that the "presumed indorsement on the back, or claimed indorsement is made by a party *claiming to be* the agent of the Grain Belt Manufacturing Company." Crowley did not testify upon the trial and therefore made no claim, whatsoever, that he was agent, nor was there any competent or legal evidence before the jury that Crowley himself claimed to be an agent of the payee corporation with authority to indorse the note in suit. Moreover, any declarations made by him to the effect that he was agent of the payee would not be competent upon the question of his authority to indorse negotiable paper. There is nothing in the record in this case to bring any such declarations within any exception to the rule that declarations of an agent are not admissible to prove the fact of agency or the extent of his authority. Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924.

In this instruction, the court virtually withdrew from the consideration of the jury a controverted and material issue of fact and advised the jury, in substance, that a prima facie case thereon had been made by the plaintiff. Indorsement being traversed in the answer, the presumption held to apply in Farmers Bank v. Riedlinger, 27 N. D. 318, 146 N. W. 556, does not arise. Under the issue as made, the duty devolved upon the plaintiff to prove the authority of the person who made the indorsement.

There was not submitted to the jury any issue upon the question of ratification. The evidence shows that a certificate of deposit was issued

by the plaintiff in payment of the note and that this certificate was subsequently indorsed by the Grain Belt Manufacturing Company, to other parties and later paid by plaintiff. The evidence, however, shows that the plaintiff bank purchased several other notes from the payee at about the same time and the evidence does not conclusively show that the Grain Belt Manufacturing Company received the proceeds of the note in suit or of the certificate of deposit issued in payment thereof with full knowledge of the facts and circumstances, so that ratification can be presumed. In any event, this question was not submitted to the jury and the case was not tried upon the theory of ratification of a prior unauthorized endorsement.

Reversed and remanded with costs to the appellant.

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

DEARBORN TRUCK COMPANY, a Corporation, Respondent, v. JOHN J. NEDRELOE, as Sheriff of Ward County, North Dakota, Appellant.

(193 N. W. 311.)

Evidence — trover and conversion — burden on plaintiff to establish title: evidence held insufficient to establish plaintiff's ownership in property alleged converted.

1. The plaintiff in an action in conversion has the burden of establishing his title to the property in suit. For reasons stated in the opinion it is *held* that in this case the plaintiff has failed to establish ownership of the property claimed to have been converted.

Trover and conversion — value established as in other actions.

2. In establishing value of property the same rules govern in actions for conversion as in other actions in which the question of value is involved.

Opinion filed May 8, 1923.

Trover and Conversion, 38 Cyc. p. 2078 n. 77; p. 2082 n. 8; p. 2085 n. 21.

From a judgment of the District Court of Ward County, *Leighton*, J., defendant appeals.

Reversed and remanded for a new trial.

Palda & Aaker, for appellant.

"In an action of trover and conversion, as in an action of ejectment, the plaintiff must recover upon the strength of his own title, without regard to the weakness of that of his adversary." Bowers on Conversion, p. 431.

The defendant being in rightful possession of the property, had a right to a reasonable time in which to investigate the plaintiff's claim before it could be compelled to surrender the property or refuse to do so. First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 280; Skjerseth v. Woodworth Elevator Co. 35 N. D. 295; Taugher v. Northern P. R. Co. 21 N. D. 111; Citizens Nat. Bank v. Osborne McMillan Elevator Co. 21 N. D. 335; Towne v. St. Anthony & D. Elevator Co. 8 N. D. 200.

The respondent having neglected to show the value of the (grain) as on the date of conversion and only at the dates of delivery and sale, some weeks prior to this demand, had not made a prima facie case when it rested and the appellant submitted its motion for a directed verdict. Hence, it was error to deny such motion. Citizens Nat. Bank v. Osborne McMillan Elevator Co. 21 N. D. 235; Towne v. St. Anthony & D. Elevator Co. supra; First Nat. Bank v. Minneapolis & Northern Elevator Co. supra.

The complaint alleges a demand on the 26th day of May 1914 and no such demand is proved. Even if proved, then the conversion would take place and the damages would be based on the market value of the grain on that day or the highest value between that date and the verdict. Comp. Laws, 1913, § 7168. There is no proof whatever of this value; the value on November 28th, 1913 alone being sought to be proved. Skyjerseth v. Woodworth Elevator Co. 35 N. D. 295.

Bosard & Twiford, for respondent.

While it is true that the general rule is that the measure of damages in case of conversion is the fair market value of the property at the place of conversion, the reason for the rule ceased with the advent of modern transportation facilities and modern manufacturing and business methods, and the courts have recognized well-defined exceptions. Wal-

lingford v. Kaiser, 191 N. Y. 393, 123 Am. St. Rep. 600; Des Lacs Western Oil v. Northern Tool (N. D.) 179 N. W. 607.

CHRISTIANSON, J. Plaintiff brought this action to recover damages for the alleged conversion of certain "auto truck" parts. The trial resulted in a directed verdict in favor of the plaintiff for the sum of $635.70, with interest thereon at the rate of 6 per cent per annum from November 14th, 1918. Judgment was entered pursuant to the verdict and the defendant has appealed.

It is contended that the judgment is erroneous and should be reversed:

1. Because the evidence was insufficient to establish plaintiff's ownership of the property in controversy; and,

2. Because the court erred in excluding certain testimony offered by the defendant relating to the value of the property alleged to have been converted. The propositions will be considered in the order stated.

The evidence shows that the Fuller Motor Company of Minot, North Dakota, had certain business dealings with the Smith Motor Truck Corporation of Chicago. In the summer of 1918 the latter corporation became involved in financial difficulties. On or about August 31st, 1918, one McKay was appointed receiver of the latter corporation by the United States district court for the northern district of Illinois. The receiver testified that, on becoming receiver, he took over not only the goods of the company but orders for goods. It appears that the Fuller Motor Company transmitted an order for the goods in controversy here, which order was filled by the receiver and shipment made on October 15th, 1918. The receiver forwarded the bill of lading for the shipment with sight draft attached for the amount of the list price of the goods. The Fuller Motor Truck Company refused to honor the draft, claiming that the Smith Motor Truck Corporation was indebted to it in the sum of $554, and consequently that it ought not to be required to pay the amount of cash requested. Subsequently the Fuller Motor Company commenced an action in the district court of Ward county upon its account against the Smith Motor Truck Corporation, and caused a warrant of attachment to be issued in such action; and the goods in controversy were thereupon seized by the sheriff of said Ward county, acting under said warrant of attachment, as the property of the Smith Motor Truck Corporation.

The evidence shows that on November 4th, 1918, the receiver sold all the assets of the Smith Motor Truck Corporation as of the close of business on October 9th, 1918, inclusive of all property in transit and all orders or proceeds of orders unpaid on that date, to one, J. D. Peterson. The plaintiff claims to have purchased from Peterson all the property which he (Peterson) so purchased from the receiver.

(1) In our opinion the defendant's contention, that the plaintiff failed to establish ownership of the property in controversy, is well taken. In its complaint, the plaintiff alleges that it is the absolute owner of the goods claimed to have been converted. It is elementary that the plaintiff has the burden of proving the title so alleged and must recover upon the strength of its own title and not upon the weakness of that of its adversary. The only evidence offered by the plaintiff in this case to sustain the claim of ownership was a certain letter purporting to have been written by J. D. Peterson, to the receiver, stating that he (Peterson) *had* sold his interest in the assets of the Smith Motor Truck Corporation to the Dearborn Truck Company. This letter purports to have been written almost a year after the receiver made the sale to Peterson. There is no testimony on the part of any officer or employee of the plaintiff to the effect that the plaintiff is the owner of the property; but, as already stated, the only purported proof of ownership adduced by the plaintiff was the letter referred to. This is not a case where a declaration of ownership, made by a party in possession of personal property, is offered in support of such claim of ownership; this is a case where it is sought to introduce the declaration of one through whom title is claimed, made *after the divestment of all interest and title in the property,* as evidence of the ownership of the property by the person who claims to have acquired title from such declarant. In our opinion, this declaration was not admissible in support of, and was wholly insufficient to establish, plaintiff's claim of ownership. See Horwitz's 2 Jones, Ev. § 245, pp. 401-403; 3 Wigmore, Ev. § 1779. It follows, therefore, that plaintiff's ownership of the property was not established, and the trial court erred in directing a verdict in favor of the plaintiff. The defendant and not the plaintiff was entitled to a directed verdict. But as it is probable that this defect in the proof can be supplied upon another trial, we will not order judgment notwithstanding the verdict,

but award a new trial. First State Bank v. Kelly, 30 N. D. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044.

Inasmuch as the views already expressed are decisive of the case, it is unnecessary to consider in detail the correctness of the rulings made on the admission or rejection of evidence relating to the value of the property in suit. In view of a new trial, however, we deem it advisable to indicate in a general way the rules applicable in determining the amount which plaintiff is entitled to recover, in event it establishes its right to recover in this suit.

Under our statute (Comp. Laws, 1913, § 7168) "The detriment caused by the wrongful conversion of personal property is presumed to be:

"1. The value of the property at the time of the conversion with the interest from that time; or

"2. When the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict without interest, at the option of the injured party; and,

"3. A fair compensation for the time and money properly expended in pursuit of the property."

In this case the plaintiff elected to invoke, and recover under the first rule fixed in the statute. Its complaint was drawn, and its proof was adduced, on that theory. The fundamental principle of the statute is that of compensation. That is, the purpose of the statute is to award plaintiff compensation commensurate with the actual injury sustained, no more and no less. See, Lovejoy v. Merchants' State Bank, 5 N. D. 623, 625–627, 67 N. W. 956. The injury claimed to have been sustained by the plaintiff in this case and for which it is entitled to compensation, if it establishes the right of compensation at all, is the value of the property converted at the time of the conversion, with interest from that date. Ordinarily the value of property which may be so recovered is that which it had at the time and place of conversion. 38 Cyc. 2094. To this rule there are certain recognized exceptions, as where goods are converted while in transit or at a forwarding point. See, authorities collated in 38 Cyc. p. 2094, note 60.

In establishing the value of property, the same rules govern in actions for conversion as in other actions in which the question of value is in-

volved. 4 Sutherland, Damages, 4th ed. § 1133; 38 Cyc. 2092. Even if it is true as asserted that the goods in controversy were manufactured by the Smith Motor Truck Corporation, under patent rights owned by it, it would not necessarily follow that the list price of such goods is controlling. If the goods have a market value that value will govern. 4 Sutherland, Damages, 4th ed. p. 4226; 38 Cyc. 2092–2094. And if the goods were available in the market at lesser prices than those claimed by the plaintiff, the defendant was entitled to show that fact. On the other hand the defendant may not escape liability by showing that there was in fact no demand for the goods at Minot, and that they had little or no value there. If there was a market elsewhere, the market value at Minot may be established by taking the market value at the nearest available market, taking the expense of transportation into account. 4 Sutherland, Damages, 4th ed. p. 4227. See also Williston, Sales, p. 969. In other words, the fundamental principle of compensation will be applied.

Reversed and remanded for a new trial.

BRONSON, Ch. J., and JOHNSON, NUESSLE, and BIRDZELL, JJ., concur.

WILLIAM J. CARROLL, Respondent, v. NEW YORK LIFE INSURANCE COMPANY, a Foreign Corporation, Appellant.

(193 N. W. 471.)

Insurance — questions of waiver and estoppel in an action on life insurance policies held for the jury.

In an action upon policies of life insurance, where the insurance company seeks to exercise the right of forfeiture for failure to pay an annual premium, it was *held*, following the law of the case announced upon a former appeal, and, for reasons stated in the opinion, that the questions of waiver and estoppel concerning the exercise of such right, were for the jury.

Opinion filed December 30, 1922. Rehearing denied May 12, 1923.

Insurance, 33 C. J. § 869 p. 136 n. 80; Life Insurance, 37 C. J. § 449 p. 649 n. 47.

Action in District Court, Ward County, *Moellring*, J., upon two policies of life insurance.

Defendant has appealed from the judgment.

Affirmed.

Newton, Dullam & Young, for appellant.

There is nothing mysterious about a contract of insurance; it requires the assent of both parties to the same things as in any other contract. Stevens v. Insurance Co. 87 Iowa, 283; Weidenaar v. New York Life, 94 Pac. 1.

No other or different rule is to be applied to a contract of insurance than is applied to other contracts. Rathbun v. New York L. Ins. Co. 30 Idaho, 34; Quinlan v. Phœnix Mut. L. Ins. Co. 140 N. Y. 79; Dwight v. Germania L. Ins. Co. 103 N. Y. 341; Foote v. Aetna L. Ins. Co. 61 N. Y. 571; Liverpool & L. G. I. Co. v. Kearney, 180 U. S. 134; Imperial Fire Ins. Co. v. Coos County, 151 U. S. 450; Crane v. City Ins. Co. 3 Fed. 558; Wells, Fargo v. Pacific I. Co. 44 Cal. 37; Goodrich v. Treat, 3 Colo. 408; Connecticut Mut. L. Ins. Co. v. Pyle, 45 Ohio St. 19; Iowa Life v. Lewis, 187 U. S. 335; Behling v. Northwestern Nat. Ins. Co. 117 Wis. 24.

Under the terms of the policy, as qualified by the practice of the company, the agent was without authority to waive full and timely payment of the premium, save as he could adjust the payment conformably to the blue note plan. His authority turned upon the giving of the note, which was a matter of real substance, and not of mere form, as is shown by the terms of the note, before quoted. See White v. New York L. Ins. Co. 200 Mass. 510, 86 N. E. 928.

It must be remembered, however, that when the plaintiff was made beneficiary on July 28, 1913, the premium due June 15, 1913, had not been paid, the time for the payment having been extended by the "blue note" plan to September 15, 1913. The further extension of time for the payment of the premium, granted on September 15, 1913, was simply a renewal of the extension granted June 15, 1913, and, in effect, was beneficial to the beneficiary, as without such extension the policy would have lapsed sooner than it did. In the second place, the "blue note" did not change or attempt to change the terms of the policy itself, as it expressly stipulated that if the amount due at maturity was not paid, the rights of both parties should be the same as if no agreement

had been made. Sims v. Jefferson Standard L. Ins. Co. 18 Ga. App. 347, 89 S. E. 445.

A note given by insured to insurer to cover a life policy premium, not being taken in payment of the premium, but as an agreement for extension of the time of payment of premium from its date, when it was not paid there was a default in the premium payment from the date of the note. Underwood v. Jefferson Standard L. Ins. Co. (N. C.) 98 S. E. 832.

A soliciting agent has no power or authority to waive any of the provisions of a policy contract after the same has been executed, delivered and put in full force and effect. Phipps v. Union Mut. Ins. Co. 150 Pac. 1083; Fidelity Mut. Ins. Co. v. Russel, 75 Ark. 25, 86 S. W. 814; Bryan v. Nat. L. Ins. Asso. 42 Atl. 513, 21 R. I. 149; New York L. Ins. Co. v. O'Dom, 100 Miss. 219, 56 So. 379; Cayford v. Metropolitan L. Ins. Co. (Cal.) 91 Pac. 266; Madsen v. Maryland Casualty Co. 142 Pac. 51; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335; Globe Mutual Life Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387; Mutual L. Ins. Co. v. Abbey, 76 Ark. 331, 88 S. W. 951; Union Mut. L. Ins. Co. v. McMellan, 24 Ohio St. 67; Metropolitan Life Insurance Co. v. Hall, 4 Va. 572, 52 S. E. 345; Lewis v. Phoenix Mut. L. Ins. Co. 44 Conn. 72; Metropolitan L. Ins. Co. v. McGraff, 52 N. J. L. 358, 10 Atl. 386.

Under the terms of the policy limiting the agent's authority the insured is conclusively presumed to know that no engagement entered into between him and the agent who took the application extending the time for payment for premiums is binding on the insurer unless brought to its knowledge and ratified by it. Collins v. Metropolitan L. Ins. Co. 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609; Security L. Ins. Co. v. Eades, 152 Ky. 577, 153 S. W. 989; McElroy v. Metropolitan L. Ins. Co. 84 Neb. 866, 23 L.R.A.(N.S.) 968, 122 N. W. 27; Greenwood v. New York L. Ins. Co. 27 Mo. App. 409.

It is well settled that a party dealing with the agent of a corporation must at his peril ascertain what authority the agent possesses, and is not at liberty to charge the principal by relying upon the agent's assumption of authority which may prove to be entirely unfounded. Rice v. Peninsular Club, 52 Mich. 90, 17 N. W. 708; Meachem, Agencies, 137; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924.

It is well settled in this state that the declarations of an agent are not

competent proof of his authority to act and that the principal is not responsible or bound by the declarations of an agent not made in the course of an agency. Rounseville & Doty v. Paulson, 19 N. D. 466, 126 N. W. 221; Bacon v. Johnson, 56 Mich. 182, 22 N. W. 276; Coon v. Gurley, 49 Ind. 199; Saussy v. Southern Florida R. Co. 22 Fla. 327; Graves v. Horton, 38 Minn. 66, 35 N. W. 568; Blevins v. Pope, 7 Ala. 371; Cannon v. Lindsay, 85 Ala. 198, 7 Am. St. Rep. 38; Little v. Little, 2 N. D. 175, 49 N. W. 736; Quimby v. Shearer, 56 Minn. 534, 58 N. W. 155.

Palda & Aaker, for respondent.

Statement.

BRONSON, J. This is a consolidated action upon two policies of life insurance. Defendant has appealed from a judgment entered upon a verdict in plaintiff's favor. The same cause was heretofore before this court. 180 N. W. 523. Then plaintiff appealed from a judgment of dismissal entered upon a verdict directed at the close of plaintiff's testimony. Pursuant to the order of this court, a new trial was had. The salient facts have been fully set forth in the previous opinion of this court. It is unnecessary to restate theme in detail excepting as additional testimony or purposes of this opinion so require. The facts are: In June, 1916, plaintiff's son, then aged nineteen, applied to defendant for insurance upon his life. Two ordinary life policies, dated July 7th, 1916, one for $3,000, the other for $2,000, were issued, payable to plaintiff, his father, as beneficiary. In the former policy, the premium was $57.30, in the latter, $38.20, payable annually on June 23d. The policies recited the payment of such premiums for a period terminating June 23d, 1917. One Kane had been an agent and solicitor of defendant for insurance during some thirteen years. In some respects, he was distinguished in the service of defendant, belonging to the so termed $200,000 club. For many years, since November, 1908, at Minot, North Dakota, as such agent and solicitor, he represented the defendant. During the past eight or nine years he has devoted practically all of his time to such business. At Grand Forks defendant maintains a branch office. There it has an agency director or manager over the agents in the state. This branch office receives premiums from

agents and attends to the collection of renewal premiums. It furnishes reinstatement blanks. It has authority to reinstate policies of $2,000 within thirty days after the grace period allowed. The policies, however, provide that at any time after default, upon written application by the insured and upon presentation at the home office of evidence of insurability satisfactory to the company, they may be reinstated. In 1918 Kane moved to Grand Forks. He has a private office there connected with the branch office, the rent for all of the rooms of which is paid by defendant. Previously, he occasionally visited Grand Forks for purposes of conferring with the agency director or the cashier of the branch office. At Minot, Kane represented himself to be the agent of defendant. There, as Kane testified, he tried to let them know that the defendant insurance company was on the map at all times. He had known plaintiff since 1905 or 1906. Plaintiff has lived in Minot since 1887. Frequently, before and after 1916, Kane talked and solicited life insurance from plaintiff. In 1916, Kane solicited the life insurance involved from plaintiff and his son. On June 23d, 1916, the son signed an application for a policy for $2,000 and for $3,000. Kane witnessed the application. After his signature is the statement: "Other agents, none." On June 24th, 1916, the son submitted to and passed medical examination. Plaintiff gave to Kane a note for the premium. Kane cashed the note. Plaintiff later paid the note at the bank. Kane received the policies and delivered them to either plaintiff or his son. It was Kane's duty to collect and to remit the first premium to the branch office. The records of this branch concerning these policies show that Kane was the agent for the same. That he was entitled to a commission of 55 per cent or $52.53 of this first premium and that the premium was paid on August 14th, 1916.

Kane, as agent, operated under an agreement between him and defendant dated September 1st, 1910. This agreement is countersigned by the agency director of the branch office. The agreement constitutes Kane a special agent for the purpose of canvassing applications for insurance and of performing such other duties in connection therewith as the officers of the company may in writing expressly require of him. It provides that Kane shall have no authority to accept risks of any kind, to make, modify, or discharge contracts or to extend the time for paying any premium, to waive forfeitures, or to receive any moneys due

or to become due, excepting upon applications obtained by him or upon policies or renewal receipts sent to him for collection. It inhibits Kane from placing any application for life insurance with any other company except with defendant's consent.

The insured belonged to the National Guard which, in 1916, was ordered to the Mexican border. The son performed service there but returned to Minot before enlistment. On June 4th, 1917, at Minot, he enlisted in our United States Army. The premiums fell due on June 23d, 1917.

The policy provides for a grace period of one month during which every premium after the first may be paid. On July 14th, 1917, the plaintiff wrote to the branch office to the effect that he did not receive the policies until after four months so that he figured that he had no insurance for that period of time. That the policies are so patched up with clauses that if his son were killed in any country outside of the United States, his estate would receive little or nothing on such policies. That if such was the company's way of doing business he did not feel like putting up $95 more for this year's premium. That if they wished to change the policy and make them a straight life, whether his son is in the army or not, he would pay up the premium. That he preferred to give his note for ninety days as he had just invested considerable money, but he could send the cash if they insisted on it. On July 19th, 1917, the cashier of the branch office wrote to the plaintiff to the effect that the full insurance took effect on June 23d, 1916, and plaintiff was fully protected. That their records did not show that the policies had any restrictions and that they were liberal contracts indeed. That if plaintiff would forward policies they would be pleased to proceed to do all that they could to adjust matters to his complete satisfaction for the New York Life's aim is to at all times satisfy their policy holders. That it gave him pleasure to attach herewith two extension agreements of $30 and $45 due September 23d which should be signed by his son and returned with a deposit of $20.50. That he trusted that this deposit would be made within the thirty days' grace which expired July 23d. These extension agreements are the so-termed blue notes, one of which is fully set forth in the former opinion of this court. See 46 N. D. 588, 180 N. W. 525. These two blue notes were signed by both the plaintiff and his son. On July 21st, 1917, he wrote to the company

at Grand Forks to the effect that he inclosed the two policies also the notes and check for $20.50. That he wanted a straight policy that was good in any country with no notice to be given the company because the company knew that the boys would not have a chance to do such things in war time. That he wanted a twenty-year payment plan. On July 31st, 1917, the cashier of the branch office wrote to plaintiff to the effect that he had the policies. That he noted the indorsement on the policies which provides that during the first two years, if the insured shall engage in military service, etc., outside of the United States and shall die in consequence thereof, the amount shall be limited to one fifth of the face amount. That the policies are already over one-year old and on the second year. That as liberal contracts as these could not be secured at this time by his son in view of the condition of the war. That they are splendid contracts indeed, and the military provisions expire June 23d, 1918. That he was securing figures on the twenty payment life basis and would advise him further in due course. That meanwhile the policies were being held subject to his order. Before the time when these blue notes became due, plaintiff, in accordance with his testimony, had several conversations with Kane at Minot. The substance of these conversations has been heretofore stated in the former opinion. See 46 N. D. 588, 180 N. W. 526. Plaintiff's son was then in the military service of our government. Mobilization was then taking place in this section of the state for transportation to France. Plaintiff was concerned, not about paying the notes because he knew he could pay those, but about the insurance policy provision. He talked with Kane about this in several conversations. The particular conversation he detailed was about September 17th or 18th, 1917, before the notes became due. Kane advised him that he had nothing to worry about; that the company was making, or had made, arrangements with the government so that the government was going to take care of the premiums. Kane talked about his trips to New York and his connection with the company. He told plaintiff that he was in good standing with the company and his word went a long way; that the policies were all right; that all that was necessary was a letter from the captain that his son was in the service or that he wanted to take advantage of the arrangement the government was making. Another witness testified that he heard a part of this conversation and that Kane told plaintiff

that everything would be all right. On September 26th, 1917, the branch office sent a form notice to the insured, noting therein failure to pay the note given in connection with the premium due June 23d, on the policy which has lapsed for nonpayment of such premium. It inclosed an application for reinstatement; requested answer to the questions therein, and its return together with $45.56. On September 27th, 1917, this branch office wrote to the plaintiff inclosing the policies and stating that they could not hold them in suspense for an indefinite period; that the blue notes became due September 23d, 1917, and, as they were not paid when due, the policies were lapsed, and that they were so advising the insured under separate cover; that they trusted his son would be in a position to apply for reinstatement and would forward requirements called for in the letter at an early date in order that prompt action might be taken. On October 27th, 1917, this branch office, wrote to plaintiff. A copy of the letter is set forth in the former opinion. After the plaintiff received this letter he talked with Kane who informed him that the company had made arrangements to take care of these premiums through the government. He advised plaintiff that he had nothing to worry about; that the company was looking after it. As this letter discloses, a copy had been sent to Kane by the Grand Forks office. Plaintiff further testifies that after he got the letter he sent the papers he had received from the company to his son at Camp Greene; that then, they were going from one place to another; that sometimes his son would get his letters and sometimes not. Otherwise, he testifies that his son was in camp some three or four months before he sailed; that they left for France in December and landed there on Christmas day. On December 26th, 1917, plaintiff wrote to the branch office that he had that day received the policies; that he was sorry this had happened but, if not too late, he would send a check for one half if the company would take his note for ninety days for the balance; that he had been so hard up this fall, he could not see any crop and the laundry had been losing money every month. Otherwise, in the testimony it appears plaintiff relied on the statements made by Kane. The blue notes never were returned to him. He thought they were a liability for which he could be held responsible; he never read the fine print in the blue notes. He was financially able to pay them. In fact, later, he borrowed $15,000 on his straight note. Kane, in his

testimony, states that he had no instructions from the branch office or the company to undertake a collection of the renewal premiums due in 1917, that he had no instructions to tell plaintiff that either the company or the government would carry the insurance on the life of the deceased while he was in military service; that he did not make such statements to plaintiff. He admitted that he was a licensed agent, pursuant to license issued by the insurance commissioner of this state, which authorized him, as agent, to transact the authorized business of defendant in this state. He testified that he was interested in the soldier boys; that he was in Washington and New York along in the summer of 1917; that he talked with the officers of the company in New York about the war provisions to be made by Congress for the purpose of taking care of premiums of our soldiers; that the life insurance companies were very much interested in it; that he talked considerable with the officers of the company about it. In Washington he talked with congressmen and senators about it. That in this second premium he had a 15 per cent commission to be earned; that usually he got notice after a policy lapsed; that he received a copy of this letter of October 27th, that he understood when he receives a special notice that the company meant that he should try to keep the policy from lapsing; that one of the things the company expected him to do in his agency was to see if renewals could not be fixed up or lapses reinstated. That he is interested in every policy that he has on the books of the company as agent of the company. A lapsed policy means a loss for the company. When he receives copies of these special letters concerning lapses he tries, if possible, to put it back again and fix it up. He admits having conversations with the plaintiff, but he thinks he remembers telling him once if there was any liability he did not need to worry, the company would pay the claim if there was any liability.

The cashier of the branch office testified: She took her position as such September 27th, 1917; she is in charge of the cashier's department. Her office received the renewal receipts for the premium due in June, 1917. The function of her department is the handling and collection of renewal premiums. Neither the notes nor the renewal receipts were ever turned over to Kane for attention; she has examined the records of the office and has found no authority in writing given to Kane to deal with the renewals on these policies. She sent the renewal receipts and

the notes back to the home office when the policies lapsed, the exact date of which she does not remember. She never received notice that Kane had assumed to act for the company with reference to these renewals or that he had made any representations to plaintiff. Mr. Habeck preceded her as cashier; he did not testify. The agency director did not testify. Anderson, comptroller of the head office, testified by deposition. He explained the records of the company and their methods of keeping an account of the premiums. That the renewal receipts were mailed to the cashier, Habeck, at Grand Forks under definite instructions and under specific written rules; that Kane was not authorized to take any action about such renewal premiums. So far as defendant's records showed, the premium on the policies due June 23d, 1917, had not been paid Lewis, the contract register of the home office testified through deposition. He testified that the contract designating Kane as a special agent was the only contract ever made with him concerning his agency; he identified the book of instructions given to agents. Lindsay, the superintendent of agencies at the home office testified through deposition that the scope of Kane's authority as agent was limited by his written contract of agency. Reference thereto has heretofore been made. That Kane had nothing whatever to do with the collection of any renewal premium concerning the policies involved.

Defendant contends that, under the contract, the policy was not in force beyond the date when the next premium fell due including the grace period of one month; that the note extension extended the insurance and the right to pay the premiums until midnight of September 23d, 1917; that the failure of the makers to pay the notes at such time automatically abrogated any claims against the makers under their very terms; that the blue notes did not change the terms of the policy but that their rights remained the same as if no agreement had been made thereunder; that no waiver is established because the agent became possessed of no authority thereafter to waive any provisions of the policy or the agreements made, and had no authority to solicit or collect a renewal premium; that the trial court erred in reception of evidence concerning the declarations and representations of the agent, Kane.

Decision.

The facts presented upon this record are substantially the same as

those presented upon the former appeal. The exception is that now they are more complete, and the record thereof more extensive. In the present record Kane's authority as an agent, and his actions in representing the company have been much more fully detailed through testimony elicited by both plaintiff and defendant. Defendant has explained in the testimony the limitations upon the authority of Kane, as the agent, and the proceedings had by the home office and branch office in the consideration of these policies, and the collection of the renewal premium. The facts now presented are, accordingly, substantially the facts presented upon the former appeal, with the additional facts showing the limited authority of Kane, as a special agent of defendant. Upon the former appeal this court held that the question of waiver of the right of forfeiture was for the jury. Upon this question the jury, upon the new trial, have decided in plaintiff's favor. The instructions of the trial court are not challenged. The only question presented, therefore, is whether, as a matter of law, the present record presents any evidence to support the jury's finding of waiver by the defendant. The law of the case is announced by the previous opinion of this court. To a large extent defendant now presents arguments and authorities upon the questions that were fully considered heretofore by this court through defendant's former brief and petition for rehearing. It is unnecessary to restate the law applicable upon the facts as heretofore stated in the former case. We are of the opinion that in some respects the present record contains more substantial evidence for submission to the jury than the former record. We are also of the opinion that the evidence of defendant concerning the limited contract with Kane and the denial of any authority possessed by Kane to make any representations, or with authority to do any act concerning the collection, or renewal, of the second premium, does not, as a matter of law, destroy the right of consideration by the jury, of the facts presented by plaintiff's case. On the present record peculiar and unusual facts are presented. Defendant is demanding its bond of forfeit according to the letter and word of the contract made.

There is a good faith that searcheth the conscience of the parties in every transaction; the good faith of the giver, of the receiver, for right and for justice. The law, ever seeking, as its raison d'etre, to render every one his due, is ever ready to hear and apply good faith. Waiver

and estoppel are handmaidens, closely related, that assist. The conscience of the defendant must be found in the actions of its representatives, for it has no actual identity or entity except through the fiction of the law which gives to it a status. For its right of forfeiture, defendant invokes the law of agency, the principle that the principal cannot be bound except through authorized acts of its agent. Invoking principles of agency, defendant, reciprocally, must be bound by the law that applies to the relation.

As a foreign insurance corporation, defendant, by the law of this state, is permitted to do business in this state only through its authorized agents, who must be residents of and have their office and place of business within, this state. Comp. Laws, 1913, § 4926. Upon this record, defendant had two representative agencies in this state. The branch office at Grand Forks, and Kane, at Minot, later at Grand Forks. The cashier of the branch office, for a part of the time, alone, testified. From her testimony, limited as it is, it does appear that this branch office has an agency director or manager. That it has authority to receive applications and remittances for first premiums. That it has authority to collect renewal premiums sent to it and, to a certain extent, to make reinstatements of policies. It was the custom of Kane to confer with this agency director. Later, he had an office connected with this branch office. Even under the special contract with Kane there might have been conferred upon him a duty and power concerning renewal premiums. It is certain that a duty and power was so conferred upon the branch office. Kane was a man of long experience with the company. He enjoyed its confidence. He had close connections or relations with the branch office. It may be noted that the agency director did not testify. The record further does not disclose the agency director was a licensed agent in this state. It does disclose that the authorized and licensed agent of defendant, resident in the state, was Kane. He was not authorized to act as agent for defendant until the commissioner of insurance had issued to him a certificate of insurance showing that the defendant had complied with the requisites of the law. Comp. Laws, 1913, § 4920. To Kane, through state authority, there was issued a certificate which certified that defendant had appointed him, a resident of Minot, its agent for the transaction of its authorized business of insurance in this state. It is admitted that this agent Kane

was authorized to solicit this insurance, take the application therefor, collect the first premium and to remit it to the branch office, and to deliver the policy to the insured. It is admitted that Kane was interested financially in the collection of the second premium; that it was his duty to prevent policies from lapsing and to exercise his best endeavors to so prevent. When Kane solicited this insurance he knew the status of the insured as a member of the National Guard. War time conditions then were at hand. The disclosure was made in the application. Upon the policy there was a rubber stamp provision that if the insured engaged outside of the United States in military service during the first two years of the existence of the policy it should be limited to one fifth of the face amount unless the insured obtained a war risk permit before leaving the United States. Thus was the insurance limited to $1,000 during the first two years of its existence, and thus was defendant possessed of full knowledge of the status of the insured at the very inception of the insurance. The first premium was paid to Kane through a note which was good and thereafter paid. The policy was issued on July 7th, 1916, acknowledging receipt of the premium, when notations on defendant's records disclose that such premium was not paid to the company until August 14th, 1916. The policy was not delivered to plaintiff until about four months after the time of its application, yet, the company reassured plaintiff that the policy had been in full force and effect from June 23d, 1916. But the application provided that the insurance should not take effect unless the first premium is paid and the policy delivered and received by the insured during his lifetime and good health. The son went into military service upon the Mexican border. When the time occurred for the payment of the second premium he had returned. His father, not satisfied with conditions contained in the policy, complained to the branch office requesting changes. He offered to pay the premium in cash, if they insisted, or to give his note. Then his son had already enlisted in military service. Then the United States had become engaged in the World War. His father desired a policy that would apply whether his son was here or abroad. The branch office, in reply, reassured plaintiff and submitted, for payment of the second premium, two blue notes for signatures and a request for payment of $20.50. These notes were signed by both plaintiff and his son and sent, together with $20.50, to the branch office. Plaintiff

thought the so-termed blue notes were notes in fact. He thought he was liable upon them. He was never advised to the contrary and they never were returned to him. As notes they were ingenious. They purported to be notes but the minute they became due they ceased to be notes. In other words they were no obligations at all unless paid. In fine print these so-termed blue notes state that no part of the premium due on June 23d, 1917, had been paid, whereas, as a matter of fact, plaintiff paid, and defendant's records show, $8.20 applied on one policy and $13.30 upon another. This amount of cash, together with the notes, made exactly the amount of premium due for the second year. The policies involved are continuing obligations, subject to forfeiture upon conditions. Throughout the record it appears that plaintiff desired to keep the insurance and that defendant was equally solicitous in preventing a lapse. Throughout the record it further appears that plaintiff was financially able to pay the second premium in cash; that his notes were good and that he thought he had assumed an obligation for the second premium. Before these blue notes became due Kane had conversations with plaintiff concerning the payment of the premium. His representations and statements made to the plaintiff reassured plaintiff that the insurance contained in the policies was valid and would be continued without the necessity for actual payment of cash on September 23d, 1917. Kane appeared to be in a position of authority to make these representations by reason of his connections with the company, with the branch office, and his long standing as sole representative of the company at Minot. The peculiar conditions that then existed concerning soldiers who were at the front and the governmental activities to protect their insurance further served to reassure the plaintiff. When the blue notes became due September 23d, 1917, and the policy then, pursuant to strict interpretation of its contract provisions, terminated and lapsed, then and thereafter the branch office at Grand Forks assumed to act and assumed the authority to act. It proposed an extension and the execution of a new note. It prescribed conditions of reinstatement. It then assumed to have, and it did have, powers of reinstatement. It sent a communication concerning the matter direct to the licensed agent, Kane. He again reassured plaintiff concerning the validity and continuance of the insurance without the necessity of further action. It is apparent that powers and duties were

assumed by the branch office co-operating with Kane concerning the reinstatement of this policy contrary to the express provisions contained in the policy.

The branch office assumed to have a power and a duty, conferred by the home office, contrary to the provisions of the policy that no agent is authorized to waive forfeitures or to make, modify, or discharge contracts. Thus, was the branch office permitted to assume and to accept powers and responsibilities contrary to the right of forfeiture as expressly provided in the policies. Upon this record, in considering the application of waiver and estoppel, there are more elements involved than the mere representations and assurances of the agent Kane. The statute provided that whoever solicited insurance, on behalf of any insurance corporation, or made any contract of insurance, or collected any premium, or in any manner aids or assists in doing either, or in transacting any business of a like nature for any insurance corporation shall be deemed to be an agent of such corporation to all intents and purposes. Comp. Laws, 1913, § 4959. Defendant clothed the branch office with the habiliments of authority contrary to the policy. The branch office, thus clothed, assumed to act and to seek the co-operation and assistance of its agent Kane. Thus, through their activities, so assumed, and so permitted, did they, pursuant to the statute and their representations, appear to have and possess an authority equal to their assumptions. And so, the defendant, as a matter of law, may not hide behind a secret and restrictive agency which it itself, by its acts and statutory regulations, has enlarged, and assert strict enforcement of the policy provisions where the plaintiff, able to perform, has been misled to his prejudice. Therefore, as held in the former opinion of this court, the questions of waiver were for the jury and the findings thereupon should not be disturbed. We are further of the opinion that the trial court did not prejudicially err in receiving in evidence the statements and admissions of the agent Kane which concerned the res gestæ. The judgment is affirmed with costs.

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

ROBINSON, J., dissents.

CHRISTIANSON, J. (dissenting). The defendant is held liable in

this case on account of the acts of its agent, Kane. Upon the former appeal I expressed the opinion that the evidence was insufficient to establish Kane's authority to act for and bind the defendant in regard to those matters where his acts are said to establish waiver and estoppel on the part of the defendant.

I am also of the opinion that the evidence is insufficient in the same respect on this appeal.

On petition for rehearing.

PER CURIAM. On December 30th, 1922, the decision of this court was filed in this case. The case was decided by a divided court. The majority opinion written by Mr. Justice Bronson was concurred in by Mr. Chief Justice Birdzell and Mr. Justice Grace. Justices Christianson and Robinson dissented. On January 1st, 1923, there was a change in the membership of the court. On that day Justices Grace and Robinson retired from, and were succeeded in, office by Justices Johnson and Nuessle. On January 13th, 1923, the defendant filed a petition for rehearing. The situation confronting this court upon the filing of the petition was this: There were only two members of the court who had participated in the case upon the original hearing who agreed with the disposition of the case made in the former decision, one of the members of the court disagreed with the former decision, and two members of the court had not participated in the former hearing and were wholly unfamiliar with the case in any of its aspects. In view of the circumstances it was thought advisable to order a reargument without determining whether a rehearing should or should not be granted. The reargument was intended to serve a twofold purpose:

(1) To determine whether a rehearing ought to be granted and the conclusions reached in the former opinion as to the law and facts re-examined; and,

(2) Whether in event any ground for rehearing existed the former decision ought to be departed from.

On oral argument counsel were informed by the Chief Justice of the purposes for which reargument had been ordered.

After careful consideration a majority of the court are agreed that the petition for rehearing filed in this case does not present any cause

for which a rehearing ought to be granted. Rule 16, Rules of Practice. The petition is in reality a reargument of the questions determined by the former decision. The mere fact that there has been a change in the membership of the court and that there is either a possibility or a probability that the new members of the court may disagree with the conclusions reached in the former opinion does not afford any reason for a rehearing. 4 C. J. 625. The petition for rehearing is, therefore, denied. The members of the court who participated in the former decision adhere to the views then expressed. Justices Johnson and Nuessle express no opinion as to correctness of the former opinion; but they agree that no cause has been presented requiring a rehearing. In other words, the majority of the court are of the opinion that the questions presented in the petition for rehearing were all disposed of adversely to the defendant by the former decision; and that in making such decision the majority of the court, as then constituted, had before them and considered all the facts; and that it is not shown that they overlooked any controlling decision or statute.

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

UNDERWOOD STATE BANK, a Corporation, Appellant, v. JOHN G. WEBER, Cleveland State Bank, a Corporation, John O'Donnell and Molius Dronen, Respondents.

(193 N. W. 602.)

Chattel mortgages — evidence held sufficient to establish that note secured by chattel mortgage paid before foreclosure action.

1. In an action to foreclose a chattel mortgage securing a note for $1,500, the evidence is examined, and it is *held* that the note had been paid and discharged prior to the bringing of the action.

Disposition of cause.

2. The findings and judgment of the trial court are reviewed and modified as to the amount of defendant's indebtedness existing at the time of the giving of the note in suit.

Judgment — on counterclaim denied where rights of strangers to record involved.

3. A judgment on a counterclaim will be denied where the transactions out of which the claim arose were with persons who are not parties to the record and where the rights of such third parties are involved.

Opinion filed April 20, 1923. Rehearing denied May 12, 1923.

Appeal and Error, 4 C. J. § 3169 p. 1157 n. 8, 9; Chattel Mortgages, 11 C. J. § 485 p. 695 n. 80; Judgments, 33 C. J. § 61 p. 1106 n. 58.

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

Judgment modified and affirmed.

Knauf & Knauf, for appellant.

J. A. Hyland, for respondent.

BIRDZELL, J. This is an action to foreclose a chattel mortgage securing a note for $1,500, dated October 21, 1920, and payable on demand. Judgment was entered in the court below in favor of the defendant and the plaintiff appeals. For some years prior to the transactions involved herein, the defendant Weber was a farmer living in the vicinity of Underwood. In 1908 he contracted for the purchase of 480 acres of land from one Casey, later obtaining title by deed dated December 9, 1916. He placed an $8,000 mortgage on the land and gave Casey a quitclaim deed to the coal rights. In the course of time he became indebted to three banks in Underwood, the First National, the Security State and the Underwood State Bank, the plaintiff herein. In the fall of 1920, he was desirous of settling his affairs in and about Underwood preparatory to moving to a place near Cleveland in Stutsman county, where he resided at the time this action was brought. To this end he conducted an auction sale and entered into negotiations with the plaintiff bank and with three individuals, who were directors and officers of the bank, namely, Bauer, cashier, Tauer, president, and Klein, vice president, for a liquidation of his indebtedness and for the sale of his land. October 21, 1920, the defendant went to the plaintiff bank for the purpose of effecting a settlement of his affairs preparatory to moving. It appears that there was an understanding, in fact a contract, that Bauer, Tauer, and Klein were to take the defendant's land at $39 per acre. They were to assume the incumbrances against it and apply the defendant's equity in liquidation of his indebtedness, the

amount of this equity being disputed as will subsequently appear. The defendant at the time owed the First National Bank on notes, $3,657.07, the Security State Bank, $4,338.23, the plaintiff bank, $1,850, with perhaps some small items of interest. An overdraft and interest items owing to the plaintiff amounted to $434.90. On this day Weber executed the $1,500 note in suit, a note of $1,000 (the execution of this note is disputed by defendant) and one of $2,657.07. According to the contention of the plaintiff herein, the $1,000 note and the $1,500 note together represent the balance owing by the defendant after applying his equity in the land towards the payment of the obligations mentioned above and which were either paid or assumed by Bauer, Tauer, and Klein. The defendant, however, contends that the $1,500 note alone represents the balance so found to be owing. And it is his further contention that this is more than he in fact was owing at the time of the settlement. There were two items of personal property left behind by the defendant when he moved, a threshing rig and a header. Negotiations had been practically completed with one Grabinger for the sale of the threshing rig for $1,000, and after the defendant had left the country it was sold to him for $950. Later the header was likewise sold for $175 and the amount of $1,225 less a small item not necessary to mention here was thus realized by the plaintiff. The plaintiff credited the proceeds of the threshing machine sale on the $1,000 note, but at the time of the trial had given no credit for the header owing, as Bauer claimed, to a misunderstanding relating to a charge for a new canvas, ($28), which it was necessary to furnish.

The following fall of 1921, when the defendant decided to sell his crop, he could not do so on account of the mortgage in question here, and he went to Underwood for the purpose of effecting a settlement. He was, however, unsuccessful, but upon his return to Cleveland an arrangement was made by telephone whereby on the payment of $500 the mortgage would be released so far as the crop was concerned. This $500 was paid. The present action was later begun.

Upon the trial it became apparent to the court that the action had taken on the aspect of an accounting and it required the plaintiff to produce the various notes in its files which had been renewed and retained as collateral and which it had acquired from the other banks

mentioned by virtue of the real estate transaction. They are all exhibits in the case.

The main controversy in the court below centered about an item of $1,920 in the real estate transaction which Bauer, Tauer, and Klein claimed they had withheld with Weber's assent on account of an alleged defect in title, due to the quitclaim deed of the coal rights to Casey; and about the $1,000 note, executed October 21, 1920, which the defendant contends was not executed or, if executed, that it only evidenced a renewal of part of his original obligations to the First National Bank, all of which had been assumed by Bauer, Tauer, and Klein along with the other indebtedness. As stated above the plaintiff contends that this note was a portion of the balance struck which was put into a separate note and left unsecured with the understanding that the proceeds of the threshing machine sale would liquidate it.

The trial court found that on the 21st day of October the defendant owed the plaintiff bank $2,500 and that he gave the two notes of $1,000 and $1,500; that the real estate deal above mentioned was had for and in behalf of the bank in so far as liquidating the debts of the defendant to the bank was concerned; that there was no settlement or accounting between the purchasers of the land and the defendant; that there was no agreement authorizing the purchasers of the land to withhold money from Weber for the purpose of liquidating an alleged claim arising out of the coal right transaction; and that the purchasers of the land, after liquidating Weber's indebtedness, still retained the sum of $881.27 rightfully belonging to the defendant. The judgment entered, however, is simply to the effect that the chattel mortgage and all of the notes produced by the plaintiff bank are discharged and that defendant recover his costs. In a memorandum opinion the trial court had said he was holding that Weber was entitled to recover the amount retained on account of the coal right claim with 6 per cent interest from October 21, 1920; that it should be applied on the two notes ($1,000 and $1,500) in full payment; and that Weber have judgment against the plaintiff for the remainder or balance. It will be seen that the judgment does not conform to the decision announced.

Upon this appeal the principal contention of the appellant is that it should be permitted to foreclose its mortgage for a balance claimed to be due after crediting the cash payment of $500 in the fall of 1921

and the amount realized for the header. For the purpose of this contention the $1,000 note is considered as having been discharged by the threshing machine transaction and the payment of $50 by Bauer, Tauer, and Klein.

We are of the opinion that the finding of the trial court to the effect that the $1,500 note and the mortgage were fully satisfied is correct. Our reasons for this conclusion may be briefly stated. Bauer did not testify that Weber owed the bank, on October 21, 1920, $2,500. He said the amount was $2,450. The notes that were executed that day were the $1,500 note secured by the chattel mortgage in question, the $1,000 note, and a note for $2,657.07, the latter two of which, according to the account filed by Bauer himself, operated to evidence a renewal of the indebtedness of Weber to the First National Bank of Underwood, which, according to the arrangement, was to be paid or assumed by Bauer, Tauer, and Klein. The pencil notations on the $1,000 note, presumably placed there by Bauer or by some officer or agent of the plaintiff bank, are identical with those placed upon the note for $2,657.07. These circumstances tend strongly to show that the bank must have treated the $1,000 note as part of the indebtedness which all agree the purchasers of the land were assuming. Furthermore, the statement which the trial court required the plaintiff to produce showing the status of Weber's account does not show him to have been indebted to the bank in the sum of $2,450, as testified to by Bauer, nor $2,500, as found by the trial court, but it shows, after taking credit for the $1,920 on account of the coal right conveyance and taking into consideration the giving of the $1,500 note and the $1,000 note, that Weber was overpaid or overcredited to the extent of $189.25. It thus becomes quite apparent that no balance was struck on the basis of allowing the claim of $1,920, as no reason appears in this record why the bank would over credit Weber to this extent at a time when he was giving secured paper for his remaining indebtedness, and it is only by allowing this amount that the account can be made to show that Weber owed approximately $2,450 as claimed, or, to be exact, $2,689.25. The other findings of the trial court are in reality consistent with this view, for the judge affirmatively finds that Weber never agreed to allow the $1,920 item. In the light of these discrepancies in the plaintiff's account and in the testimony produced in support of the plaintiff's claim,

we are of the opinion that the version of Weber is nearer correct when he says that the amount agreed upon as a balance was $1,500. Whether such was in fact the amount of his indebtedness we shall not undertake to determine. Clearly the plaintiff's evidence, though it kept account of its business with Weber does not satisfactorily establish any different amount. Hence we are of the opinion the $1,000 note was given just as the note for $2,657.07 was given, to evidence a portion of the indebtedness to the First National Bank, and was to be treated in the same manner. We find that it did not represent any part of the balance Weber was thought to be owing the bank. The $1,500 secured note, the one in suit, represented that balance. According to all of the testimony, ample payments have been made to discharge this note. We therefore conclude that the judgment of the trial court is right in so far as it finds this note to have been paid and satisfied but erroneous in so far as it finds Weber to have been indebted to the bank in the sum of $2,500.

In addition to the demand for a trial de novo in this court the appellant has particularly specified as error the findings of the trial court to the effect that the land contract was a bank transaction. (2) That the defendant was entitled to a credit of $1,920 with interest against the plaintiff bank. (3) That the $1,920 item was due from the officers and directors of the plaintiff bank and a proper offset against it. On the other hand, respondent contends that judgment should be entered in his favor for the amount of $906.15, inasmuch as the record shows that by disallowing the coal right damage claim he has overpaid his indebtedness to the plaintiff to that extent. Upon this record we can see little merit in any of these contentions. It will be noted that the findings and judgment of the trial court did not embody those features of the memorandum opinion to which counsel for the appellant objects in the specific errors referred to. The finding was limited. It was only to the effect that the land transaction was conducted on behalf of the bank and the bank bound thereby insofar as the liquidation of Weber's indebtedness to it was concerned. While there is also an affirmative finding to the effect that the individual purchasers of the land retained $881.27 of money rightfully belonging to the defendant, that finding is not made the basis of any judgment against them; nor could it well be, for they are not parties to this proceeding. Neither is there any

judgment against the bank on the counterclaim. The reasonable inference from this circumstance is that the trial court doubted the propriety of litigating the coal right damage claim in this action to any greater extent than to determine whether or not that the defendant had assented to the allowance of any definite amount therefor and to the extent of holding the bank bound by its agreement of novation. Thus it held that the bank accepted Bauer, Tauer, and Klein instead of Weber as its debtor to the extent of the obligations owing by Weber to it and to the other banks. The judgment being thus limited does not injure the plaintiff and appellant beyond its effect on the defendant's indebtedness.

As to the respondent's contention that judgment should be entered against the bank for the overpayment or surplus in its hands, we are of the opinion that it must be denied, except for the small overpayment on the $1,500 note, for the reason that the parties principally concerned with the disputed damage claim were not before the court. We think the trial court properly limited its findings concerning this transaction to the effect upon Weber's indebtedness to the bank and that on this record the rights of Bauer, Tauer, and Klein, arising under the covenants of warranty in the deed, should not be litigated as between them and Weber. Had it been the desire of the defendant to have litigated this question it would seem that he should have made his grantees parties to the suit. We are of the opinion that the judgment in this action should not be res judicata concerning any question of breach of warranty between Weber and his grantees, except that the latter must be credited with the discharge of Weber's obligations to the banks to the extent that the judgment herein finds them to have been satisfied. Similarly any findings concerning the coal right damage claim may be considered as stricken from this record, except the finding that Weber did not agree to its settlement upon any definite basis.

Our finding that at the date of settlement Weber's obligation to the bank was considered to be $1,500, for which he gave the secured note in suit, leads to the conclusion that this note was overpaid through monies received by the bank that should have been applied as follows: threshing machine $950; header $175; payment by check $500. With allowance for interest on the unpaid principal, taking into consideration the time the credits should have been entered, there must be an affirmative judgment for the defendant and respondent to the extent of

his overpayment of this note. As so modified the judgment appealed from is affirmed. The respondent will recover costs on this appeal.

BRONSON, Ch. J., and CHRISTIANSON and JOHNSON, JJ., and COOLEY, Dist. J., concur.

NUESSLE, J., disqualified, did not participate, Honorable CHAS. M. COOLEY, Judge of First Judicial District, sitting in his stead.

HERMAN BACKHAUS and R. R. Hogue, et al., Appellants, v. T. P. LEE, F. J. McConville, Frank Goughnour, Leonard du Heaume, and Jacob Schall, as County Commissioners of Emmons County, North Dakota, et al., Respondents.

(194 N. W. 887.)

Counties — taxpayers held not entitled to enjoin issuance of warrants in payment for culverts and bridges, though law under which constructed not fully complied with.

In a taxpayers' suit to enjoin the county commissioners from paying for culverts and bridges, it is *held*, for reasons stated in the opinion, that the trial court properly refused to grant an injunction.

Opinion filed May 12, 1923.

Counties, 15 C. J. § 353 p. 642 n. 87.

An appeal from the District Court of Emmons County, Third Judicial District, *McKenna*, J.

Affirmed.

Lawrence, Murphy & Nilles, for appellants.

"The appellant bases the argument for the validity of the contract upon the powers vested in boards of county commissioners by subdivision 3 of § 3275, Comp. Laws, 1913, which authorizes them to construct and repair bridges, and to open, lay out, vacate, and change highways in the cases provided by law."

The argument is that except as may be elsewhere limited by express

statutory enactment, the power conferred by the foregoing subdivision may be exercised in any manner that the county commissioners elect, and that all contracts made in exercising the power so conferred are valid, in the absence of fraud. Bayne v. Thorson, 37 N. D. 187; Dalezal v. Bostick, 41 Ill. 743, 139 Pac. 964.

"There is not, in the common law, a maxim more eminently just and promotive of the public convenience than that of 'stare decisis.' . . . If law, well established, may be annulled by an opinion, a foundation is laid for the most restless instability. The decisions of one court may be overruled by another court, and those of the latter will have only a transient efficacy, until some further court, dissatisfied with them, shall substitute new principles in their place. No system of inflexible adherence to established law can be as pernicious as such ceaseless and interminable fluctuations." Palmer v. Mead, 7 Conn. 157.

"The rule of stare decisis means in general that, when a point has been once settled by judicial decision, it forms a precedent for the guidance of courts in similar cases. It expresses the principle upon which rests the authority of judicial decisions as precedents in subsequent litigations and adherence to it is necessary to preserve the certainty, stability and symmetry of our jurisprudence." Menge v. The Madrid, 40 Fed. 679.

If the contracts are illegal and void, and they are each manifestly so, then the county auditor had no authority in law to issue nor has the county treasurer authority in law to pay warrants drawn on public funds, raised by taxation, in payment of the contract price and as a final completion on the part of the county of such invalid agreements. Engstad v. Dinnie, 8 N. D. 1; Story v. Murphy, 9 N. D. 115; State v. Mikkelson, 24 N. D. 175.

"The right of a taxpayer to initiate an action to enjoin municipal officials from unlawfully disbursing public funds is a right common to all taxpayers, great and small." Engstad v. Dinnie, 8 N. D. 12.

"The weight of modern authority, which concedes to the resident taxpayer the right to intervene on his own behalf as well as on behalf of the public, and invoke the powers of a court of equity to prevent the unlawful dissipation of the public funds, does not recognize the earlier doctrine of laches which defendants seek to invoke. In our judgment, no laches on the part of taxpayers or others can operate to confer author-

ity upon the officials of a corporation in a case where such officials are wholly without power to act." Storey v. Murphy, 9 N. D. 115.

"There has been a conflict of opinion on some branches of this question; but an investigation of the authorities will show, we think, that where courts have estopped municipalities from interposing the plea of ultra vires, and from escaping the responsibility of their acts, it has been where there has been a defect in the execution of the contracts, as in the issuance of bonds, etc., and not where there has been an absolute want of power on the part of the municipality to contract." A like distinction is recognized in the Monroe Case. There the court said: "The case of Spokane St. R. Co. v. Spokane Falls, 6 Wash. 521, 33 Pac. 1072, is not in point. The city council had the power to grant the franchise there in controversy, in the first instance. It was a case of the defective or irregular exercise of an existing power, and not a case where the power to act in the first instance was entirely lacking." Franklin County v. Carstens (Wash.) 122 Pac. 1001.

The corporation cannot, in any matter, bind itself by any contract which is made without authority of law or which is against public policy and all persons contracting with a corporation are bound to know its limitations in this respect. In brief, he is not only required to see to it that his contract complies substantially with the law, but "he is compelled to go further and ascertain whether his contract is authorized by the controlling law. If he fails to do this he becomes a mere volunteer and must suffer the consequences." Roberts v. Fargo, 10 N. D. 230, 86 N. W. 726; Anderson v. International Sch. Dist. (N. D.) 156 N. W. 54; Hart v. School Dist. 24 N. D. 385.

"Ignorance of the law excuses no man."

"The learned trial court found that the parties concerned in making the contracts in question acted in the utmost good faith. In one aspect of the matter, which is probably correct, the officers doubtless had no other motive than to secure for their city a bridge as cheaply as possible. In that sense a public officer may act in good faith, and yet be a wilful law breaker and guilty of fraudulent appropriation of the people's money. If such officers knowingly or wilfully use such money contrary to law, but otherwise to accomplish a legitimate purpose in a legal sense they are guilty of acting in bad faith and of actionable misappropriation of such money, regardless of their good intentions.

It will not do to allow such officers to escape responsibility in such cases because, though they broke the law, they acted in good faith. The law does not permit that, yet such species of good faith is one of the most common defenses insisted upon in cases of this kind." See Chippewa Bridge Co. v. Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931. See also Peet v. Leinbaugh (Iowa) 164 N. W. 128.

Such agreements are "illegal and void" and the question of ratification cannot arise where no power existed in the first place to make the agreement. Goose River Bank v. School Dist. 1 N. D. 26; Capital Bank v. Sch. Dist. 1 N. D. 479, 48 N. W. 363; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Roberts v. Fargo, 10 N. D. 230, 86 N. W. 726; Fox v. Wallely, 13 N. D. 610, 102 N. W. 161; State v. School Dist. 18 N. D. 616, 120 N. W. 555; Bartells v. Sch. Dist. (N. D.) 174 N. W. 78; Henderson v. Sch. Dist. 41 N. D. 641; Capital Bank v. School Dist. 1 N. D. 485; State v. Getchell, 3 N. D. 248.

To give the statute the interpretation contended for, would be to invest in the county commissioners such power to construct bridges at their own discretion and will as would preclude entirely the exercise of a similar power by petition. Brady v. New York, 16 How. Pr. (N. Y.) 432; Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 585; People v. Gleason, 121 N. Y. 631, 25 N. E. 4; Addis v. Pittsburg, 85 Pa. 379; Chippewa Bridge v. Durand, 122 Wis. 85, 106 A. S. R. 931, 99 N. W. 603; Keane v. New York, 88 App. Div. 542, 85 N. Y. Supp. 130; 1 Beach, Pub. Corp. § 698; 1 Dill. Mun. Corp. 4th ed. § 466; Colorado Springs v. Coray (Colo.) 139 Pac. 1037; Cement Company v. Tracy (Minn.) 176 N. W. 189; Moore v. Hupp (Idaho) 105 Pac. 212; McNaye v. Lome (Ind.) 84 N. E. 782; Kelley v. Tonington (Conn.) 68 Atl. 857.

"There can be no estoppel by conduct or ratification where there is a want of power." State v. School Dist. 18 N. D. 616, 120 N. W. 555.

"The retention by a municipality of the fruits of such a contract will not subject it to liability under the contract or upon quantum meruit." Cement Co. v. Tracy (Minn.) 176 N. D. 189; Henderson v. School Dist. 41 N. D. 640.

"But it is a remarkable claim that, where work is done under such a contract, the contract may be treated as null, and the services regarded as rendered properly. No one can use a void contract as a means of

getting better terms than he could have claimed under it. The whole transaction is covered by the same taint, and must be treated as beyond the protection of courts of justice." Ridgway v. Wetterhold (Kan.) 153 Pac. 491.

"It has long been the conceded province of a court of equity to restrain the unlawful plans and purposes of public officials in cases where the same threaten in large measure to dissipate the public funds."

"Ratification presupposes the power on the part of the board to make the original contract and that body having no power there is no question here of ratification." Fox v. Wallely, 13 N. D. 610; Storey v. Murphy, 9 N. D. 115; Colorado Springs v. Coray, 139 Pac. 1038.

Scott Cameron, Zuger & Tillotson, for respondents.

It is to be kept in mind that the term ultra vires is used in many different senses. . . . The first of these describes a contract which is not within the scope of the powers of a corporation to make under any circumstances, or for any purpose; for example . . . it was held to be wholly outside of a city's power . . . to pay money to aid in building a shoe factory within its limits; to aid in the construction of a dam for the purpose of improving a private water power, to construct a building for the use of another municipality or other third person. . . .

The second of these meanings refers to contracts of a class which the corporations had a right to execute, but with respect to which there has been some irregularity or defect in the actual exercise of the power . . . affecting the individual contract at issue.

The former class is ultra vires in the primary, and really only proper, use of the term, while in the second, it is merely secondary. That is to say, an ultra vires municipal contract, in its true sense, is a contract relating to matters wholly outside the charter powers of a corporation. . . . These distinctions must be constantly borne in mind when considering a question arising out of dealings with a corporation, when an act is ultra vires in the first sense mentioned, it is generally, if not always, void in toto, and the corporation may avail itself of the plea. But, when it is ultra vires in the second sense, the rights of the corporation to avail itself of the plea will depend on the circumstances of the case. . . . Bell v. Kirkland, 102 Minn. 213, 13 L.R.A.(N.S.) 703, 113 N. W. 271; 19 R. C. L. § 352, p. 1063.

The great weight of authority now denies to a public corporation in case of an executed contract which is neither malum in se nor malum prohibitum, the right to retain its proceeds and interpose the plea of ultra vires when sued upon the contract, and those courts which still deny the right to sue upon the contract generally permit a recovery on quantum meruit. Green v. Okanogan County, 60 Wash. 309, 111 Pac. 229, affirmed in 114 Pac. 457 on rehearing.

"Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has, by its promise, induced a party relying on its promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract." State Board v. Citizens State R. Co. 47 Ind. 407.

"Where a municipal corporation receives and retains substantial benefits under a contract, which it was authorized to make but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received." Lincoln Land Co. v. Grant, 57 Neb. 70, 77 N. W. 349; Green v. Okanogan County, 60 Wash. 309, 111 Pac. 226, 229.

"The illegality of the contracts does not arise from any moral turpitude. The property was transferred under a contract which was merely malum prohibitum and where the city was the principal offender. In such case the party receiving may be made to refund to the person from whom it has received the property for the unauthorized purpose, the value of that which it has actually received." Parkersburg v. Brown, 106 U. S. 487, 503, 27 L. ed. 238, 245.

"The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." Chapman v. Douglas County, 107 U. S. 355, 27 L. ed. 381; Hitchcock v. Galveston, 96 U. S. 341; Moore v. Mayor, 73 N. Y. 238; Board v. Ry Co. 47 Ind. 407; McGuire v. Rapid City (S. D.) 43 N. W. 708; Dill. Mun. Corp. § 936; 5 Cyc. 1068; Kansas City B. & I. Co. v. Wyandotte County, 35 Kan. 557, 11 Pac. 360; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66; Thompson v. Vold, 38 N. D. 569, 165 N. W. 1076; Lorentzen v. Stiles (N. D.) 189 N. W. 249.

JOHNSON, J. This is an appeal from the district court of Emmons county, third judicial district, from an order of the trial judge, vacating a temporary restraining order and denying a permanent injunction.

The plaintiffs are taxpayers of Emmons county and brought this suit to enjoin the issuance of warrants for disbursement of money out of the bridge fund of the county in payment for nine structures built under three separate contracts between Emmons county and the defendant and respondent Fogel, doing business under the name of the Linton Bridge and Construction Company. The commissioners entered into three separate contracts with the respondent Fogel for the construction of nine bridges or culverts and for the payment of the contract price, aggregating approximately $14,000. The contract for the construction of projects A, H, and I was executed June 30, 1922; the contract for the construction of projects B, D, E, F, and G was awarded to respondent Fogel on July 20, 1922, and on August 18, 1922, the contract was awarded to respondent Fogel for the construction of project C. Appellant claims that all these contracts were illegal and wholly void for reasons hereinafter stated.

Warrants were issued in full for structures referred to in the record as G, D, E, H, and I; warrants were issued for one half of the contract price of the structure A; no warrants were issued for B, C, and F. The warrants that were issued were registered with the county treasurer. The record shows that the bill on account of the construction of structure F was allowed by the county commissioners in the sum of $1,713.76. The structures have become a part of the highway system of Emmons county and hence the materials cannot be returned to the contractor.

Two suits were commenced, but they were consolidated below and on this appeal. Upon the trial of the issues, the court found that the bridges and structures were erected in good faith; that they are necessary; that the county received full value; that the warrants have been issued in payment thereof as indicated in the preceding paragraph; that all the structures were completed before suits were commenced; that the taxpayers of the county now enjoy the use of the structures as a part of the highway system of the county; that the county commissioners, or some of them, with the county superintendent of highways, investigated all of the cases before the contracts were let and found that in each case the structure was necessary; that the old structures, replaced

by new ones, were in bad repair, the timbers rotten and their use dangerous to the traveling public; and that plaintiffs and other taxpayers of the county made no complaint before the suits were commenced. The court also found that, with reference to structures A, D, and E, petitions were filed as provided in §§ 1951–1953, Comp. Laws, 1913. The court further found that structures A and B are bridges, A of wood and B of concrete; that structures C, D, E, F, and H are culverts; and that structure I is a concrete abutment to a bridge; the court specifically found that the county commissioners acted in good faith and their acts were free from "any suspicion of fraud, collusion or thought on their part to do anything contrary to law." The same is true as to the action of the county superintendent of highways, the county auditor, and county treasurer. The court further found that the structures were all properly built, strictly in accordance with the plans and specifications; that the contract price, in each instance, was the reasonable value of the structure and that Emmons county received dollar for dollar value in these improvements, and did, in fact, receive "everything that under the law it would be entitled to under legal contracts fully performed."

It is contended by the appellants that the county commissioners had no authority to enter into the contracts with the contractor, that the statutory requirements were not complied with and that, therefore, the plaintiffs are entitled to an injunction restraining the authorities of Emmons county from paying the warrants already drawn, and from issuing new warrants in payment of the work. The appellant thus states the gist of the action: "It is well here to bear in mind that the gist of this action is to enjoin the issuance of warrants or the payment of warrants already issued against the Emmons County Bridge Fund in discharge of the contract price and consideration for these bridges."

Section 1951, Comp. Laws, 1913, as amended by chapter 72, Session Laws, 1919, reads as follows:

"Sec. 1951. Petition. Bids. Whenever a majority of the freeholders of a civil township or a majority of the freeholders living within a radius of 3 miles of the proposed location, shall petition the board of county commissioners for a bridge at a specified location within such township, or within any incorporated city or village, when the cost of such bridge shall exceed the sum of $100, it shall be the duty of the board of county commissioners to view and investigate the necessity of

such proposed bridge; and if such county board approves its location and building, it shall proceed to advertise in the official paper of the county, for a period of thirty days, the plans and specifications of the proposed bridge, asking for sealed bids for the building of such bridge, to be submitted to them at their next regular or special meeting, at which meeting of the board it shall proceed to examine all proposals or bids for the building of such bridge, and if such board sees fit they shall award the contract to the lowest responsible bidder; requiring such bidder to give a bond in a sum not less than the amount stipulated in the bid or contract conditioned for the faithful compliance with the terms of such bid or contract, which bond shall be approved by the board of county commissioners and filed in the office of the county auditor.

"Provided, however, that the board of county commissioners shall have the authority to refuse any or all bids received, and to proceed to construct such bridge under their own supervision, and in the manner deemed by them most expedient and to enter into contracts for the labor or material to be used in the construction of the same."

Section 1953, Comp. Laws, 1913, is as follows:

"Sec. 1953. Supervision and repairs of bridge. Any bridge built under the provisions of § 1951 shall be under the supervision of the board of county commissioners, and the cost of all such building and repairs shall be estimated by the county commissioners and paid for by the county; provided, however, that should any emergency arise, requiring the immediate rebuilding or repairing of any bridges, the board of county commissioners are hereby authorized to rebuild or repair, as the circumstances require, and without advertising for bids, in case said work can be performed by a responsible party, at a price not to exceed the last bid accepted by said board of county commissioners for like work."

The failure of the county commissioners of Emmons county to comply with the statutes may be summarized as follows: They failed in all cases to advertise for bids for a longer period than fifteen days; in some cases no petitions were filed; and in some cases there were either no bonds executed by the contractor or approved by the board, or the bond which was executed was of extremely doubtful legality and sufficiency.

It will be perceived that the construction and repair of bridges and culverts is within the general scope of the powers of the county board.

Upon this state of the record, the question arises whether or not the plaintiff taxpayers are entitled to an injunction restraining the county commissioners from paying money from the county bridge fund to the contractor who has fully performed the work.

The contention of the respondent is that, inasmuch as the record discloses and the findings of the trial court show that the contracts were fairly entered into, fully and honestly performed, full value rendered to the county, and the work was necessary and the subject-matter of the contract was within the scope of the powers of the board, therefore the county, having received and accepted the benefits, and notwithstanding the fact that the contract may be illegal and unenforceable, owes at least a moral obligation to pay the actual and reasonable value of the materials furnished and the services rendered in the construction of the bridges, and that a court of equity should not enjoin such payment. On the other hand, it is contended by the appellant that the contracts are illegal and void; that the courts will not permit recovery upon an implied contract because the court will not permit an act prohibited by law to be accomplished by indirection; and that equity, at the instance of a taxpayer, should enjoin the payment of the warrants.

At the outset, it should be pointed out that this is not a proceeding by the contractor to recover upon a contract or to recover the reasonable value of the services and materials furnished Emmons county in the construction of the bridges or culverts described. It is a suit by taxpayers, invoking the equity jurisdiction of the court, to enjoin the proper officers of Emmons county from paying the respondent. Fogel, for materials and services rendered Emmons county and which, according to the findings of the trial court and the record before us, resulted in the receiving of full value under the contracts, alleged to be illegal and void, for work found to be necessary by the county commissioners, acting in good faith and within the general scope of their authority.

It is clear that the county commissioners, in entering into these contracts, failed to comply with several statutory requirements. The statutes, however, nowhere provide that in the event these provisions are not complied with, no contract shall be entered into or that, if contracts be entered into, they shall be illegal and void. This, therefore, is not a case where the contract is expressly prohibited by any statutory or constitutional provision.

The doctrine of ultra vires in the law of municipal corporations has not always been applied by the courts in the same sense or with the same meaning. Strictly speaking, an act is ultra vires when it is wholly beyond the power of the municipal corporation under any circumstances to perform it; in another and less restricted sense, a contract may be ultra vires although the subject-matter is within the scope of the powers of the corporation if the manner in which the contract was entered into is prohibited by the Constitution or by statute. There seems to be no conflict in the authorities on the proposition that he who transacts business with a municipal or public corporation, with respect to a matter wholly beyond its corporate powers, can have no relief in law or in equity. That is to say, a contract entered into with a public corporation, concerning a subject-matter wholly beyond its powers, cannot constitute a basis of recovery in an action at law, nor will the court, upon any equitable theory, permit a recovery. Such contracts are wholly void because they are prohibited and of this fact all persons dealing with public corporations must take notice.

In the case before us, it must be conceded, laying aside, for the moment all technical legal rules, that the position taken by the plaintiffs presents few, if any, aspects that appeal to the conscience of a court of equity. They claim to represent taxpayers who have never complained, though many of them must have had actual knowledge that the respondent Fogel was making valuable improvements that would ultimately be used by Emmons county, and who, after all the work has been fully and fairly completed, at an expense of many thousands of dollars to the respondent, under contracts fairly and honestly entered into and upon competitive bidding in fact, for the erection of an improvement of public necessity, now come into a court of equity and invoke rules of law to prevent the duly constituted officers of the county from paying the actual and fair value of this public improvement. It is difficult to escape the conclusion that here it was attempted to invoke the equitable powers of the court to aid in the accomplishment of a purpose manifestly inequitable. It would be little less than appalling for a court of equity to be compelled to confess, not only that its arm is powerless to prevent gross injustice, but that at the instance of a litigant, it can be made the unwilling instrument in the actual furtherance of wrong and inequitable conduct.

It is said that equity must follow the law and the chancellor must give full force and effect to the legislative will as expressed in the statutes. This is undoubtedly correct. Statutes governing the method of contracting by public corporations and the rules of law laid down by the courts concerning the interpretation of such statutes, are generally designed for the protection of the interests of the taxpayers and of the public at large. When it happens that such public and private interests have been fully protected, as intended by the statutes and the rules of law, when, notwithstanding a failure to comply with the letter of the law, its spirit and purpose have been fully regarded, can it be said that a court of equity, in preventing the repudiation of a moral obligation due to an individual, though such repudiation be in obedience to the strict letter, but, in fact, in violation of the liberal spirit of the law, exceeds its powers, abuses its great prerogatives, and substitutes its own arbitrary will for the will and purpose of the legislature? We do not think so. To so hold would be to attribute to the legislative branch of the government a willingness, if not an actual purpose, to be unjust and oppressive, to be unwilling to do equity notwithstanding the protective purposes of the statute have been realized, and to refuse to recognize that an individual who deals with a public corporation, in good faith and within the general scope of its powers, may acquire rights which, in equity and good conscience, should be protected. In short, it would be to ascribe to the legislature a purpose to relieve the state and its political subdivisions from the ordinary obligations of honesty and fair dealing which ought to rest equally upon all persons, natural and artificial, having legal capacity to contract.

Speaking of the vital power of equity to do justice and prevent injustice, the supreme court of Wisconsin said in Harrigan v. Gilchrist, 121 Wis. 127, 235, 99 N. W. 936:

"There is no vitality in precedents: there is in rules. They are susceptible of expansion along every line necessary to reach new conditions. The ingenuity of man in devising new forms of wrong cannot outstrip such development. In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice where legal remedies are infirm. Precedents will be a constant guide, but never a bar. Where a new condition exists, and legal remedies afforded are inadequate or none are afforded at all, the never-failing ca-

pacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, not adopting new ones, for that purpose."

In a recent case decided by the supreme court of Minnesota, First Nat. Bank v. Goodhue, 120 Minn. 362, 43 L.R.A.(N.S.) 84, 139 N. W. 599, the court had under consideration the question of the right of the plaintiff to recover $2,800 loaned to the village of Goodhue, pursuant to a transaction wholly illegal and void. The court held the village liable and that the plaintiff was entitled to recover. The court say among other things: "The foundation of the rule is found in the fact that the municipality has received money or property for a legitimate municipal purpose for which equity and good conscience require full payment." In this case the act of the village council was not ultra vires in the strict or primary sense, but the power was not exercised in a legal manner.

This question was again before the supreme court of Minnesota in Fargo Foundry Co. v. Callaway, 148 Minn. 273, 181 N. W. 584. The plaintiff in that case contracted with the defendant village to repair a steel water tank and to install some machinery. The contract was void because not let upon competitive bids as required by the general statutes of Minnesota. The village had the power to contract with reference to the subject-matter, but the power was exercised in a manner contrary to the statutes. The court say:

"The improvement served a municipal purpose and the contract was one that the city had power to make, and, had the essential requirements of the law been complied with, the contract would have been enforceable. In such a situation the village may be compelled to pay the value of what it has received. The express contract disappears from the case. The cause of action arises, not from any contract on the subject, but from the general obligation to do justice which binds all persons, natural and otherwise. The obligation to pay is measured by the benefit which the village has received."

Speaking of the moral obligation of the defendant to pay for services rendered, though an action at law might not be maintained on the contract, the Pennsylvania supreme court say:

"A moral obligation, in law, is defined as one 'which cannot be enforced by action, but which is binding on the party who incurs it, in

conscience and according to natural justice;' and again, a 'duty which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party, in that particular instance, from legal liability.' . . . Councils, it is true, are trustees, and the law limits their expenditure of public money to public purposes, but they are also representatives of their constituents, and delegates of the city's legislative powers; and there is nothing in the law, or in sound public policy, to prohibit the city from being honest, and paying its bona fide debts, which are good in conscience and justice, though, for sufficient other reasons, there is a general rule which prevents them from being enforceable by law." Bailey v. Philadelphia, 167 Pa. 569, 46 Am. St. Rep. 691, 31 Atl. 925.

"Equity will not coerce the enforcement of a strict legal right, however clear, if thereby injustice and inequity will be done." Dorner v. School Dist. 137 Wis. 147, 19 L.R.A.(N.S.) 171, 118 N. W. 353.

"In some jurisdictions the courts have refused to enjoin an act manifestly illegal when it has seemed more inequitable to grant than to refuse an injunction." Pom. Eq. Jur. § 1776; Brasher v. Miller, 114 Ala. 485, 21 So. 467; Pillager v. Hewett, 98 Minn. 265, 107 N. W. 815.

After reviewing many authorities, the Kansas supreme court says:

"From the authorities we think the following principle may be educed: Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of a want of power on the part of the corporation to make it, or to enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed, in whole or in part, by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render, and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party, by either rescinding the contract, and placing the other party in statu quo, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and

equity will permit." Brown v. Atchison, 39 Kan. 54, 7 Am. St. Rep. 515, 17 Pac. 474, 475.

In the case of Farmer v. St. Paul, 65 Minn. 176, 33 L.R.A. 199, 67 N. W. 990, the facts were as follows: Farmer was a taxpayer of the city of St. Paul and brought this suit to enjoin the city from paying the defendant, the House of the Good Shepherd, $71.50 for boarding female prisoners committed by the municipal court of the city and to enjoin the city from allowing any sum in the future for such purpose, and further, to compel an accounting between the city and the House of the Good Shepherd, of all money paid to it prior thereto. For many years the city had committed female prisoners to the care of this institution under an ordinance which was wholly invalid, and had paid the institution a very reasonable compensation for such services. The reason for doing this was that the city had no facilities to take care of delinquent female prisoners. The court found the ordinance void, and that the city council had no authority, whatever, to pay the money or to enter into the engagement. The court say among other things:

"Waiving the technical objection that there is no allegation in the complaint that he has requested the city to bring such an action, we are of the opinion that, on the merits, he is not entitled to maintain this action for the purpose of compelling such repayment, for the simple reason that it would be grossly inequitable to permit him to do so. The reason we have suggested why the payment of $71.50 ought not to be enjoined, applies with greater force to past payments." In refusing to enjoin the payment of $71.50 for services already rendered, the court said among other things: "While it is true that, upon grounds of sound public policy, the doctrine of ultra vires is applied with greater strictness to municipal than to private corporations, and that in this state a taxpayer may enjoin an unauthorized appropriation of public money, yet in cases where the proposed appropriation is only technically illegal, and it would be more inequitable to grant the injunction than to refuse it, it may be refused. . . . The city has received full consideration for the proposed payment and in equity and good conscience the claim ought to be paid; and the refusal to enjoin its payment, under such circumstances, by the trial court, was a proper exercise of its discretion."

In the Pillager Case, supra, the court say, referring to the right of

the corporation to recover money paid the contractor under a void contract:

"The consideration for such payment was full and fair, and, in equity and good conscience, it ought to have been paid by the plaintiff. Such being the case, it would be most inequitable and unconscionable to compel the defendant to return the money and bonds paid to him under the circumstances found by the trial court, and we hold that the plaintiff cannot maintain this action to recover them."

The court points out the fact—the distinction has been adverted to heretofore in this opinion—that a case where there is no power in the public corporation to contract, with reference to the subject-matter, is to be distinguished from one where the power exists, but the contract is void because entered into in violation of some statutory provision prescribing the manner in which the power shall be exercised. It seems to be well settled, therefore, in Minnesota, that equity will not enjoin the payment of the consideration after full performance by the contractor, although the contract with a public corporation was wholly void, where the subject-matter is within the general power of the corporation and the contract is not prohibited by statutory or constitutional provision, where there has been no fraud, where full value has been rendered, and where the work was necessary and the benefits have been accepted and are in use by the public. Within these limitations we think the rule sound in equity and it fully protects the interests of the taxpayers and the general public as intended by the legislature.

Counsel for the appellant cite several North Dakota decisions in which this court has either refused recovery upon contracts of public or municipal corporations entered into in violation of a prohibitory statute or sustained the action of the trial court in enjoining payment under such contracts or the further prosecution of work thereunder. We have examined all of these decisions carefully and we find that no one of them is in point. They are either cases where the county commissioners sought to contract with private individuals for the performance of services which the constitution required that certain public officers perform; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; Fox v. Walley, 13 N. D. 610, 102 N. W. 161; or cases where recovery was asked under, or an injunction sought against the performance of a contract prohibited by statutory or constitutional provision; State ex rel.

Diebold Safe & Lock Co. v. Getchell, 3 N. D. 243, 55 N. W. 585; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Roberts v. Fargo, 10 N. D. 230, 86 N. W. 726; State v. School Dist. 18 N. D. 616, 138 Am. St. Rep. 787, 120 N. W. 555; McKinnon v. Robinson, 24 N. D. 367, 139 N. W. 580; or where the real power to act in the premises was lodged in the voters and the voters had either taken no action or refused to authorize the expenditure; Capital Bank v. School Dist. 1 N. D. 479, 48 N. W. 363; Henderson v. Long Creek Dist. 41 N. D. 640, 171 N. W. 825; State ex rel. Diebold Safe & Lock Co. v. Getchell, supra.

It should be noted that in none of the cases cited by the appellant from this court were the equities in favor of the contractor as strong as they are in the case at bar. In the Engstad Case the contractor knew that his contract was of doubtful validity and, in fact, commenced operations for the express purpose of inviting litigation to determine the question. It is true that in the Diebold Safe & Lock Co. Case, supra, the materials had been delivered, but that was a mandamus proceeding and not an action in equity and an express statutory provision required a submission of the question of making the expenditure to the voters of the county, which, however, had not been done. It was a case of complete lack of power in the commissioners to act. The power there was reserved to the electors and for the commissioners to act without action under the statute by the electors was a clear case of usurpation of power and not merely an illegal exercise of power.

Appellants rely strongly on the case of Bayne v. Thorson, 37 N. D. 187, 163 N. W. 822. In that action the plaintiff sued on a contract that was void because the county commissioners had failed entirely to advertise for bids. The court held that there should be no recovery on the contract and the decision is carefully limited to that single point. No attempt was made to recover the reasonable value of the work and materials furnished. Upon principle and authority, no recovery on the contract could be had in that case.

We think the trial court did not err in refusing to grant an injunction and its decision is affirmed. The respondents to recover the costs of this appeal.

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

JAMES J. BAILEY, Respondent, v. JAMES COX DAVIS, the Agent of the President under the Transportation Act of 1920, Appellant.

(193 N. W. 658.)

Appeal and error — motion for new trial or directed verdict necessary to review sufficiency of evidence.

1. To review the sufficiency of the evidence to support the verdict, a motion for a directed verdict or for a new trial is necessary.

Trial — motion for dismissal and for directed verdict distinguished.

2. Although a motion for dismissal and a motion for a directed verdict are both, in effect, demurrers to the evidence, nevertheless, they are not identical.

Appeal and error — finding that master was negligent and that employee did not assume risk sustained on conflicting evidence.

3. In an action under the Federal Employer's Liability Act to recover damages, it is *held*, for reasons stated in the opinion, that the verdict of the jury finding that the defendant was negligent and that the plaintiff did not assume the risk will not be disturbed.

Removal of causes — railroad sued for personal injury held to have waived right to removal.

4. In an action brought in a state court directly under the Federal Employer's Liability Act, where, under the facts pleaded and proved, it is doubtful whether the employee, at the time of his injury, was then engaged in interstate commerce, and, where the defendant has failed to show in the record a petition and bond for removal of the cause, or any fraudulent attempt to evade the right of removal, and, where further, it is not shown that any different result would be obtained if the action had been removed, and where the state statute, (N. D. Laws 1915 chap. 207) applicable to intrastate commerce, embodies practically the same identical language as the Federal Employer's Liability Act, it is *held:*

(a) That it is immaterial whether the Federal act or the state act be applied.

(b) That the defendant has waived its right of removal, if any it had.

Note.—As to what employees are engaged in interstate commerce within the Federal Employers' Liability Act, see notes in 47 L.R.A.(N.S.) 52; L.R.A.1915C. 60; 10 A.L.R. 1184; 14 A.L.R. 732, and 24 A.L.R. 634. 18 R. C. L. p. 854; 3 R. C. L. Supp. p. 662; 4 R. C. L. Supp. 1219, and 5 R. C. L. Supp. p. 1008.

Appeal and error — admission of evidence in action under Federal Employers' Liability Act held harmless error.

5. For reasons stated in the opinion it is *held* that the admission of certain evidence was nonprejudicial.

Opinion filed December 30, 1922. Rehearing denied May 15, 1923.

Appeal and Error, 3 C. J. § 746 p. 839 n. 40; § 906 p. 985 n. 34; 4 C. J. § 2836 p. 858 n. 3; § 2952 p. 969 n. 56; Removal of Causes, 34 Cyc. p. 1218 n. 32; Trial, 38 Cyc. p. 1551 n. 59; p. 1565 n. 76.

Action in District Court, Williams County, *Lowe,* J., to recover damages against a carrier.

Affirmed.

Dudley Nash, W. B. Overson, and *Murphy & Toner,* for appellant.

The burden of proving interstate commerce is on the person asserting it (the plaintiff in this case), and where the proof does not show that a car under repair is devoted permanently, or has been assigned exclusively to interstate commerce at the time of accident, it is not engaged in interstate commerce and an action under the Federal Employers' Liability Act cannot be maintained. Mpls., etc., R. Co. v. Winters, 242 U. S. 353; Central R. Co. v. Paslick, 239 Fed. 713; Delaware etc. R. Co. v. Yurkonis, 238 U. S. 439; Payne v. Wynne (Tex.) 233 S. W. 609; Loveless v. Louisville etc. R. Co. (Ala.) 75 So. 7; Deffenbaugh v. U. P. R. Co. (Kan.) 171 Pac. 647; Herzog v. Hines (N. J.) 112 Atl. 315; Hines v. Industrial Acci. Comm. (Cal.) 192 Pac. 859; Manson v. Great Northern R. Co. 31 N. D. 643; Carver v. Ry. Co. 72 Tex. 308; Cooley, Torts, § 543; Boyer v. Ry. Co. (Minn.) 12 Am. Neg. Rep. 496; Timm v. Ry. Co. (Mich.) 57 N. W. 116; Roecke v. Ry. Co. 59 N. W. 243; Hanley v. Ry. Co. 62 N. W. 274; Hunter v. Co. 85 Fed. 379; Hamilton v. Ry. Co. 61 N. W. 415; Cameron v. Ry. Co. 8 N. D. 618; Dewey v. Ry. Co. 31 Ia. 373; Kemey v. Ry. Co. 61 Ga. 590; Maglin v. Ry. Co. 85 Ill. 481; Denny v. Ry. Co. 24 S. W. 317; Brunswick v. Ry. Co. 25 S. E. 759; Birmingham v. Mfg. Co. 12 So. 36; Taylor v. Baldwin, 21 Pac. 124; McDermott v. Ry. Co. 42 Pac. 348; Hudson v. Ry. Co. 55 Fed. 248; Berlick v. Ashland, etc. 67 N. W. 712; Gorham v. Ry. Co. 20 S. W. 1060; Lane v. Ry. Co. 29 N. W. 419; Snyder v. Ry. Co. 7 N. E. 604; Ry. Co. v. Silliphons, 8 S. W. 673; Hubert v. Ry. Co. 54 S. W. 1074.

"It is not necessary that the servant should be warned of every possi-

ble manner in which an injury may occur to him, or of risks that are as obvious to him as to the master, or which are readily discoverable by him by the use of ordinary care, with such knowledge, experience, and judgment as he actually possesses, or as the master is justified in believing him to possess." 29 Cyc. 1169.

"It is well settled that a servant cannot recover damages because of the dangerous condition of a working place, when such condition is as obvious or well known to him as to the master, or by the exercise of reasonable care by him would have been, or where it was the duty of the servant to ascertain as to the dangerous condition of the place which duty he has neglected." Woelflen v. Lewiston, 95 Pac. 497; Ell v. N. P. 1 N. D. 336; N. P. v. Hogan, 63 Fed. 102; Beleal v. R. Co. 15 N. D. 318; Boldt v. R. Co. 245 U. S. 441.

Where an experienced employee works in a dangerous place with dangerous tools, about which he knows, and is conscious of the danger and makes no complaint, and upon such complaint or without it is promised nothing, as a matter of law he assumes the risk. Boyer v. R. Co. 12 Am. Neg. Rep. 496; Ness v. G. N. 25 N. D. 572; Wyldes v. Patterson, 31 N. D. 282; Unsted v. Elevator Co. 18 N. D. 309; Hanley v. Grand Trunk, 62 N. H. 274; Ry. Co. v. Horton, 233 U. S. 492; Cartwright v. Ry. Co. 228 Fed. 876; Wheat v. Ry. Co. 99 N. W. 827.

Before letters are received in evidence, there must be, as in the case of other documents, some proof of their genuineness. This is not proved by the mere fact that the letter is received by mail when the signature is not proved. State v. Hall (S. D.) 84 N. W. 766; Sweeney v. Oil Co. 18 Atl. 612; White v. Gordon, 24 N. E. 1053; Pinkham v. Cockell, 43 N. W. 921; Hightower v. Ogeltree, 21 So. 934; Flamers v. Fletcher (W. Va.) 20 S. E. 87; 2 Jones, Ev. §§ 255, 298; Behrens Lumber Co. v. Lager (S. D.) 128 N. W. 698.

A motion for a nonsuit is in the nature of a demurrer to the evidence. It admits the truth of the plaintiff's testimony, together with every inference of fact which the jury may legally draw from it. Brown v. Lumber Co. (Or.) 33 Pac. 557; Warner v. Darrow (Cal.) 27 Pac. 737; Butler v. Hyland (Cal.) 26 Pac. 1108; Messenger v. Woge, 78 Pac. 314; Small v. Harrington, 79 Pac. 461; Klenichmidt v. McAndrews (Mont.) 12 Pac. 286.

The statutory dismissal for failure of proof is the same as the common-law nonsuit. Cartwright v. Hall (Minn.) 93 N. W. 117.

The practice of ordering a nonsuit for this cause is the same whether the cause is being tried by the court, referee, or a jury. Thorlson v. Wyman (Minn.) 59 N. W. 1009.

Fisk & Taylor, Greenleaf & Wooledge, for respondent.

"These questions really are immaterial here, since the Kansas statute is so similar to that of the United States that the liability of the defendant does not appear to be affected by the question which of them governed the case." Kansas City W. R. Co. v. McAdoo, 240 U. S. 51, 60 L. ed. 520.

The rejection of evidence as to the interstate character of the railway and of the employment offered for the purpose of making the Federal Employers' Liability Act applicable to a personal injury action brought by an employee against a railway company, if error, does not require the reversal of a judgment in favor of the employee, where the railway company's position was made no worse because the case was tried upon the hypothesis that the state law governed. Of course, the argument for the railway company is that Gray's employment on the cinder pit was employment upon an instrument of interstate commerce, and so an employment in interstate commerce. Chicago & N. W. R. Co. v. Gray, 237 U. S. 399, 59 L. ed. 1018, 9 N. C. C. A. 452.

"Where an injury was received while engaged in interstate commerce was alleged in a state court as the basis for a recovery under the Federal Employers' Liability Act (35 U. S. Stat. 65), and the evidence showed that it did not so occur, the allegations respecting the interstate character of the injury may be considered as eliminated, or the declaration amended and a recovery permitted under the state law, without depriving the defendant of any rights or immunities granted by the Federal act. . . .

"The plaintiff's declaration alleged that the injury occurred while the defendant was engaged and while the plaintiff was employed by it in interstate commerce. The allegations were such that, with that one, they stated a good cause of action under the Federal act, and without it they stated a good cause of action under the common law prevailing in the state. . . .

"The plaintiff asserts only one right to recovery from the injury and

in the nature of the thing he could have but one. Whether it arose under the Federal act or under the state law, it was equally cognizable in the state court." Karas v. McAdoo (N. D.) 179 N. W. 710.

The question of defendant's negligence and plaintiff's contributory negligence is generally proper for the jury and when passed upon by it will not ordinarily be disturbed. Messenger v. Valley City S. R. Co. 21 N. D. 82, 32 L.R.A.(N.S.) 881, 128 N. W. 1023; Davy v. G. N. Co. 21 N. D. 43, 128 N. W. 311; Umsted v. Colgate Farmers Elev. Co. 18 N. D. 309, 122 N. W. 390; Cameron v. G. N. R. Co. 29 N. D. 481, 496, 151 N. W. 36.

"Doubt must be resolved in favor of the plaintiff and in favor of the findings of the jury by their verdict. It also seems to be a rule that in master and servant cases a railway is held liable to a higher degree of care than is required in less hazardous employments." Gunn v. Mpls. St. P. & S. Ste. M. Ry. Co. 34 N. D. 418, 427, 158 N. W. 1004; Am. Bonding Co. v. Ensey, 105 Md. 211.

"Where a letter has been received by the due course of mail in answer to a prior letter sent by the receiver with the name of the addressee of such prior letter signed thereto, a presumption arises that it is the letter of the person whose name is signed thereto." Am. Bonding Co. v. Ensey, 105 Md. 211, 11 Ann. Cas. 883.

"A letter received in the due course of mail purporting to be written by a person in answer to another letter proved to have been sent to him is prima facie genuine and is admissible in evidence without proof of the handwriting or other proof of its authenticity." 22 C. J. 908.

Statement.

BRONSON, J. In a civil action for damages under the Federal Employer's Liability Act, plaintiff recovered a verdict for $3,500 against a common carrier. Defendant has appealed from the judgment.

The facts are: Defendant is the presidential agent of the carrier under the Federal Transportation Act. From about September 1st, 1919, to March 13th 1920, while the carrier was under Federal control, plaintiff worked as a car repair man in the yards of the carrier at Williston. There the carrier has its division point. There, in its railroad

yards, the carrier maintained repair or rip tracks for purposes of repairing cars in bad order. There it repaired foreign cars and cars of its own. These rip tracks were not inclosed. Plaintiff's duties consisted in making repairs upon cars placed upon such rip tracks. On February 18th, 1920, a gondola car loaded with coal from Wolf Point, Montana, arrived at Williston. It was in bad order. In accordance with the testimony of the carrier, this was the carrier's car. Plaintiff gave testimony to the effect that it was a foreign car. This car was sent to the coal chute of the carrier and the coal there unloaded on February 19th, 1920. Then it was taken to the rip tracks. Plaintiff and another coworker were directed to repair this car. The needed repair was the installation of a new draft timber at the end of the car. It was necessary to prepare such draft timber. On February 20th, 1920, plaintiff and his coworker started upon this work of repair. They picked out an oak timber, about 8 x 12, 12 feet long. The carrier furnished the materials, the tools, and instrumentalities. On the morning of February 21st, 1920, they started active work upon the timber to prepare the same for installation in this gondola car. They worked in the open between the rip tracks. The ground was covered with smooth, slippery ice from snow that had been there throughout the winter and which had melted and frozen again. Upon this ice, there being no other place near the car, this oak timber was placed upon two wooden horses. It was necessary to bore some holes in the timber, insert some eight bolts, fasten with the same nuts thereon, and fashion the timber for a lug casting. The weather was cold; there was frost on the horses, the timber and the bolts. Plaintiff's coworker was using a wrench that was so worn that it did not grasp or hold the nut securely. While the plaintiff and his coworker were working on opposite sides of this timber tightening these bolts, the wrench of the coworker slipped, the timber slipped off one of the horses and struck the shin bone of plaintiff's right limb. Plaintiff saw the doctor of the carrier who dressed the leg and put bandages upon it. He was advised that the leg was all right and that he could go to work. Plaintiff continued to work until March 13th, 1920, receiving treatment from the company doctor from time to time. Later, the leg became infected and was subjected to many operations which, in accordance with the testimony, occasioned both permanent impairment

and disfigurement. In accordance with the carrier's testimony, this gondola car, after being repaired, was loaded with cinders and taken, on February 25th, 1920, intrastate from Williston destined to Niobe, North Dakota. In the complaint, plaintiff specifically alleges that the action is brought under the provisions of the Federal Employer's Liability Act. He alleges negligence of the carrier concerning the place where plaintiff worked and was ordered to work; concerning defective and unsafe tools with which plaintiff and his coworker were furnished and did their work, and concerning the negligence of plaintiff's coworker. The carrier, in its answer, alleges that plaintiff instituted the action fraudulently for the purpose of depriving the defendant of its constitutional right to remove the case to the Federal court; further, that the plaintiff, at the time of his injury, was not then employed in interstate commerce; that plaintiff's injuries resulted from his own contributory negligence and through risks assumed by him.

During the trial, plaintiff introduced into the evidence over objection two letters from a person at Niobe, North Dakota, purporting to be the agent of the Great Northern Railway Company to the effect that such agent had no record there of the car which the carrier claimed was the gondola in bad order. At the close of plaintiff's case defendant moved for a dismissal upon grounds that plaintiff, at the time of his injury, was not employed in interstate commerce; that the cause of action pleaded was not proved; that no negligence was shown on the part of the defendant; that the injuries received were the result of a mere accident; that plaintiff assumed the risks and was guilty of contributory negligence. At the close of the testimony, defendant again moved for a dismissal upon grounds that plaintiff, by false allegations, had deprived defendant of its constitutional right to remove the cause; that plaintiff, at the time of the injury, was not engaged in interstate commerce; that no negligence of the defendant was established; that the plaintiff assumed the risks. No motion was made for a directed verdict or for a new trial. The instructions of the trial court have neither been settled nor returned. The principal contentions of the carrier are that, upon the record, plaintiff was not employed in interstate commerce at the time of his injury; that defendant was fraudulently deprived of a right of removal; that no negligence of the defendant was established; that

plaintiff assumed the risks; that the trial court erred in receiving the letters mentioned.

Opinion.

This court has frequently held that the sufficiency of the evidence to support the verdict is not subject to review where neither a motion for a directed verdict or for a new trial has been made. Horton v. Wright, B. & S. Co. 43 N. D. 114, 116, 174 N. W. 67; Lofthouse v. Galesburg, 48 N. D. 1019, 188 N. W. 585; Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 32 N. D. 366, 155 N. W. 861; Erickson v. Wiper, 33 N. D. 193, 221, 225, 157 N. W. 592; Buchanan v. Occident Elevator Co. 33 N. D. 346, 350, 157 N. W. 122; Freerks v. Nurnberg, 33 N. D. 587, 595, 157 N. W. 119. At the close of plaintiff's case, and at the close of the testimony, plaintiff made a motion for dismissal. A motion for dismissal and a motion for a directed verdict are both, in fact, demurrers to the evidence. 38 Cyc. 1551, 1565. They are, however, not the same. The former is generally less hazardous to plaintiff's rights than the latter. Sorenson v. Smith, 65 Or. 78, 51 L.R.A.(N.S.) 612, 129 Pac. 757, 131 Pac. 1022, Ann. Cas. 1915A, 1127. The former under code procedure generally seeks a nonsuit; 7 Enc. Pl. & Pr. 829; the latter, a fact determination by the jury. The former seeks action of the court without a jury, the latter, action by the jury upon peremptory instructions. Our statutes recognize a distinction between the motions by providing for motions of dismissal and motions for directed verdicts and, the effect of each. Comp. Laws, 1913, §§ 7597, 7643; Laws 1921, chap. 133. A motion for a directed verdict supersedes a motion for dismissal or nonsuit. 26 R. C. L. 1066.

Accordingly, upon technical grounds, the sufficiency of the evidence concerning the carrier's negligence or plaintiff's assumption of the risk is not before this court for review. Apparently, at the trial, the defendant advisedly made its motions, as motions for dismissal. Now, before this court, by challenging the sufficiency of the evidence to justify the verdict, it seeks a final determination upon the merits of the facts pleaded and proved, whether considered under the Federal, or the state, acts. However, we are not disposed, upon mere technical grounds, to deny defendant a review of the sufficiency of such evidence to establish

a cause of action either under the Federal or the state acts where it seeks so to do. We have, accordingly, reviewed the entire record. We do not hesitate to express considerable doubt concerning the sufficiency of the evidence to justify the jury's findings of defendant's negligence and plaintiff's nonassumption of the risk. Whether under the circumstances defendant exercised that reasonable care required concerning the place where plaintiff worked and in furnishing proper tools and instrumentalities, is indeed a close question. Likewise, the question of whether or not the plaintiff, through his experience and the manner of the work, did not assume the risk. The condition of the place where plaintiff was working in connection with the work he was then and there requested or permitted to do was more or less hazardous. The wrench used by plaintiff's coworker, if worn and defective, increased the hazard in connection with this particular work at the particular place. It is deemed unnecessary to restate the well-known fundamental rules applicable between master and servant in such situation. After full consideration we are of the opinion that the minds of men might reasonably differ and draw different conclusions upon the question whether there were acts of negligence by defendant and assumption of risk by plaintiff at the time and place where the injury occurred. Accordingly, we are not prepared, as a matter of law, to disturb the verdict returned. See Schantz v. Northern P. R. Co. 42 N. D. 377, 173 N. W. 556, id. 47 N. D. 1, 180 N. W. 517; Koofos v. Great Northern R. Co. 41 N. D. 176, 170 N. W. 859; Abelstad v. Johnson, 41 N. D. 399, 170 N. W. 619; Karas v. MacAdoo, 46 N. D. 344, 179 N. W. 710.

It is a serious question, upon the record, whether plaintiff, at the time of his injury, was engaged in interstate commerce or in work so closely related to it as to be practically a part of it. Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 558, 60 L. ed. 436, L.R.A.1916C, 797, 36 Sup. Ct. Rep. 188; Industrial Acci. Commission v. Davis (May 29th, 1922), 259 U. S. 182, 66 L. ed. 888, 42 Sup. Ct. Rep. 489; Southern P. Co. v. Industrial Acci. Commission, 10 A.L.R. 1181 and note, (251 U. S. 259, 64 L. ed. 258, 40 Sup. Ct. Rep. 130). The jury, pursuant to a special question, found that the plaintiff was employed in interstate commerce. However, upon the record, this was a question of law. Kanable v. Great Northern R. Co. 45 N. D. 619, 178 N. W. 1000. We are of the opinion that it is unnecessary to determine this

question. We are satisfied, upon the record, that plaintiff's cause of action, as proved at the trial, if considered not to be within the terms of the Federal act because he was not then engaged in interstate commerce, in any event, falls within the terms of the state statute. N. D. Laws 1915, chap. 207. The state statute uses practically the same identical language as the Federal act; it changes only the language of the Federal act to the extent necessary for the purposes of making the same a law of this state. Apparently, it has been copied directly from the Federal act. See Froelich v. Northern P. R. Co. 42 N. D. 550, 173 N. W. 831. Upon the facts as pleaded and proved, plaintiff's cause of action, whether within the Federal act or the state act, was, in either event, within and subject to the jurisdiction of the state court. If the pleading had directly alleged that it was subject to the state act and the facts, as pleaded and proved, disclosed that plaintiff, as a matter of law, was engaged in interstate commerce at the time of his injury, the Federal act, by force of its superiority would have applied. See Schantz v. Northern P. R. Co. 42 N. D. 377, 386, 173 N. W. 556; Froelich v. Northern P. R. Co., supra, and cases cited. It is not contended that, if the provisions of the state act had been applied, the result of the action would have been in any manner different. See North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109. It is defendant's contention that, fraudulently, it was deprived of a right of removal into the Federal courts.

We are clearly of the opinion that, upon this record, defendant is not in a position to successfully assert any such contention. It has waived this right, if any it had. This record does not disclose that the defendant at any time has presented or filed any petition or bond for removal of this cause. There is no proof whatever of any fraudulent attempt by plaintiff to prevent a removal. The record simply discloses an allegation by defendant in its answer to that effect without any proof whatever to support it. Throughout the trial and before this court plaintiff has consistently maintained that plaintiff, at time of his injury, was then engaged in an act concerning interstate commerce. The fact that plaintiff specifically alleged his cause of action to be under the Federal act, and that this thereby gave to him a prima facie right to maintain such action in the state court without a right of removal upon

the pleading, did not foreclose defendant's right of removal, afterwards, upon taking proper steps so to do when it might clearly appear that the right of removal existed. Great Northern R. Co. v. Alexander, 246 U. S. 276, 62 L. ed. 713, 38 Sup. Ct. Rep. 237; Northern P. R. Co. v. Austin, 135 U. S. 315, 34 L. ed. 218, 10 Sup. Ct. Rep. 758. But, this, the defendant has failed to do. Furthermore, it has sought in a state court to secure a determination upon the merits. See Great Northern R. Co. v. Alexander, supra.

The reception in evidence of the letters was error. They were incompetent until identified and agency established. But, in view of our determination herein, the error was without prejudice. They concerned, remotely, the question of whether the car involved was then engaged in interstate commerce. Error predicated concerning the instructions cannot be reviewed in the absence of their return and settlement. Otherwise, defendant objects to testimony received concerning foreign cars being in the carrier's yards; to the introduction of a photograph showing the present condition of plaintiff's limb; and to testimony of the plaintiff concerning directions he took or received from his coworker. These objections are without merit in view of the determination herein made.

The judgment is affirmed with costs.

GRACE, J., concurs.

BIRDZELL, Ch. J., dissents.

CHRISTIANSON, J. (concurring). While I have considerable doubt as to whether the findings of the jury on the questions of negligence and assumption of risk are supported by the evidence, I am not prepared to say that, as a matter of law, there was no actionable negligence on the part of the defendant, or that the plaintiff assumed the risk. Nor am I prepared to say that the record here establishes a situation where it can be said that prejudicial error was committed in not permitting a removal to the Federal court.

I am, also, of the opinion that the admission of the letters referred to in the principal opinion was error without prejudice.

ROBINSON, J. (dissenting). This is an action against the govern-

ment for alleged negligence of its transportation agent, to the injury of the plaintiff. The plaintiff is a boss carpenter and he undertook to do some ordinary carpenter work on a timber 8 x 12 inches, 12 feet long, which timber he and his helper placed on two wooden horses for the purpose of working on the same. The work was not at all dangerous, but it seems the weather was cold, the wooden horses were slippery and frosty, and the plaintiff neglected to clean them off and secure the timber against slipping, which he might easily have done in two minutes. So, by chance, the timber slipped from the wooden horses and in falling injured the shin bone of plaintiff's leg. It was a pure accident, due to obvious carelessness of the plaintiff and not to any carelessness of the government, its agents, or servants. But in such cases the verdict goes against the government almost as a matter of course, because the amount of any verdict is very small when compared with the great wealth of the government.

In the opinion as written by Mr. Justice Bronson, it is said that counsel for defendant failed to move for a directed verdict or a new trial, and for that reason, he cannot question the sufficiency of the evidence to sustain the verdict. Such has been the holding of a majority of this court on several occasions. It is not the law, because it is in direct conflict with a plain statute, which reads as follows:

Chap. 131, Laws 1913, § 9: "No motion for a new trial shall be necessary to obtain on appeal a review of any question of law or of the sufficiency of the evidence, unless before the taking of the appeal, the judge shall notify counsel of the party intending to take the appeal that he desires such motion to be made."

The purpose of the statute is to do away with the idle act of moving for a new trial which is almost sure and certain to be denied, unless the judge himself directs a motion for a new trial.

It seems time for this court to cease piling error upon error by following majority decisions contrary to a plain statute.

On petition for rehearing.

PER CURIAM. The decision in this case was filed December 30th, 1922. The case was decided by a divided court. A majority—Justices Bronson, Christianson and Grace—agreed that the judgment appealed from should be affirmed. Mr. Chief Justice Birdzell and Mr. Justice

Robinson dissented. On January 1st, 1923, there was a change in the membership of the court. On that day Justices Robinson and Grace retired, and were succeeded in office by Justices Johnson and Nuessle. On January 15th, 1923, the defendant filed a petition for rehearing. The situation confronting this court upon the filing of such petition was this. There were only two members of the court who had participated in the case upon the original hearing who agreed with the disposition of the case made in the former decision, one of the members disagreed with the conclusion reached in the former decision and two members of the court had not participated in the former hearing and were wholly unfamiliar with the case in any of its aspects. In view of the circumstances, it was thought advisable to order a re-argument without determining whether a rehearing should or should not be granted. The re-argument was intended to serve a two-fold purpose. (1) To determine whether a rehearing ought to be granted and the conclusions reached in the former opinions as to the law and facts re-examined; and (2) Whether in event it appeared that grounds for rehearing existed the conclusion reached in the former decision ought to be departed from.

On oral argument counsel were informed by the chief justice of the purposes for which re-argument had been ordered. After careful consideration we are agreed that the petition for rehearing filed in this case does not present any cause for which a rehearing ought to be granted. Rule 16, Rules of Practice. The petition is merely a re-argument of the questions determined by the former decision. The mere fact that there has been a change in the membership of the court and that there is or may be, a possibility or even a probability that the new members of the court (if they were to consider the case anew) might reach different conclusions from those reached by the majority members in the former decision, does not afford any reason for a rehearing. 4 C. J. 625. The petition for rehearing is, therefore, denied.

The members of the court who participated in the former decision adhere to the views then expressed. Justices Johnson and Nuessle express no opinion as to the correctness of the conclusions reached by the majority members in the former opinions; but they agree that no cause for rehearing has been presented. In other words, the members of the court as now constituted are all of the opinion that the questions presented in the petition for rehearing were all considered and disposed

of adversely to the defendant by the former decision; and that in making such decision the majority of the court as then constituted had before them and considered all the material facts, and that it is not shown that they overlooked any controlling decision or statute.

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

IN RE DUNBAR.

THE STATE OF NORTH DAKOTA, Plaintiff, v. ED. E. DUFEK and James R. Smith, Defendants, HARRY B. DUNBAR, Appellant.

(193 N. W. 928.)

Intoxicating liquors — law authorizing peace officer to seize intoxicating liquors unlawfully transported subjects seized liquors to control of court.

1. Chapter 97 of the Session Laws of 1921, which makes it the duty of a peace officer to seize intoxicating liquors being transported in violation of law and which requires such officer to proceed against the person arrested and authorizes the court, upon conviction of such person, to order the liquor destroyed, is construed and *held* to subject seized liquors to the control of the court having authority to order destruction.

Intoxicating liquors — court under whose control seized liquors held by peace officer has jurisdiction to require him to account for it.

2. The court under whose control seized liquors are held by a peace officer has jurisdiction to inquire concerning the liquors and to require the person in possession to account for the same.

Intoxicating liquors — order for destruction signed by judge of another district does not preclude inquiry by court under whose control liquor held.

3. A peace officer has not the right to remove seized liquors without the consent of the court in which a prosecution is pending, and an order for destruction signed by a judge of another district does not preclude inquiry by the court under whose control liquor is held.

Intoxicating liquors — one in possession of seized liquors must respond to orders of court on peril of contempt.

4. One having possession of seized liquors and who is under obligation to account to the court therefor, must respond to the orders of the court at the peril of being held guilty of contempt.

Witnesses — constitutional privilege of refraining from answering incriminating questions does not purge one of contempt in failure to render account ordered by court.

5. Reliance upon the constitutional privilege of refraining from answering incriminating questions does not purge one of a contempt consisting in the failure to render an account ordered by the court having jurisdiction.

Contempt — original affidavit and facts alleged in citation as to nonappearance of seized liquor held sufficient to support judgment for contempt.

6. Where an order to show cause is issued on an affidavit which alleges facts making it proper for the court to institute an inquiry as to the disposition of seized liquors but which does not purport to allege any contempt, and where, in response to the order to show cause, the party to whom it is directed does not personally appear and does not in other respects comply with the order, and where the court issues a second order to show cause reciting therein the additional negative facts with respect to the nonappearance and the failure to file a sufficient inventory and account, directing the defendant to show cause why he should not be punished for contempt, it is held that the original affidavit, together with the recital of facts in the second order to show cause, is a sufficient pleading to support a judgment of conviction for contempt.

Contempt — judgment held void.

7. The judgment in the instant case is examined and *held* not to be in conformity with § 8181, Comp. Laws 1913 which prescribes the procedure requisite to a legal conviction of contempt committed in the immediate view and presence of the court, in that there was no order stating the facts which constituted the offense and reciting that the same occurred in the immediate view and presence of the court.

Contempt — law requiring court or judge to cause interrogatories to be filed specifying circumstances of offense charged, mandatory.

8. Section 8188 Comp. Laws 1913, which requires the court or judge before whom an accused is produced by virtue of a warrant or an order to show cause, to cause interrogatories to be filed specifying the facts and circumstances of the offense charged against the accused, is mandatory.

Opinion filed December 30, 1922. Rehearing denied May 21, 1923.

Contempt, 13 C. J. § 89 p. 65 n. 85; § 104 p. 73 n. 29; § 121 p. 81 n. 55; Intoxicating Liquors, 33 C. J. § 397 p. 689 n. 25, 26, 27, 28; Witnesses, 40 Cyc. p. 2540 n. 39 New.

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

Reversed and remanded.

Jacobson & Murray, for appellant.

Section 8188 requires that unless the accused admits the offense charged, written interrogatories must be filed, specifying facts and circumstances of the offense, to which the accused must make written answers. No such interrogatories were made or filed in the case at bar, or any written answers made thereto by the party proceeded against for contempt. The filing of such interrogatories is mandatory, and is a jurisdictional prerequisite for a judgment for contempt, when it is not charged that the contempt was had in the presence of the court. There is no claim here, in the case at bar, that contempt was committed in the presence of the court. Noble Twp. v. Wasen (N. D.) 86 N. W. 742.

The facts relied upon as constituting the offense of contempt of court may be few or many, and they may be submitted in one or in many affidavits; but the plainest principles of justice demand that the defendant should, before interposing his defense, be confronted with an accusation setting forth concisely the facts and circumstances constituting the offense charged. This rule is sustained by a great preponderance of authority, and this court has expressly recognized it in the case of State v. Root, 5 N. D. 487, 67 N. W. 590; Nichols v. State, 129 Pac. 673; State v. Harris, 14 N. D. 501; State v. Root (N. D.) 67 N. W. 590; Freeman v. Huron (S. D.) 66 N. W. 928; Mitchell v. San Francisco (Cal. Super. Ct.) 125 Pac. 1061; State v. Sweetland (S. D.) 54 N. W. 415.

Defects in the affidavit cannot be cured by proof on the hearing. See Crowley v. Superior Ct. (Cal.) 110 Pac. 817.

"Where, however, as in the case at bar, the fact of the commission of the offense is not within the personal observation of the judicial officer presiding over the court, it becomes necessary to bring the facts before the court by a formal accusation." State v. Henthron (Kan.) 26 Pac. 937; State v. Anders, 68 Pac. 668; Herald Republican Pub. Co. v. Lewis, 129 Pac. 624.

"Where, however, as in the case at bar, the fact of the commission of the offense is not within the personal observation of the judicial officer presiding over the court, it becomes necessary to bring the facts before

the court by a formal accusation. This is done at common law and under the statute by an affidavit. Where this course is pursued the affidavit at once assumes great importance as it is not only the foundation for issuing the order to show cause, but also constitutes—and this is its most important office—the accusation upon which the accused is to be tried for a criminal offense. Under the modern authorities at least, the sufficiency of such accusation is to be tested by the rules governing the framing of indictments and informations, all the material facts and essential ingredients of the offense, are required to be set out by distinct and positive averments; nor can any essential allegation be supplied by implication." State v. Newton, 16 N. D. 151, 112 N. W. 52.

Louis G. Tellner, Russell D. Chase, State's Attorney, *Geo. F. Shafer,* Attorney General, and *R. J. Kamplin,* Assistant Attorney General, for respondent.

In some jurisdictions there are holdings to the effect that certain contempts, though not committed in the presence of the court, are necessarily within the knowledge of the court, and may be initiated by the court on its own motion. Among these are scurrilous articles in the newspapers reflecting on the dignity of the court. 2 L.R.A.(N.S.) 231, note.

"The cases which hold to the contrary entirely ignore the distinction between civil contempts, where the court cannot proceed unless so moved by some party aggrieved, and criminal contempts, where only the maintenance of the court's dignity is involved. In the latter class of cases it is primarily the duty of the court itself to see that it is not brought into public contempt by words or conduct of individuals. It is not bound to wait for some third person to initiate proceedings, for it would be anomalous to say that the first duty rests with the court, and yet it must wait for some individual to institute proceedings before the court can take any steps to maintain its own dignity. . . ." 2 L.R.A.(N.S.) 233; Carl v. State, 102 Ark. 122, 143 S. W. 909; State v. Rott, 4 N. D. 487; State v. Crum, 7 N. D. 299.

Negative acts may also constitute a direct contempt as for instance the failing to produce a prisoner at the trial or hearing. 6 R. C. L. 491.

"The failure of Sternes to produce the body of Ah Fong, as the court found he had the power to do, before the court in obedience to the writ, was a contempt committed in the face of the court, and no affidavit of

the facts constituting the contempt was necessary to give the court knowledge thereof. Re Robb, 64 Cal. 431, 1 Pac. 881. An order to show cause or notice of a motion for an attachment would not have served Sternes any useful purpose. He had an opportunity, as shown by the judgment, to explain the circumstances of his failure to obey the writ, and the court was not in duty bound to accept as true his return to the writ." Ex parte Sternes, 77 Cal. 156, 19 Pac. 275.

"Whenever any person shall be committed for a contempt under the provisions of this act, the substance of his offense shall be set forth in the order or warrant of commitment." Ex parte Chastain, 127 S. W. 973; Davies v. State, 84 S. W. 633; Easton v. State, 39 Ala. 551, 87 Am. Dec. 49.

"Another principle seems to be equally well settled, to wit: that a judgment or sentence for contempt is valid without any recital of the conduct or facts which constitute the contempt." Ex parte Summers, 5 Ired. 149; State v. Woodfin, 5 Ired. 199.

Statement.

BIRDZELL, Ch. J. This is an appeal from a judgment of conviction of contempt against Harry B. Dunbar. On or about May 5, 1921, the appellant herein (Dunbar) who was chief inspector of the state licensing department and a peace officer of the state, captured from the defendants in the above-entitled criminal action and one M. J. Madden, in Stutsman county, a Cadillac automobile loaded with whisky. The capture and the arrest of the defendants were accomplished after overcoming resistance, a gun fight taking place, in which Madden, the owner of the car was killed. The remaining defendants were held to answer for the offense and admitted to bail. The action was on the calendar for the December 1921 term of the court, and when the state's attorney moved the arraignment of the defendants they failed to appear; whereupon the court declared the bonds forfeited and directed the issuance of bench warrants. Of the whisky captured approximately two cases were left with the sheriff of Stutsman county, Dunbar retaining the remainder and the automobile. Prior to the convening of the December term of the district court of Stutsman county, and on or about November 17th, Dunbar, or an attorney purporting to represent him,

attempted to secure from the Honorable J. A. Coffey, district judge of the fourth judicial district (embracing Stutsman county), and who was at the time holding court at Washburn, the county seat of McLean county in said district, an order for the destruction of the liquor. Closely following the refusal of Judge Coffey to make the order, an unverified application for such an order was made to Honorable John C. Lowe, a district judge of the fifth judicial district, who granted the application. The application for the order of destruction alleges that the liquors belonged to and were the property of Madden, the deceased: "that subsequently to the seizure of said liquors, and for the purpose of protecting and preserving the same, applicant removed all of the same to the county of Ward in the fifth judicial district of the state of North Dakota, with the exception of two cases of whisky which applicant deposited with the sheriff of Stutsman county, North Dakota, where the same now is."

It further alleges that the other parties who were riding in the automobile were arrested and were being prosecuted in the district court of Stutsman county, and that the prosecutions were then pending; that the liquors were at the time of the application within the jurisdiction of the court in the fifth judicial district and, upon information and belief, that no other court had jurisdiction thereof. The only circumstance recited or alleged in the petition, showing any necessity for the destruction of the liquor is as follows:

"That applicant is about to retire from office and it would be quite expensive to transport said liquor back to Stutsman county, or to Burleigh county, and that the best interests of the state would be subserved by destroying the same here in Ward county."

By order dated November 19, 1921, signed by the Honorable John C. Lowe, judge, Dunbar was directed to destroy the liquors in Ward county, and by a return dated the 21st day of November, he certified that the order had been executed. On April 22, 1922, by an order filed April 25, 1922, in the office of the clerk of the district court of Stutsman county, the report of destruction was confirmed nunc pro tunc as of November 21, 1921.

While these proceedings (except the nunc pro tunc order) were taking place outside of the district court of Stutsman county, the case of State v. Dufek and Smith had not been disposed of, nor reached for

disposition. It was placed upon the calendar for the December term of the district court of Stutsman county, and when reached for trial the defendants were not present. Their bail was forfeited and bench warrants issued. By affidavit dated December 31, 1921, the state's attorney of Stutsman county informed the court of the taking of the whisky and the automobile from Stutsman county by the said Dunbar; that he had relinquished the office of chief inspector of the state licensing department; that by reason of the wrongful taking and removal of the whisky it was not available as evidence in the criminal action; that the court has been and was impeded and hampered in making a lawful disposition of the whisky; and that Dunbar had thereby impeded and hampered the function of the court and the officers thereof. Wherefore affiant, the state's attorney, prayed and moved the court for an order requiring Dunbar to deliver forthwith into the possession and custody of the sheriff of Stutsman county, the automobile and whisky, and required him to make and prepare in writing, under oath, a full, true, and correct inventory and accounting of said automobile and whisky and file the same with the court. Upon this affidavit an order to show cause was issued reciting, among other things, that the proper functioning of the court in said criminal matter was being impeded and hampered by the failure and neglect of Dunbar to deliver said automobile and liquor into the possession and custody of the sheriff in the jurisdiction of the court. It was ordered that Dunbar show cause on March 10th why he should not be required to deliver the property to the sheriff of Stutsman county. Also "ordered that the said H. B. Dunbar forthwith make and file with the clerk of this court a full, true, and correct inventory and accounting, under oath, of said automobile and said liquor," and that he present himself in person on March 10th for report and examination in reference to the said matters. Upon the return of this order Dunbar did not appear in person, but he did appear by attorney, who stated his position as follows:

"Now, if the court please, our position amounts to this, that there is no authority in law for this kind of a proceeding. There is no civil action pending against the party who is ordered to show cause. There is no summons or complaint issued, either issued or served on him, so we take it from that that there is no provisional remedy that could lie because there would be no foundation for it, namely a plenary action.

We cannot make it stick from a criminal standpoint because there is no criminal proceeding pending against the party required to show cause; no complaint was ever filed with a magistrate charging him with any crime and no warrant issued. There is nothing in the Volstead Act which would give the court jurisdiction of authority in this special proceeding, and there is nothing in the act which appoints—under which Dunbar is inspector which would authorize this proceeding. I will briefly call the court's attention to it. . . . Now as to the act appointing him inspector; I presume, if your Honor is familiar with it, I won't need to take your time to read it. It makes him a peace officer. Furthermore it appears from his affidavit that he is not now pool hall inspector—I mean license inspector. He has been discharged, so he is an ordinary citizen. He is not a de facto officer or a de jure officer. I take this position, that there is a great question whether he can be brought in and examined. I take the position that there must be a proceeding in court of a plenary nature, either civil action or a criminal action. Mr. Dunbar is not subpœnaed to come in to testify on matters which are material to an information which is filed. He is ordered to come in and testify generally. No subpœna has been issued. I can't conceive of any statute or any law which would authorize this kind of a proceeding unless we say the court's inherent powers. Now, if the court has inherent power to order Mr. Dunbar then the court would have inherent power to order any citizen of North Dakota in."

At the conclusion of this hearing the court continued the matter for two weeks. In the interim a second order to show cause was issued reciting, among other things, the nonappearance of Dunbar personally, as directed by the previous order; that no reason or excuse was presented for his failure to appear and submit himself to examination as required. Also, that it further appeared to the court that the purported return to the previous order was not a sufficient compliance therewith. Whereupon it was ordered that Dunbar appear on the 24th of March and show cause why he should not be held and adjudged in contempt of court on account of this failure to comply with the requirements of the previous order. Upon the adjourned hearing of the original order to show cause and upon the return of the second order, returns were filed, showing reliance upon the order of destruction made by the district judge of Ward county as above indicated, and stating "that the liquor

and property described in the order to show cause herein is the identical liquor and property designated and described in said certified copy." (Certified copy of the order of destruction.) In addition, it pleaded the action of the Ward county district court as res judicata.

The state's attorney was granted permission to examine Dunbar; whereupon his counsel stated:

"The said H. B. Dunbar refuses to testify or to be sworn on the grounds and for the reasons that the answers to the questions propounded might have a tendency to incriminate him, and the said H. B. Dunbar claims the constitutional privilege, both under the Federal and the state Constitutions, and the attorney for Mr. Dunbar states, that he has interviewed the said Dunbar with reference to the matter and upon the facts given, advised the said H. B. Dunbar to claim the privilege of immunity from testifying both under the state and Federal Constitutions."

Dunbar took the stand and was advised of his constitutional rights by the court. He refused to answer any question having the remotest bearing upon the disposition of the liquor. Another witness testified to the application being made to Judge Coffey at Washburn on or about November 17th. At the conclusion of the hearing, the court entered the following judgment:

"Now, on this 25th day of April, 1922, came into court H. B. Dunbar, pursuant to an order to show cause dated March 10, 1922, in the within entitled matter, directed to the said H. B. Dunbar, requiring and ordering him to be and appear before this court at the court room thereof, in the courthouse, in the city of Jamestown, in said county of Stutsman, and state of North Dakota, on the 24th day of March, A. D. 1922, at 2 o'clock in the afternoon of said day, or as soon thereafter as counsel could be heard, and then and there show cause, if any there be, why he should not be held and adjudged in contempt of this court on account of his failure to comply with the requirements of a certain order of this court in the within entitled matter dated February 27, 1922, and why he should not be punished for said contempt; the time for hearing said order to show cause dated March 10, 1922, having been postponed and continued on the application of said H. B. Dunbar from the 24th day of March 1922, to the 25th day of April, 1922; the said H. B. Dunbar appearing on this 25th day of April, 1922, in person

and by J. K. Murray of Mott, North Dakota, his attorney, and the state of North Dakota appearing by Louis G. Tellner, state's attorney, and F. G. Kneeland, assistant state's attorney; and it appearing to the court that the said H. B. Dunbar has failed to produce in this court, or deliver into the possession and custody of the sheriff of Stutsman county, that certain intoxicating liquor which was seized by him on or about the 5th day of May, 1921, in Stutsman county, said intoxicating liquor being that certain liquor referred to in the aforesaid order dated February 27, 1922, he being required so to do by the said last-mentioned order; and it further appearing to the court that the said H. B. Dunbar has failed to make a proper showing to this court, on account of his failure to produce said liquor in this court, or to deliver same into the possession and custody of the sheriff of Stutsman county and has failed to file with the clerk of this court an inventory of said liquor, as required by said last-mentioned order; now therefore, upon all the proceedings had in this matter and all the files and records herein, it is the order and judgment of this court that the said H. B. Dunbar is in contempt of this court by reason of his failure to comply with the orders of this court, or to offer a reasonable excuse for his failure to so do, and that by reason thereof, and on account of such contempt, it is hereby ordered and adjudged that the said H. B. Dunbar be, and he is, ordered committed to the county jail within and for the county of Stutsman and state of North Dakota, on account of such contempt and as a punishment therefor, for a period of thirty days, beginning at 12 o'clock noon of this day, and that he stand committed until this order is complied with."

This judgment is stayed on appeal.

BIRDZELL, Ch. J. (after stating the facts). Section 9 of the Prohibition Law in force at the time of the seizure of the liquor in question (Sess. Laws 1921, chap. 97) makes it the duty of any peace officer to seize any and all intoxicating liquors found in any automobile or other conveyance when any person is discovered in the act of transporting it in violation of law. The officer is further required to proceed at once against the person arrested in any court having competent jurisdiction, and the court upon conviction of the person so arrested is

required to order the liquor destroyed and the property used in the transportation of the same forfeited. The state's attorney of the county in which the property was seized is required to cause summons to be issued against all persons having any right, title, or interest in the property seized, particularly describing the property and stating that the same is held for forfeiture and sale under the provisions of the act. If no answer is filed and no claim made therefor, the court is directed to declare the forfeiture of the property to the state and order sale of the same in the manner provided for the sale of property on execution, and if answer is filed or claim made, the court is required to hear and determine the claims according to law. The statute is entirely silent as to what shall be done with the liquors seized pending the prosecution, but it is sufficiently definite in its requirement of prompt proceedings in a court of competent jurisdiction to afford a clear indication of what is to be done with seized liquors. It is also sufficiently definite in its provision vesting authority in the court to order the liquor destroyed to indicate that the liquor, at all times subsequent to seizure, is, in reality, in legal custody under the direction of the court. The plain purpose of the statute obviously could not be carried out if the court having ultimate authority to order destruction should not have the authority to require preservation or conservation of the liquors in the meantime. Furthermore, the fact that seized liquors usually constitute the most reliable evidence of the violation of the law would naturally subject it to the exercise of the inherent judicial power of preservation, even in the absence of authority for its destruction being expressly vested. Hence, we do not question the power of a court in which a prosecution is pending to inquire concerning the whereabouts of seized liquors, for the transportation of which in violation of law persons are held to trial. We think these observations are a sufficient answer to the contention of the appellant that the court is powerless to inquire of a peace officer or an ex peace officer in the absence of a plenary action pending. There is, in fact, a criminal prosecution pending and there is a duty devolving upon the peace officer who seized liquor to hold it subject to the lawful orders of the court, and if the peace officer has ceased to function as such, by reason of resignation or otherwise, he is still under duty to account to the court having ultimate authority over the property in question.

The appellant contends that the judgment in question is invalid for

the reason that it is insufficient, considered as a conviction of direct contempt, in that it does not contain the requisite finding; and that, considered as a conviction of constructive or indirect contempt, it is invalid by reason of the failure upon the hearing to comply with the requirement of § 8188 regarding interrogatories.

The argument for its insufficiency as a judgment on a direct contempt is that § 8181, Comp. Laws, 1913, requires an order to be made, stating the facts which constitute the offense and reciting that the same occurred in the immediate view and presence of the court, and specifically prescribing the punishment to be inflicted therefor. The only part of the judgment or order which may be thought to show a compliance with this statute is the following:

"And it appearing to the court that the said H. B. Dunbar has failed to produce in this court, or deliver into the possession and custody of the sheriff of Stutsman county, that certain intoxicating liquor which was seized by him on or about the 5th day of May, 1921, in Stutsman county, said intoxicating liquor being that certain liquor referred to in the aforesaid order dated February 27, 1922, he being required so to do by the said last-mentioned order and it further appearing to the court that the said H. B. Dunbar has failed to make the proper showing to this court on account of his failure to produce said liquor in this court, or to deliver same into the possession and custody of the sheriff of Stutsman county and has failed to file with the clerk of this court an inventory of said liquor, as required by said last-mentioned order; now therefore, upon all the proceedings had in this matter and all the files and records herein, it is the order and judgment of this court that the said H. B. Dunbar is in contempt of this court by reason of his failure to comply with the orders of this court, or to offer a reasonable excuse for his failure to so do."

It will be noted that for the most part this order or judgment, in its findings of fact, finds in the alternative that Dunbar has failed to produce the liquor in court or to deliver it into the possession and custody of the sheriff of Stutsman county. So it was not his failure to produce the liquor in court that constituted a contemptuous act or omission, for the alternative or additional finding can only mean that this failure would have been excused had he delivered it into the possession and custody of the sheriff, an act which obviously would have taken place

outside of the presence of the court. The only finding that is not thus qualified or placed in the alternative is that he has failed to file an inventory with the clerk as required by the order of February 27, 1922. We are of the opinion that this is not a statement of a fact which constitutes the offense of direct contempt and a recital that it occurred in the immediate view and presence of the court, such as is required by § 8181, Comp. Laws, 1913. In fact, the judgment does not appear to have been drawn in conformity with § 8181 as a judgment of conviction of direct contempt and it cannot stand as a judgment of conviction of such offense. See Re Mettler, 50 Mont. 299, 146 Pac. 747; State ex rel. Rankin v. District Ct. 58 Mont. 276, 191 Pac. 772.

Is the omission of interrogatories fatal? The language of the statute is mandatory. It says that when the accused is produced on the return of an order to show cause (§ 8181) "the court or judge must, unless the accused admits the offense charged, cause interrogatories to be filed, specifying the facts and circumstances of the offense charged against him. The accused must make written answer thereto under oath within such reasonable time as the court or judge allows therefor and either party may produce affidavits or other proofs contradicting or corroborating any answer. Upon the original affidavits, the answer and subsequent proofs the court or judge must determine whether the accused has committed the offense charged."

The importance of interrogatories in contempt proceedings of this character has been recognized from a very early time. At common law, if the answers of the accused cleared him the complaint was dismissed. 4 Bl. Com. 288. But this effect is not any longer generally given or conceded. On the contrary, the court is required to determine, as a matter of fact, whether a contempt has been committed. Such at least is the better view, United States v. Shipp, 203 U. S. 563, 51 L. ed. 319, 27 Sup. Ct. Rep. 165, 8 Ann. Cas. 265, and our statute expressly requires it. Notwithstanding this, however, interrogatories still appear to be mandatory. Noble Twp. v. Aasen, 10 N. D. 264, 86 N. W. 742; Latimer v. Barmore, 81 Mich. 592, 46 N. W. 1; Metheany v. Kent Circuit Judge, 142 Mich. 628, 106 N. W. 147; 13 C. J. 73; Rapalje, Contempt, § 122.

We are not prepared to say that this procedural requirement is not a wholesome one. It has a tendency, necessarily, of making the charge

upon which one is to be convicted or acquitted definite and specific. While the defendant answered in the instant case, we cannot hold that the pleadings take the place of interrogatories, particularly in view of the fact that his counsel commented on the absence of interrogatories on the return day, construing their absence as an indication that his client was not being prosecuted for indirect contempt.

The defects above pointed out are fatal to the judgment in the instant case. It is not sufficient that the record upon appeal shall show that a contempt has, in fact, been committed, but it is essential that the record shall show that the defendant has been duly convicted of a specific contempt, and that if it be a direct contempt, that the order or judgment shall contain the requisite findings of fact, or if it be an indirect contempt, that the anterior procedure prerequisite to such a judgment shall have been had in order that it shall appear that no valuable right of the party accused may have been denied him. See State v. Root, 5 N. D. 487, 57 Am. St. Rep. 568, 67 N. W. 590.

In view of the subsequent proceedings incident to the reversal of the judgment in this case, we are called upon to consider some of the additional questions presented by counsel. As previously intimated in this opinion, we construe the prohibitory statute as placing seized liquors under the control of the court in which prosecutions for the offense of transportation may be pending. The officer seizing the liquor, being required promptly to institute the prosecution, holds it thenceforth as an agent of the court and subject to the ultimate power of the court to make a legal disposition thereof. As such agent he may not assert a right to do acts likely to embarrass the court in which prosecutions are pending, either in the matter of the presentation of evidence, or in the matter of making final judicial disposition of the conveyances or of the contraband goods seized. On the contrary he may be called upon to account at any time for the property so left in his hands. A peace officer has no right, without the consent of the court in which the prosecution may be pending, to remove large quantities of the contraband goods for safe keeping or otherwise to a remote place in the state. If he might thus remove a portion of the whisky, the sheriff, with equal right, might remove the remainder and leave the prosecutor without evidence. Neither has he the right, consistent with the duty he owes to the court,

whose agent he is, to go in quest of a judge who might look with more favor than another upon an application for destruction.

Furthermore, when such peace officer is called to account for his disposition of the property seized, or is called upon to turn the property over to the sheriff of the county in which the prosecution may be pending, his failure to do so is disobedience of a lawful order of the court, and this constitutes a criminal contempt under § 8178, Comp. Laws, 1913. He may not escape the consequences of such a contempt by asserting his constitutional privilege to refrain from answering questions concerning the disposition of the liquor on the ground that his answers might tend to incriminate him. He may, if he choose, so refrain from answering questions and thus give no evidence that might be used against him upon a charge of embezzlement, perjury or the like, but nevertheless his wilful failure to account to the court having a right to demand an account when ordered so to do would constitute a criminal contempt. One cannot escape the consequences of a contempt of this character by asserting that he cannot perform an official or fiduciary duty without divulging matters that might subject him to criminal prosecution. The constitutional right to refrain from giving incriminating testimony is not a license to commit contempt.

The appellant contends that all proceedings looking towards the prosecution for contempt are invalid for the reason that they were not initiated by affidavit. It is pointed out that the original affidavit, upon which the first order to show cause was issued, did not allege any facts purporting to amount to a contempt of court, and that, as no subsequent affidavit was filed purporting to allege any contempt, all subsequent proceedings are vitally defective. While it is true that the state's attorney, in the first affidavit, was not instituting contempt proceedings, it does not follow, in our opinion, that this affidavit, together with the facts that were within the personal knowledge of the court, and which were relied upon as the basis of the second order to show cause and recited in it, did not constitute a sufficient foundation for the order and a sufficient pleading. The office of the affidavit is simply to allege facts for the information of the party against whom an order is prayed and to call the court's attention to facts of which it may not be aware. It required no affidavit to inform the court that Dunbar did not appear personally in response to the first order to show cause, or that he did not

present a sufficient inventory and account or make a sufficient return to the order served upon him, and the recitation of the additional facts in the second order was as efficacious to apprise Dunbar of the nature of the complaint against him as any affidavit would have been. We are of the opinion that the original affidavit, together with the recitation of facts in the second order to show cause, facts which were within the personal knowledge of the court, is a sufficient foundation for the second order to show cause. Together they constitute a pleading sufficient to support a judgment of conviction for contempt. They apprised Dunbar of the facts that were responsible for his being brought before the court and that he would be expected to respond to a contempt charge on account thereof. In our opinion there is no merit in this contention of the appellant.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

CHRISTIANSON, J., concurs.

ROBINSON, J., concurs in result.

BRONSON, J. (concurring specially). I concur in the reversal of the judgment. I express no opinion concerning matters that may affect subsequent proceedings incident to such reversal.

GRACE, J., concurs.

On rehearing.

PER CURIAM. A rehearing has been had in this case. The court adheres to the opinion previously rendered. In accordance with that opinion, further proceedings may be had as follows:

(1) Upon the filing of interrogatories, an inquiry may be conducted to determine whether or not the appellant herein was guilty of contempt in his failure to comply with the first order to show cause in the manner recited in the second order. In determining this question, the court need not consider the order of destruction nor the proceedings in Ward county as being a full or a sufficient accounting for the liquor.

(2) The failure or refusal to render a proper accounting in open court, in conformity with the requirements of the district court before whom the further proceedings are had, may be deemed a direct contempt and a judgment of conviction based thereon.

BIRDZELL and CHRISTIANSON, JJ., and PUGH and BURR, Dist. JJ., concur.

Justices GRACE and ROBINSON having been succeeded in office by Justices NUESSLE and JOHNSON, both of whom were disqualified, Honorable A. G. BURR, Judge of the Second Judicial District, and Honorable Thos. H. PUGH, Judge of the Sixth Judicial District, sat in their stead on the rehearing.

BRONSON, Ch. J., (specially concurring upon rehearing). I concur in the disposition of this cause as heretofore made and in the language contained in paragraphs one and two of the per curiam opinion upon rehearing.

EUGENE WEIGEL, Respondent, v. POWERS ELEVATOR COMPANY, Appellant.

(194 N. W. 113.)

Appeal and error — theory below cannot be departed from for first time on appeal.

1. This case was tried on the theory that the plaintiff had a lien in the nature of a chattel mortgage on the grain alleged to have been converted. This theory will not be departed from in this court, following Ugland v. Farmers' & M. State Bank, 23 N. D. 536.

Trover and conversion — conversion defined.

2. When property is taken subject to a lien, a conversion thereof does not take place until some affirmative act on the part of the defendant, like tortious detention thereof from the owner, or the party entitled to the possession thereof, or an exclusion or defiance of such party's rights, or the withholding of possession under a claim of title inconsistent with that of the plaintiff or owner. Conversion under the facts in this case, and the theory on which it was tried, took place at the time of the demand and refusal.

Trover and conversion — evidence of grain market sufficient.

3. For reasons stated in the opinion, it is *held* that at the time of the alleged conversion of the grain, there was a grain market, in the legal sense, at Killdeer, North Dakota.

Evidence — individual sales of grain incompetent to establish market value unless shown made at market price at time and place of conversion.

4. While individual sales sometimes are competent evidence of value, they are not competent to establish market value of wheat when there is an established market, like the wheat market in the cities and villages in North Dakota, without showing, by competent evidence, that such individual sales are in fact made at the prevailing market price of wheat at the time and place of the conversion.

Witnesses — evidence of witness having no knowledge independent from memorandum held inadmissible.

5. Where a witness, in testifying upon the question of the market value or the market price of different kinds of grain more than one year before, who has no independent recollection of such market price, has a copy of records kept in the office of the corporation in whose employ as a manager he was at the time such records were made, showing what price it paid for various kinds and grades of grain on the date of the alleged conversion, and when such witness is, after examining such copy, unable to testify that he has any independent recollection of the market price, and his recollection is not, in fact, refreshed by referring to such copy, no evidence being offered to show who made the copy, when it was made, or whether it was correct when made, it is *held* that the witness is, in fact, testifying from a copy of the records without proper foundation; that the use of the copy as a memorandum for the ostensible purpose of refreshing the recollection of the witness is improper, and the testimony should not have been received over proper objection.

Witnesses — not necessary that memorandum to refresh recollection of witness shall be made by himself, or original, if witness can speak from own recollection.

6. It is not required that a memorandum or writing, to be proper for the purpose of refreshing the recollection of a witness, shall have been made by the witness himself, or that it be an original writing, if the witness, after inspecting it, can speak from his own recollection, or otherwise guarantee the accuracy of the record or memorandum used.

Vendor and purchaser — interpretation of land contract that vendee was to deliver to vendor one half of all the crops annually held correct.

7. For reasons stated in the opinion, it is *held* that the interpretation of the contract, for the sale of the land on which the grain alleged to have been converted was raised, by the trial court, was correct, to the effect that it was incumbent upon the vendee thereunder to deliver to the vendor one half of all the crops annually.

Trial — requested instruction properly denied where no foundation laid in pleadings for evidence thereof; proper instructions as to issues established by competent evidence should be given on request.

8. Assuming, without deciding, that the colloquy between the court and counsel for the defendant at the close of the trial was a sufficient request for an instruction, it is *held* that such request was properly denied because no foundation was laid in the pleadings for evidence of a statutory seed lien which would be entitled to priority over the lien claimed by the plaintiff, following Citizens Nat. Bank v. Osborne-McMillan Elevator Co. 21 N. D. 335, p. 341. Under proper pleadings, evidence of the existence of such a statutory lien would be admissible to reduce damages, and in such a case, proper instructions, with reference thereto, should be given on request.

Opinion filed May 21, 1923.

Appeal and Error, 3 C. J. § 618 p. 718 n. 50; Evidence, 22 C. J. § 151 p. 188 n. 11; Trial, 38 Cyc. p. 1615 n. 19; p. 1703 n. 75; Trover and Conversion, 38 Cyc. p. 2018 n. 89; p. 2088 n. 32; Vendor and Purchaser, 39 Cyc. p. 1319 n. 60; Witnesses, 40 Cyc. p. 2459 n. 55; p. 2460 n. 56; p. 2458 n. 47.

In District Court, Morton County, *Berry*, J.

Action to recover the value of grain alleged to have been converted by defendant.

Reversed.

J. N. McCarter, and *E. T. Burke*, for appellant.

S. P. Halpern and *J. K. Murray*, for respondent.

JOHNSON, J. This is a conversion action. The plaintiff is engaged in the banking and the real estate business at Hebron; the defendant operates a public warehouse and elevator at Killdeer. The plaintiff seeks to recover damages from the defendant for the alleged conversion of a quantity of grain grown by one Frederick Spier, in 1920, upon certain lands situated in Dunn county. The grain, which the defendant is charged with converting, was delivered to it by Spier, at its elevator at Killdeer, North Dakota, sometime during the fall of 1920, and was the 1920 crop. It is conceded that the land on which the grain was raised had been sold by Eugene Herzog to Spier in 1918, under a contract for a deed, on the crop payment plan. The evidence also shows that in 1920 Herzog and Mr. and Mrs. Fred Spier executed a new contract covering the same premises as the old contract did, and in sub-

stantially the same terms. This contract, however, they dated back to 1918. The evidence further tends to show that the original contract was destroyed, and the new contract took its place. The contract was, on the 2nd day of September, 1920, assigned by Herzog to plaintiff and respondent, Weigel.

The contract contains the following stipulation with reference to the payment of the purchase price:

"Said party of the second part further agrees to pay the said party of the first part as and for the purchase price of said described premises the said sum of five thousand and two hundred dollars as down payment in form of equity in land and rest dollars according to the conditions of ten promissory notes for thirteen thousand no/100 dollars ($13,000), each due October 18, to 1928, and interest thereon at the rate of 6 per cent per annum, in gold or its equivalent, in manner following, to wit: 8 per cent after maturity. That he will deliver to said party of the first part or agent, one half of all crops raised each year at Killdeer or such other place as may hereafter be mutually agreed upon, such delivery to be made and the price of grain so delivered to be fixed on or before the first day of December of each year. The price so fixed to be the market price at the time of delivery of said grain; the amount so realized to be credited on this contract, first by paying the interest due at the time of said delivery, and the remainder to be applied to the reduction of the principal sum then remaining unpaid, until the full amount of the principal and interest is wholly paid."

The contract further stipulates that the title to all of the crop should be in the vendor until division, and delivery of one half thereof, to the vendee. This part of the contract is in the following language:

"It is further agreed and understood that no assignment of the premises or any part thereof, or of said contract, or any pledge thereof, shall be valid unless the consent of the said party of the first part shall be indorsed thereon or permanently attached thereto, and it is further hereby especially agreed by and between the parties hereto, that the title of all grains and crops grown and raised upon the above-described land during the entire life of this contract shall be and remain in the party of the first part, it be the express understanding that the first party reserves title to seed crops and that such title shall remain intact

in the party of the first part until after the proper division of said crops has been made."

There was a further stipulation in the contract that a chattel mortgage should be executed by the vendee to the vendor on all crops grown to secure the payment of the purchase price during the life of the contract. No chattel mortgage was ever executed or filed and the contract, itself, was not filed as a chattel mortgage nor was it filed for record in the office of the register of deeds of Dunn county. There is no claim of fraud against appellant, or that appellant purchased this grain with actual knowledge of plaintiff's alleged lien. It also appears that there was an unsatisfied seed lien against this grain which, under the statutes of this state, would be superior to that of a mortgage.

The jury returned a verdict for the plaintiff in the sum of $775.51, upon which judgment was entered.

At the conclusion of the plaintiff's case, the defendant moved for a directed verdict, which was resisted by the plaintiff, and this motion was renewed after both sides rested; both motions were denied. After the verdict was returned, the defendant and appellant moved for judgment notwithstanding the verdict upon the grounds set forth in the motion for a directed verdict. Inasmuch as there was not such a total failure on the part of the plaintiff to prove a cause of action as could not be remedied on a new trial, this motion was properly denied.

Thereafter the defendant and appellant moved for a new trial. This motion was denied. This case was tried upon the theory that the vendor in a contract for the sale of land on the crop payment plan, where the contract in terms reserved title to all of the grain raised on the premises until division of the crop each year, has a lien on such crop in the nature of a chattel mortgage and that a demand and refusal are necessary to constitute conversion. On the abstract question whether the vendor under such a contract has a lien on the crop or is the absolute owner thereof we express no opinion. We simply decide this case on the theory on which it was tried and assume that a demand and refusal are essential to plaintiff's right to recover in conversion in this action. Plaintiff below assumed that he had a lien on the crop. For the purpose of this decision we assume, without deciding, that this assumption was correct.

Appellant specifies thirty-three errors, most of which relate to rulings

of the trial court upon objections to certain evidence. This appeal, therefore, brings up for review numerous errors or law alleged to have occurred at the trial.

We believe that the decision of this court upon specifications 25, 26, 27, 28 and 29, is decisive of this case. The errors complained of in these specifications refer to the testimony of the witness, O. H. Larson, who was called by the plaintiff and respondent to establish the market price, or market value, of durum at Killdeer, on several dates, on one of which dates the conversion is alleged to have taken place.

Before considering these specifications, it will be necessary to a thorough understanding of the issues, to state the facts more fully. The plaintiff and respondent proved the execution of the contract hereinbefore referred to, the growing of the grain in issue by the vendee thereunder, and the delivery of a total of 1,000 bushels of wheat and durum and some 65 or 75 bushels of flax to the elevator of the respondent at Killdeer, sometime during the fall of 1920. The exact date of delivery does not appear, neither is there any evidence in the record tending to show the grade or quality of the wheat and the flax delivered, except that of the witness Spier, the vendee under the land contract, who testified that all his wheat and durum was No. 1. The trial court having assumed that the grain in this case was taken subject to a lien, a conversion thereof does not take place until some affirmative act on the part of the appellant, like tortious detention thereof from the owner of the party entitled to the possession thereof, or an exclusion or defiance of such party's right, or the withholding of possession under a claim of title inconsistent with that of the plaintiff, or owner. As no such act was proved until the demand and refusal, there was no proof of conversion in this case, prior to the 16th of January, 1921. Citizens Nat. Bank v. Osborne-McMillan Elevator Co. 21 N. D. 335, 131 N. W. 266; Bentler v. Brynjolfson, 38 N. D. 401, 165 N. W. 553; Merchants' State Bank v. Sawyer Farmers' Co-op. Asso. 47 N. D. 375, 14 A.L.R. 1353, 182 N. W. 263; Catlett v. Stokes, 21 S. D. 108, 110 N. W. 84; Skjerseth v. Woodworth Elevator Co. 35 N. D. 295, 160 N. W. 70; Towne v. St. Anthony & D. Elevator Co. 8 N. D. 200, 77 N. W. 608. The plaintiff and respondent, therefore, offered in evidence several letters and copies of letters, all of which were offered for the purpose of proving demand and refusal. The first letter, dated December 22,

1920, written by the plaintiff and respondent, plaintiff's exhibit 13, was directed to the appellant, at its office, at Killdeer. In this letter the respondent asks the appellant to tell him how much grain Mr. Spier has hauled to the elevator and then says: "For your information I wish to let you know that 650 bushels of grain out of his wheat crop according to his contract will have to be applied on the contract. So far he has only sent me storage tickets for about 200 bushels. Half of his flax crop will also have to be applied on the contract.

"Shall be greatly obliged for an early reply, and oblige," Then as a postscript this appears: "Spier has the right to sell the grain at any time he sees fit only the money will have to be sent to me."

Manifestly this is not a demand for the grain, or for the storage tickets.

Plaintiff next introduces exhibit 14, the reply of the appellant to exhibit 13, and which gives the information therein requested. There is no refusal, but simply an imparting of information. Plaintiff next introduces exhibit 15, his own letter, dated January 4th, addressed to the appellant, at its office in Minneapolis, advising appellant that he had notified the Killdeer office that Fred Spier was supposed to pay him 650 bushels according to his contract. There is no demand contained in this letter. The plaintiff next introduces exhibit 16, which is a letter from J. M. McCarter, attorney at law, Bismarck, North Dakota, to the plaintiff and respondent, and is an answer to respondent's exhibit 15. This letter neither refuses, nor agrees to deliver the wheat, or the storage tickets, but asks for information as a basis for consideration of the claim. Plaintiff next introduces exhibit 17, which is a letter dated January 14th, from Messrs. Halpern & Rigler, attorneys for the respondent to J. N. McCarter, attorney at law, Bismarck, North Dakota. In this letter, respondent's counsel gave Mr. McCarter information as to the description of the land, the terms of the contract, under which Spier cropped the land, and purchased the same from the assignor of the respondent, the number of bushels threshed by Spier, the number of bushels already delivered by Spier to the respondent, and the number of bushels of wheat delivered at the appellant's elevator at Killdeer. The letter then closes with the request that the writers may hear from Mr. McCarter, and expresses a willingness to give further information. Plaintiff next introduces exhibit 18, a letter from J. N.

McCarter, dated January 16th, 1921, written to Halpern & Rigler, attorneys for the plaintiff and respondent, in reply to exhibit 17, their letter of the 14th of January, 1921. In this letter, exhibit 18, the attorney for the defendant and appellant specifically refuses to comply with the suggestions of counsel in exhibit 17, to the effect that appellant should deliver to respondent the wheat or the storage tickets, and states expressly that such delivery will not be made. This is the first letter from appellant which can fairly be construed as a refusal to comply with the demand of the plaintiff and respondent and says among other things: "We will have to hold what we have," and "We will not be able to comply with your request as to handing over storage tickets to grain we have in storage at Killdeer, stored by Mr. Spier."

It is true that on October 14th, counsel for respondent wrote the attorney for the appellant, exhibit 19, repeating in substance the information given in exhibit 17, to wit: The letter dated January 14th, 1921, and asked what position the appellant took with reference to the grain. This letter was answered by the appellant, exhibit 20, on the 17th day of October, 1921, refusing to comply with the demand to deliver the storage tickets or the grain.

There are, therefore, in evidence, two distinct refusals by the appellant, one evidenced by exhibit 18, the letter of January 16th, and the other evidenced by exhibit 20, the letter of October 17, 1921. The conversion, therefore, took place on either of these dates. The view most favorable to the plaintiff and respondent is that the conversion took place on January 16th. No evidence of any kind was offered as to the market value of grain on October 17, 1921, but evidence was offered as to the market value on January 15th and 16th, 1921. Furthermore, the respondent, in his brief, apparently takes the view that the conversion took place on or about the 15th, or 16th of January, 1921, because on page 18 of the brief, counsel refer particularly to exhibits 14, 18 and 20 to show the demand and refusal. Exhibit 14 is not in any sense a refusal and cannot be construed as such. It furnishes information requested, and goes no further. Exhibits 18 and 20, however, are both unequivocal refusals to comply with the plaintiff's demand. For the purposes of this decision, therefore, we shall assume and so hold, that the conversion took place on the 16th of January, 1921. There is no evidence in the record from which the jury would be justified in finding

a conversion upon any other date, except that of October 17th, 1921. As already pointed out, October 17th must be eliminated because there was no evidence before the jury of the market value of the grain at Killdeer, on or about that date. We think, under the rule laid down, in First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 280, 91 N. W. 436, the correspondence prior to the 16th of January, 1921, cannot be construed as a demand and a refusal, but that the appellant and respondent was fairly entitled to that period of time to investigate the claim of the plaintiff and respondent.

As heretofore stated, no evidence was offered at the trial, to establish the number of bushels of any grade, or quality, or the number of bushels each of wheat and of durum raised on the land described in the contract, and delivered at the appellant's elevator by Spier. The evidence tends to show that there is a difference in the market price between Marquis wheat and durum, and that frequently durum is lower in price than Marquis or other kinds of wheat. The court instructed the jury, in substance, that if the jury was unable, from the evidence, to determine the exact number of bushels of each kind of grain converted, if there was any conversion, and if the jury found different market values for different kinds of grain, that then, in that event, the plaintiff's recovery would be limited to the rate per bushel of the grain having the lowest market value at the time and place of conversion. The court then used the following language: "For example, if you find that durum wheat had a lower market value per bushel than Marquis wheat, then you should find the total number of bushels of wheat at the market price per bushel of durum wheat." To this instruction, no specific exception was taken. The court, in this instruction, told the jury, in effect, if it found for the plaintiff upon the question of conversion generally, in determining the market value of the grain converted, to use as a basis the market value of the grain, the value of which was the lowest on the date of the conversion. The evidence shows that durum on the 16th of January, 1921 was lower than No. 1 Marquis wheat on January 15th, and, therefore under this instruction of the court, the jury, in arriving at the amount of the verdict, must have multiplied the number of bushels converted, by the market value of durum on that date, at Killdeer, which was $1.47. Marquis was higher than durum on January 14th; on January 15th, durum was one cent lower; there is no testimony in the

record as to the market price of Marquis wheat or flax on January 16th, 1921, the date of the demand and refusal, though evidence on this point on this date was vitally important to establish plaintiff's cause of action.

The only witness that testified to the market value of durum at Killdeer on the 16th of January, 1921, was the witness, O. H. Larson. His testimony appears in the transcript at pages 85 to 91. All of his testimony is hereinafter set forth.

Direct Examination.

My name is Ole H. Larson; I live at Killdeer, North Dakota; I am secretary and manager of the Killdeer Equity Elevator Company; I have been engaged in the buying of different kinds of grain for the last three years, at Killdeer. I am acquainted with the prices of different kinds of grain, of wheat, or the market price of the different kinds of wheat and grades of wheat, at Killdeer during the year 1920 and 1921; on December 22, 1920, the market price of durum No. 1 was $1.41; on December 23, 1920, the price was $1.41; on January 4, 1921, the price was $1.48; on the 5th of January, 1920 (witness probably means 1921), $1.45; on January 6, 1921, the price was $1.46; on January 7, 1921, the price was $1.46; on January 14, 1921, the price was $1.49; on January 15, $1.49; and on January 16, $1.47. The highest market price of No. 1 durum, at Killdeer, since the 22d day of December, 1920, is $1.49, and this was on the 14th and 15th of January, 1921.

Cross-examination.

On this last question in so testifying that that was the price, I know that was the price from my records. I have a copy of my records here.

Q. Have you any independent knowledge of these facts without reference to your record?

A. I have. The only way you give your knowledge of anything you have to go by your records of what you paid.

I gained that knowledge from the records I made of what I paid. I know how the price of grain was on the different dates to which my attention has been called and to which I have testified just previous to that and just after that. The price was virtually higher or lower according

to the way the market went. If it was not for the record I have kept pertaining to the different prices, and dates, that I have testified to, if I did not have that record, I would not have any independent knowledge of these prices, except just as I would know what happened to come to my memory.

Examination by the court.

Q. Were you buying wheat up there at that time?

A. Yes.

Q. And during the time you were buying you kept a record of the prices *you were paying for durum wheat?*

A. Yes sir.

Q. In order to testify as to those prices you looked up the records and refreshed your memory?

A. Yes.

Cross-examination, Continued.

I do know those different prices without my books in regard to these questions that have been asked. I know what the price was on the 15th day of January, 1921, after going back to the records. If I had not got these records I might not, just exactly, have been able to tell within a few cents or so.

The fair import of the testimony of this witness, it seems to me, is as follows:

First. Without the aid of records or memoranda, he was on January 23, 1922, the time of the trial, wholly unable to recall the price his employer paid for durum on January 16th, 1921, at Killdeer, North Dakota. That he possessed personal knowledge of this fact on January 16th, 1921, may be conceded, although on this point, the record is not clear; that this fact had vanished from his memory so completely that on January 23d, 1922, it could not be recalled without aid from extrinsic sources, he himself admits.

Second. That the concern that employed him kept records which showed the price paid by it for the different kinds and grades of grain on January 16th, 1921, and other dates, and that from these records he testified to the market price of durum on January 16th, 1921.

Third. That study of the records kept by him and an examination of the facts therein recorded, did not serve to *revive* a *faded* memory or to bring back to the surface of his mind facts which for sometime had been wholly submerged in forgetfulness, but in point of fact, the dates, amounts, kinds and grades of grain, concerning which testimony might be desired more than one year afterwards, had so completely faded from his memory, the lines of association that at one time may have bound these with associated or related facts had been so completely severed, that Mr. Larson was wholly dependent upon the records of his employer, and after examination thereof, was still unable to testify from any independent knowledge which was *revived,* rather than *re-created* (in the form of a conclusion based on the records) by such examination.

This testimony, we believe, was improperly received upon the question of market value. Objections made thereto should have been sustained or the motion to strike it out granted. It appears from the cross-examination of the witness—this was clearly brought out in the examination conducted by the court—that he bases his testimony as to market value at Killdeer on what *his employer paid* for durum on January 16, 1921.

The court instructed the jury that if they found for the plaintiff upon the claim of conversion, then recovery must be based on the "market value" of the grain at Killdeer on the date of the conversion. We do not believe that individual transactions of this sort, under the circumstances in this case, where a market exists in the legal sense, furnish a proper basis for proof of market value of wheat. The court may take judicial notice of the fact—one of common knowledge throughout the state—that the market prices of grain, particularly of wheat, in North Dakota, are determined by, and are but the reflex of prices paid for the same grades of grain at certain centers in the country, like Minneapolis, Minnesota, Chicago, Illinois, and other points, after taking into consideration the cost of transportation, insurance, handling charges, and the like. Grain buyers at points in North Dakota receive daily market reports, cards, or bulletins, showing the prices on the different kinds and grades of grain, which become the basis for prices at local points in this state. Upon the reports thus received, local market prices are fixed from day to day. There is a market; in the technical and legal

sense, for wheat at Killdeer, North Dakota, as there is in nearly every city and village in the state, situated upon a railroad. On the other hand, it is a matter of common knowledge that frequently one local dealer pays a "premium" on, a higher price than his competitors for wheat, or certain grades thereof, sometimes because of the assumed superior intrinsic value. For this, various other reasons may exist. Manifestly the price paid under such conditions by such a dealer would not represent or even be evidence of the market value at that place. It is true that individual sales may be and often are competent evidence of value, but when there is an established market, like the wheat market in the cities and villages of North Dakota, proof of what one of several competing dealers—the record shows at least three such dealers at Killdeer—paid for one kind of grain on a certain day is not alone proper and sufficient evidence of market value, without at least showing, by competent evidence, that such price was in fact the prevailing and current market price at the point. It was not even shown that the witness' employer paid this price to *all* who brought durum to his elevator on that day. Waldrop v. Goltzman, — Tex. Civ. App. —, 202 S. W. 335, 337. All Larson's testimony as to the market price of durum at Killdeer amounts to is this: "The records of the Killdeer Equity Elevator Company, by which I was employed as manager, showed that it paid *somebody,* for durum, on January 16, 1921, $1.47." It seems plain that this evidence is incompetent to establish market value. Houston Packing Co. v. Griffith, — Tex. Civ. App. —, 164 S. W. 431.

In Fahey v. Updike Elevator Co. 102 Neb. 249, 166 N. W. 622, the supreme court of Nebraska held that the testimony of a dealer as to individual sales or individual transactions should have been excluded as not the proper evidence to establish market value in face of the fact that market reports were available for the purpose. There is also in the case of Sisson v. Cleveland & T. R. Co. 14 Mich. 489, 90 Am. Dec. 254, a condemnation of evidence of individual transactions to establish market price in an opinion written by Justice Cooley. For a statement of the law as to when there is a market and definitions of "market value," see McGilvra v. Minneapolis, St. P. & S. Ste. M. R. Co. 35 N. D. 275, 287, 159 N. W. 854.

Not only was the testimony of the witness Larson incompetent upon the question of market value, but no legal foundation was laid for its

introduction for any purpose. The view we take of his testimony is that knowledge, assuming that he once possessed such knowledge personally, of prices paid by his employer on various dates for different kinds and grades of grain more than one year before, had so completely passed out of his mind that he had no independent recollection thereof, even after examining his employer's records. To permit him, as was apparently done in this case, to testify, in effect, from unverified copies of these records, violated well established rules of evidence.

It is well to bear in mind that the witness and his elevator had to deal with at least six different varieties of small grains, commonly raised and marketed in North Dakota; that some of these grains like wheat, for example, are graded on the basis of quality, into three or more different grades, and that the prices vary according to the grade; that the prices on different grains and grades of the same kind of grain fluctuated frequently on the same day, being sometimes lower in the afternoon than in the forenoon, and vice versa; that some three hundred and seventy days had elapsed between the date when the testimony was given and the time when the transactions took place. It seems to be perfectly clear that no normal memory would pretend to be able to carry such isolated and comparatively unrelated data for this length of time; nor would the examination of any records or data, in the case of the average person, serve to revive and render independent any recollection thereof.

The language of the court in the case of Russell, Burdsall & Ward v. Excelsior Stove & Mfg. Co. 120 Ill. App. 23, at pages 32 and 33, seems apt upon a state of facts similar to the facts in the case at bar. In speaking of the testimony of one Fisher, with reference to items of an account as shown by invoices, concerning which he had personal knowledge three years before, the court said:

"The judgment in this case must be reversed and the cause remanded, because the only evidence offered by appellee of the quantity and prices of bolts purchased by it from parties other than appellant, and upon which purchases appellee's claim for damages is based, consisted of invoices received by appellee from the various sellers. *True, the witness Fisher made a pretense of having an independent recollection of the different transactions involving the purchases of bolts, but an examination of the records makes it clear that his claim in that regard was mere pretense and that his testimony was based entirely upon a reading of the*

invoices and not upon his personal knowledge or recollection of the transactions. The transaction in question involved fifty or more separate invoices of bolts, purporting to show sales to appellee, from October 26, 1899, to December 23, 1900, the invoices in many instances containing several different items ranging in amount from a few cents to several hundred dollars, and it is incredible that the witness could have testified of his personal knowledge with respect to the same."

It is true in the case at bar that in response to a leading question, which probably called for a conclusion, the witness claimed that the examination of his records, or the copy thereof, "refreshed" his recollection. We think, however, that a reading of the record in the case makes it clear that the examination of the records of his employer and the copy thereof, did not revive his recollection in the legal sense, but constituted the basis, the scource of his knowledge exclusively. The fact that he found it necessary to make a copy of his records to bring with him to the trial, is itself some evidence that an examination of the records in his employer's office, did not serve to revive his recollection, so that he could depend upon the same unaided at the trial.

While the courts have permitted witnesses to use memoranda, nevertheless, great care has been exercised to prevent fraud or error. Phillip and Greenleaf have agreed upon the following classification of the cases, in which writings are permitted to be used for the purpose of assisting the memory of a witness: "(1) Where the writing is used only for the purpose of assisting the memory of the witness; (2) where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that at the time he saw it, he knew the contents to be correct; (3) where the writing in question neither is recognized by the witness as one which he remembers to have seen nor awakens his memory to the recollection of anything contained in it; but, nevertheless, knowing the writing to be genuine, his mind is so convinced that he is on that ground enabled to swear positively as to the fact." Greenl. Ev., § 437; Phillipps, Ev., 3d ed., § 411; 5 Jones, Ev. § 875. In 1 Wigmore on Evidence the following rules are stated governing the use of memoranda by witnesses:

"Sec. 744. Past Recollection Must Have Been Written Down. Exception for Former Oral Identification. It is commonly assumed,

as a fundamental condition of using a past recollection, that the thing recollected must have been written down as recollected. The ensuing rules are all corollaries of this assumed axiom.

"Yet in theory this is not essential. The tenor of the fact recollected may conceivably be preserved without writing. In practice there is one situation which not only illustrates this theoretical possibility but also demonstrates the wisdom of recognizing it, as an exception to the general rule. That situation is the former oral identification of a person, name, place, or signature whose identity is now forgotten. The fact recollected being a simple one, it suffices if the witness now knows that he did once orally verify it, even if he did not then preserve in writing the circumstance. The typical illustration is that of the identification of an accused person at the time of arrest:

"Sec. 745. (1) Recollection Must Have Been Fairly Fresh when Recorded. In order that the past recollection may be one worth trusting, it must have been sufficiently fresh and vivid to be probably accurate. When a present recollection is used, it may be sufficient (as noticed ante, § 726) to admit an 'impression,' or a 'belief': the witness tries to give 'the best of his recollection,' and the tribunal may well take what it can get, and not exclude it for want of more that is unattainable. But where the witness goes back to a past recollection, which can less easily be tested by cross-examination, he may properly be asked for something more decided,—something of a quality satisfactory in itself and not merely the best available. This quality the law has attempted to define, and even to test by an arbitrary rule. There is found, *first,* a general principle that the recollection, when recorded, should have been *fairly fresh,*—each instance being dealt with on its own circumstances; and, secondly, there is, more commonly, an arbitrary test defining the recollection as one recorded at or *near the time* of the events.

"(1) That the first is the preferable form for the law need hardly be argued; it exemplifies the excellent policy of leaving the law flexible and rational and not chilling it into rules more or less arbitrary:

"(2) But the common, though less proper, rule is that the recollection recorded must have been 'at or near the time' of the events in question. This phrasing has been generally used, even where it was not required for the decision of the case. Two things must be noted, however, about this rule: (a) The recollection must in fact have been fresh (i. e. ade-

quate), even though noted 'near the time,' (b) the phrases 'near the time' or 'shortly afterwards' really furnish no accurate test, and in their application the probable freshness of the recollection must after all be the ultimate test. It may be added that in some rulings the language mentions both the first and the second tests in the alternative. In most rulings, the decision turns upon the circumstances of the particular case.

"Sec. 746. (2) Accuracy of Record; General Principle. It has already been noted (ante, § 734) that, so far as adequacy of Recollection is concerned, it is enough to require that at the time of making the record the Recollection should have been fresh, i. e. the event recent. But, having gained this assurance that the Recollection was adequate, it remains still for the law to make sure of certain other things which (in strictness) depend on the element of correct narration or communication (post, § 766). In the first place, it must make sure that this recollection was accurately represented in the record or memorandum then made; here several situations present themselves for solution. Next, it must make sure that the statement now offered as testimony by the witness is in fact identical in tenor with the record or memorandum formerly made; here, again, several different situations arise. Finally, it has to consider the testimonial status of the record when thus used.

"For the first of these steps—that of making sure that the record or memorandum, when made, represented the Recollection of the time with fair accuracy,—the requirements of principle may be summed up thus: (a) The witness must be able now to guarantee that the record accurately represented his knowledge and recollection at the time of making. (b) But, this testimonial guaranty of accuracy being all that is needed, it will therefore be generally immaterial that the witness was not the person actually writing or printing the record, provided the witness can give this guarantee; (c) except that in particular instances the circumstance that another person had prepared the record may justify the Court in doubting the witness' guaranty and rejecting the record. These various details may now be examined.

"Sec. 747. Same: (a) Witness must Guarantee Accuracy. The witness must be able now to guarantee that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he 'knew it to be true at the time.'

It is obvious that the witness' readiness to affirm this may rest on one of two reasons: (1) He may distinctly recollect his state of mind at the time of making or first seeing the record and may thus now remember that he then passed judgment upon and knew the record's accuracy. Or (2) he may now actually recollect nothing of the occasion of making the record and of his then state of mind; nevertheless he may know, from his general practice of making such records, or from other indications on the paper, that he *must have passed judgment upon and known* the correctness of the record; here he none the less knows that he did know the record to be correct, although he has no present recollection of the specific state of mind.

"(1) As to the former of these two ways of verifying the record, no difficulty arises. If the witness can say, 'I distinctly remember that when I made or saw this memorandum, about the time of the events, I was then conscious of its correctness, his verification is satisfactory. (2) But if he relies, not on a present recollection of his past state of mind, but on other indications, such a habit, a course of business, a check-mark on the margin, or merely the genuineness of his handwriting, then the certainty is of a lower quality, though still satisfactory for most practical purposes. In general, it is conceded that when the witness' certainty rests on his usual *habit or course* of *business* in making memoranda or records, it is sufficient. Other peculiar circumstances, specially intended or calculated to indicate correctness, may be satisfactory. It is enough that the witness (as is usual with *attesting witnesses* to a *document*) merely recognizes his handwriting and knows that he would not have written or signed without believing the record to be correct? Here the witness is really calling to his aid, not his specific business custom, but his general moral attitude; but, as a rule, the indication should be and is treated as sufficient.

"It is possibly the rule in Massachusetts that only *regular entries*, not mere casual memoranda, can be used,—apparently on the motion that this regularity is the only satisfactory guarantee of correctness. But this limitation is absolutely without ground, either of principle or of policy.

"It may be added that the witness must of course have had personal knowledge of the facts (ante, § 657) in the first instance; he cannot

guarantee the correctness of the paper as a record of facts which he himself never observed."

We do not believe that the testimony of the witness, Larson, is admissible under any of the rules stated by the authorities. The writing was used for a purpose other than merely assisting the memory. The witness was entirely dependent upon records and upon the copy. It would be sheerest pretense to claim that his recollection was revived and refreshed so that he could testify as to an independent fact from a recollection thus refreshed as to the prices paid for some one grade and kind of wheat more than one year before. The writing was a copy, the records were not in court, and no testimony was offered to show that at the time the copy was made, it was correct, or the contents thereof true.

In the case of Caldwell v. Bowen, 80 Mich. 382, 45 N. W. 185, a witness had been permitted by the trial court to testify from a copy of a statement which was material in the case. The question was asked:

"Do you remember what the statement made by Mr. Adams was?

A. I have a copy of it and will swear that he made it to me and I remember distinctly going to his store and getting the statement.

Q. Can you refer to the copy and refresh your recollection in such a way as to remember what the statement was?

A. I can't remember the figures, but I remember going to the store.

Q. By refreshing your memory from the statement, can you say what the figures were and what the result of this statement was?

By the court. If you have any paper or memoranda from which you can refresh your recollection as to what the statement was?

A. In my hand I have a copy of it—a copy of the statement made by him to me.

Q. Refresh your recollection. Can you state what the statement was?

A. Yes, by reading it, yes sir.

Q. What was his statement?"

The witness gave the same statement of which he had a copy. The court held that it was improper to permit the witness to testify from this statement in this way. As in the case at bar, counsel moved to strike out the testimony, which the court refused to do. The supreme court held in that case, that the copy was hearsay and that inasmuch as

the witness was unable, after reading the copy, to testify from an independent recollection, it was improper to permit the witness to read the copy. In a concurring opinion, Mr. Justice Grant says:

"If the witness had produced the original statement and had sworn that he took down correctly at the time what Adams had told him, but that he could not remember it and could only tell it by reading the statement, I think the statement would have been admissible. In such case, unless the statement can be admitted or the witness allowed to read it, the testimony must be excluded, because the witness has no independent recollection of what has been said. If at the time a statement is made, particularly where it involves figures, a person makes a memorandum of those figures, he could hardly be entitled to credence if he should swear that he recollected the figures independently of the memorandum. The rule that he may examine the memorandum and then must swear that he had a recollection of the facts, independent of the memorandum, before he can testify to them, is not, in my judgment, founded upon reason or sound policy. To exclude the statement is to exclude the most reliable evidence and results either in excluding the evidence altogether or in placing it before the jury in such a way as to weaken, if not destroy its value." Territory v. Harwood, 15 N. M. 424, 29 L.R.A.(N.S.) 504, 110 Pac. 556.

Before a witness is permitted to use a copy of a memorandum or of records, he should be clear and explicit in his evidence that the copy is a true transcript from the original, and that the original was correctly made and was true when made. There is no such testimony in this case. The witness Larson does not state that the original record was correct when made, or that the copy was correct. Chicago & A. R. Co. v. Adler, 56 Ill. 344, 348; Calloway v. Varner, 77 Ala. 541, 54 Am. Rep. 79; Proctor & G. Co. v. Blakely Oil & Fertilizer Co. 128 Ga. 606, 57 S. E. 879.

In Proctor & G. Co. v. Blakely Oil & Fertilizer Co. supra, the facts are almost parallel with the facts in the case at bar. In that case the witness was asked the following question:

"Do you have an independent recollection of those two particular samples, or do you now depend for your testimony upon memoranda or other sources?

A. No, I do not have an independent recollection of these two particular tanks, but can depend upon a memorandum made at the time the samples were drawn."

In holding that the testimony was properly excluded, the court says at p. 617 of 128 Ga. at p. 883 of 57 S. E.: "Macdonald testified that he had no independent recollection of the matter, but could depend upon a memorandum made at the time the samples were drawn. He did not state that he testified from his memory as refreshed by the memorandum, or that he made the memorandum himself, or that when the facts were fresh in his memory he knew the memorandum to be correct."

In Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 N. E. 392, the supreme court of Illinois reversed the trial court upon the ground, among others, that a witness at the trial was permitted improperly to use a memorandum. The testimony of the witness was, on direct examination, that after having read the memorandum he remembered the condition of the elevator as described therein. On cross-examination, however, he admitted that he had no independent recollection of the facts even after reading the memorandum. The court held, that the witness improperly testified for the reason, among others, that there was no evidence offered to show that the memorandum was a correct and accurate record of what he had found on his inspection of the premises, nor was there any evidence that the memorandum correctly represented the condition of the elevator or its appliances at the time of the inspection. The court calls attention to the fact that the mere conclusion of a witness as to the existence of a fact derived from a consideration of other facts, like an examination of a written document, ought not to be permitted to go to the jury. It is a strong temptation for a witness, upon examining a paper with facts and figures thereon, to testify in some cases honestly and in other cases, dishonestly, that an independent recollection arises after such examination, when in point of fact the witness merely concludes that the facts must be true simply because they are recorded in the memorandum or record before him.

The court committed prejudicial error in permitting this evidence to go to the jury upon the question of market value. This testimony was incompetent under § 7909 of the Compiled Laws of 1913, and is objectionable upon substantially the same grounds as are set forth in

the opinion of this court in the case of Dr. R. D. Eaton Chemical Co. v. Doherty, 31 N. D. 175, 153 N. W. 966. The witness testified in substance that the memorandum which he had did not refresh his recollection so as to enable him to have any independent recollection of the facts testified to. The witness does not testify that the facts in the memorandum are correct. If the memorandum in this case was not made by the witness himself, any testimony based thereon would be hearsay and incompetent. It does not appear who made the memorandum. In short, the witness admitted a complete absence of personal recollection of the market price of grain at Killdeer upon the dates mentioned, and at the same time failed to state that the memorandum he used was prepared by himself, or under his direction, nor was he connected with such memorandum, in such a way, as to make the memorandum itself competent to establish market value within any of the rules stated by Wigmore, Greenleaf or Phillipps, supra. It is true, that it is not necessary that the memorandum, or the writing, to be proper for the purpose of refreshing the recollection, must have been made by the witness himself, or even that it be an original writing, *if the witness, after inspecting it, can speak from his own recollection,* or otherwise guarantee the accuracy of the record. 1 Wigmore, Ev. § 748.

It does not appear in this case that the memorandum was made contemporaneously with the facts concerning which the witness testified. Indeed, it appears from his own testimony that such memorandum was not made contemporaneously with the occurrence of the facts, but that it is merely a copy of the records made at the time when the information was received in his employer's office at Killdeer, with respect to the prices *it paid for durum on the dates given.* Neither judge nor jury saw these records. Larson's testimony was accepted as evidence of what these records showed. The originals should have been produced or their absence accounted for. 1 Wigmore, Ev. § 749. We believe it would be a dangerous innovation upon well established and salutary rules of evidence to permit a witness to testify exclusively from a memorandum made under the circumstances in this case. It involved no hardship to require the witness in question to produce the original price cards, or records, and to testify therefrom, and if required, and after a proper foundation, to offer the same in evidence at the trial.

Counsel also allege error in admitting copies of certain correspond-

ence, based on the contention that notice to produce the originals was not timely given appellants. Under the facts in this case, the reasonableness of the notice was a matter that rested in the discretion of the trial court and we conclude that there was no prejudicial error in the manner of its exercise. 22 C. J. 1064, 1065 and notes.

While the decision of this court upon specifications 25 to 29, inclusive, disposes of this appeal, we have examined the other alleged errors complained of. The errors alleged to have been committed in specifications 1 to 4, inclusive, are based upon the claim of the appellant that the crop contract did not require the vendee to deliver one half of the crop raised each year prior to 1921, and that under the contract, the vendee, Spier, was under no obligation to deliver one half of the crop of 1920. It is claimed that the plaintiff's share of the crop of 1920 was converted. The trial court construed the contract to require the vendee to deliver one half of any and all crops raised during the life of the contract, including, therefore, crops raised during 1920, and prior years. This interpretation of the trial court was clearly correct, and indeed the plain terms of the contract refute the contention of appellant's counsel.

Immediately after the court had delivered its instructions to the jury, the following colloquy between the court and counsel took place:

"Mr. Burke: Will you instruct the jury on the effect of the seed lien in case it is not satisfied?

Mr. Murray: We object to the court giving any instructions in that as it is not pleaded or set up as a defense.

The court: I will deny the request.

Mr. Burke: Exception."

Upon the foregoing, the thirty-second specification of error is predicated. In our opinion this ruling was not error. Assuming without deciding that the foregoing constituted a sufficient request for an instruction, we think, that in the first place, proof of the existence of the seed lien would not necessarily defeat the action; in a proper case its effect at most would be to mitigate damages. In the second place, and this is fatal to appellant's contention, no foundation was laid for this evidence or such instructions in the pleadings. Citizens Nat. Bank v. Osborne McMillan Elevator Co. 21 N. D. 335, 131 N. W. 266.

It is apparent upon the record in this case that the parties received a fair trial upon the issues therein, excepting the question of market value. We are, therefore, agreed that the new trial should be limited solely to the question of value of the grain converted. 4 C. J. 1194, 1195.

The judgment appealed from is reversed and remanded with directions to retry the issue of value in accordance with the views herein expressed. The appellant will recover the costs of this appeal.

CHRISTIANSON, BIRDZELL, and NUESSLE, JJ., concur.

BRONSON, Ch. J., concurs in result.

STATE OF NORTH DAKOTA EX REL. SVEINBJORN JOHNSON, Attorney General, Respondent, v. JOHN BLOOM, Appellant.

(193 N. W. 940.)

Game — failure to qualify as game and fish commissioner by filing oath of office held to make office vacant.

Defendant appeals from a judgment against his claim to the office of game and fish commissioner. It appears that the defendant never qualified by filing with the secretary of state an oath of office. Hence his office became vacant and the governor had a legal right to fill the vacancy.

Opinion filed December 28, 1922. Rehearing denied May 22, 1923.

Game, 27 C. J. § 19 p. 954 n. 74, 75.

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

Wm. Langer, *W. S. Lauder*, and *P. D. Norton*, for appellant.

"Defect in qualification does not ipso facto work a forfeiture of office." Sprowl v. Lawrence, 33 Ala. 674; Crawford v. Howard, 9 Ga. 314; State v. Jackson, 27 La. Ann. 541; Clark v. Ennis, 45 N. J. L.

69. Compare Hoagland v. Culvert, 20 N. J. L. 387. See also State v. Potts, 4 N. J. L. 396; Cronin v. Gundy, 16 Hun (N. Y.) 524; Kelly v. State, 25 Ohio St. 567.

A justice of the peace who acts as such without having taken the oath of office is an officer de facto until his forfeiture of the office is declared in a proper proceeding, though under the law the neglect to take such oath amounts to forfeiture of the office, and acting without having so qualified is a misdemeanor. Weeks v. Ellis, 2 Barb. (N. Y.) 320.

"There are many loose expressions in the law books concerning an officer de facto and de jure. Under the former term judges have frequently grouped with those who had a colorable title, and even with those who were regularly inducted into office and yet had committed some act which would justify a forfeiture. This last case is, however, not properly a case of an officer de facto. It is an instance of a rightful officer holding by a defeasible title. His acts are in all respects lawful *until the state interferes by a proceeding in the nature of a quo warranto.* It only tends to confusion to style him an officer de facto whose acts are only valid as to the public and third persons, and cannot be sustained as to himself."

A statutory requirement that a bond or oath of office must be executed and filed within a certain number of days is merely directory and the bond and the oath of office may be lawfully filed on a subsequent day. Duntley v. Davis, 42 Hun, 229; McRoberts v. Winant, Abb. Pr. N. S. 210; People v. Holley, 12 Wend. 481; Com. v. Read, 2 Ashm. 261; State v. Churchill, 41 Mo. 41; State v. Texas Co. Ct. 44 Mo. 230; Kearney v. Andrews, 10 N. J. Eq. 70; State v. Porter, 7 Ind. 204; Smith v. Kronkhite, 8 Ind. 134; State v. Peck, 30 La. 280.

"Failure to take the oath of office within the time specified by law does not ipso facto create a vacancy which would prevent the officer from qualifying thereafter, if it is done before legal steps are taken to declare the vacancy, although the statute declares that the office shall become vacant on refusal or neglect to take the oath within the prescribed time." State ex rel. v. Ruff, 4 Wash. 234, 29 Pac. 999; Chicago v. Gage, 95 Ill. 593; People v. Holley, 12 Wend. 491; State v. Churchill, 41 Mo. 41; State v. Porter, 7 Ind. 204; State v. Falconer, 44 Ala. 696; Mechem, Pub. Off. §§ 265, 266.

"Failure to give a bond within the time prescribed does not work

for a forfeiture (of a public office) even though the statute expressly provides that upon a failure to give bond within the time prescribed the office shall be deemed vacant and may be filled by appointment." Cronin v. Stoddard, 97 N. Y. 271; People v. Watts, 73 Hun, 404, 26 N. Y. Supp. 280. See also Cronin v. Gundy, 16 Hun, 520; Worsley v. Smith, 81 N. C. 304; State v. Tool, 4 Ohio St. 553.

Sveinbjorn Johnson, Attorney General, and *Geo. F. Shafer,* Assistant Attorney General, for respondents.

Where a statute requires an appointee to take an oath of office he cannot be considered as having qualified unless he takes such oath. Johnston v. Wilson, 2 N. H. 202, 9 Am. Dec. 50.

Taking the required oath of office is an indispensable prerequisite to investiture with the authority and duties thereof. Thomas v. Owens, 4 Md. 189; Murphy v. Hudson, 102 Atl. 896; State v. McClendon, 118 La. 792, 43 So. 417; State v. Aikens, 118 La. 805, 43 So. 421; State v. Plunkett, 118 La. 804, 43 So. 421; People v. Anderson, 164 N. W. 481; People v. McKinney, 52 N. Y. 374; Riddle v. County, 7 Serg. & R. 386; City v. Given, 60 Pa. 136; Re Advisory Opinion to Governor, 50 L.R.A.(N.S.) 365; Archer v. State, 74 Md. 443, 28 Am. St. Rep. 261.

A document is "filed" with an officer when it is placed in his custody and deposited by him in the place where his official records and papers are usually kept. O'Brien v. Schneider, 88 Neb. 479, 129 N. W. 1002; People v. Peck, 22 N. Y. Supp. 576; Re Norton, 53 N. Y. Supp. 1093.

A paper is "filed" when delivered to the proper officer and by him received to be kept on file. Eureka Stone Co. v. Knight, 82 Ark. 164, 100 S. W. 878.

To file a paper it must be deposited with or placed in the custody of the proper officer and it is incumbent upon the party filing to see that the paper is so deposited or placed in the custody of such officer before he may claim that it is properly filed. It is not sufficient that such paper be deposited in the postoffice addressed to the officer. Pendry v. Brenna, 169 Pac. 174; Wells v. State, 175 Ind. 380, 94 N. E. 321. See also Prather v. Hart, 17 Neb. 598, 24 N. W. 282; State v. Wait, 92 Neb. 313, 138 N. W. 159; Harris v. Tucker, 54 Ala. 205; People v. Common Council, 77 N. Y. 503; State v. Gormley, 53 Wash. 543; Chandler v. Starling, 19 N. D. 144, 121 N. W. 198; People v. Taylor,

57 Cal. 620; Adams v. Doyle, 139 Cal. 678, 73 Pac. 582; Re Advisory Opinion to Governor, 62 So. 363, 50 L.R.A.(N.S.) 365.

ROBINSON, J. Defendant appeals from a judgment against his claim to the office of game and fish commissioner. As the complaint avers, on April 21, 1921, Governor Frazier appointed him for a term of two years to the office of game and fish commissioner. Under such appointment defendant acted as game commissioner until February 27, 1922, without filing an official oath with the secretary of state. On February 28th, 1922, the governor declared the office vacant and appointed Elmer T. Judd to fill the vacancy. On March 3, 1922, Judd qualified, filed his oath of office and bond with the secretary of state, paying the fee of $2. On March 2d, 1922, after receiving notice of the revoking of his appointment, defendant attempted to qualify, but the secretary of state refused to receive the papers. On the trial defendant made proof that soon after receiving his commission he duly executed his official oath and mailed the same, at Devils Lake, in a sealed envelope with $2 in currency, addressed to the secretary of state at Bismarck; but it appears the same was never received in the office of the secretary of state. When currency is inclosed in a letter it greatly lessens the chance of its delivery. The facts are defendant did not qualify, and his attempted qualification came too late. The statute attaches great importance to the qualification of an officer and makes it a misdemeanor to exercise the duties of an office without qualifying. Comp. Laws, § 9300. The contention of defendant is that his failure to qualify did not constitute a vacancy, but that is contrary to the plain words of the statute:

Sec. 683. "Every office shall become vacant upon the happening of either of the following events:

1. Death of the incumbent.
2. His insanity judicially determined.
3. His resignation.
4. His removal from office.
5. His failure to discharge the duties of his office, etc.
6. His failure to qualify as provided by law.
7. His ceasing to be a resident of the state.
8. His conviction of a felony.

9. His ceasing to possess any of the qualifications of office prescribed by law.

10. The decision of a competent tribunal declaring void his election or appointment."

Thus it appears an office becomes vacant on the death of the incumbent, on his resignation, on his failure to qualify, or the decision of a competent tribunal declaring void his election or appointment. The plain word of the statute is that an office becomes vacant on a failure to qualify and also on the decision of a competent tribunal. Such being the plain words of the statute, there is no occasion for a review of the numerous decisions cited on different statutes of other states. The defendant did not qualify and by reason of his failure to qualify the office became vacant. The governor had a perfect right to fill the vacancy just the same as if the defendant had died or removed from the state, and just the same as if a court of competent jurisdiction had declared void the appointment.

Judgment affirmed.

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

BRONSON, J., concurs in result.

GRACE, J., did not participate.

On petition for rehearing.

PER CURIAM. In this case defendant has petitioned for a rehearing. The contention is that the former opinion is basically wrong; that the statute Comp. Laws, 1913, subd. 6, § 683 providing that an office shall become vacant upon the failure of the incumbent "to qualify as provided by law," is directory merely, and does not of itself work a forfeiture of the right to the office. The question thus raised has been fully considered in the case of State ex rel. Johnson v. Cahill, post, 193 N. W. 938, decided herewith. The opinion in that case is a complete answer to the question raised in the petition for rehearing in this case.

Rehearing denied.

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

Justices JOHNSON and NUESSLE, being disqualified, did not participate in the decision on petition for rehearing, Honorable CHAS. M. COOLEY, Judge of First Judicial District, sitting in their stead.

STATE OF NORTH DAKOTA EX REL. SVEINBJORN JOHNSON, Attorney General, and R. B. Murphy, Respondents, v. J. I. CAHILL, Appellant.

(193 N. W. 938.)

States — failure to qualify as member of administration board held to create vacancy and work forfeiture of right to office.

The failure of an appointive member of the board of administration to file his oath of office with the secretary of state within the time prescribed by law, creates a vacancy in such office and works a forfeiture of all right thereto on the part of the person who has so neglected to file his oath of office.

Opinion filed May 22, 1923.

States, 36 Cyc. p. 859 n. 22.

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

Action brought by the state of North Dakota on the relation of Sveinbjorn Johnson, attorney general, and R. B. Murphy, against J. I. Cahill, to try title to the office of member of the board of administration.

Judgment for the plaintiff.

Defendant appeals.

Affirmed.

Charles L. Crum and *William Langer*, for appellant.

Even though defendant had inadvertently omitted to file or even take an oath of office that fact would not create a vacancy in the office. 8 Am. & Eng. Enc. Law, p. 788 says:

"Defect in qualification does not ipso facto work a forfeiture of office." Sprowl v. Lawrence, 33 Ala. 674; Crawford v. Howard, 9

Ga. 314; State v. Jackson, 27 La. Ann. 541; Clark v. Ennis, 45 N. J. L. 69. Compare Hoagland v. Culvert, 20 N. J. L. 387. See also State v. Potts, 4 N. J. L. 396; Cronin v. Gundy, 16 Hun, 524; Kelly v. State, 25 Ohio St. 567.

A statutory requirement that a bond or oath of office must be executed and filed within a certain number of days is merely directory and the bond and the oath of office may be lawfully filed on a subsequent day. Duntley v. Davie, 42 Hun, 229; McRoberts v. Winant, Abb. Pr. N. S. 210; People v. Holley, 12 Wend. 481; Com. v. Read, 2 Ashm. 261; State v. Churchill, 41 Mo. 41; State v. Texas Co. Ct. 44 Mo. 230; Kearney v. Andrews, 10 N. J. Eq. 70; State v. Porter, 7 Ind. 204; Smith v. Kronkhite, 8 Ind. 134; State v. Peck, 30 La. 280.

"The term of the office of recorder is four years. M. A. Sweet was returned as elected by the board created by law to ascertain that fact, and the commission issued by the acting governor is conclusive of that fact in all cases, except where the election has been contested, within the time fixed by law. This is the well-settled jurisprudence of this state. Therefore, the appointment by the governor of Jackson was made in error, and it is null and void." Leonard v. Jackson, 27 La. Ann. 541.

"In the case cited it was held that the legislature could not, even by an express statute, create a vacancy in a constitutional office; and, certainly, if the legislature cannot create a vacancy in a constitutional office, a board of commissioners cannot, by a ministerial or legislative act, create a vacancy in an office created by the legislature. If such a board assumes to declare a legislative office vacant, it assumes to exercise a *judicial power,* and in all cases where its decisions are judicial, there is a right of appeal." Stocking v. State, 7 Ind. 326.

Sveinbjorn Johnson, Attorney General, and *Geo. F. Shafer* and *Geo. I. Reimestad,* Assistant Attorney Generals, for respondents.

"A wide scope, a large liberty, is thus given to the form of the oath, but some form remains essential. . . . To make a valid oath, for the falsity of which perjury will lie, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act, by which the affiant consciously takes upon himself the obligation of an oath." O'Reilly v. People, 86 N. Y. 154; 20 R. C. L. p. 508, § 4.

COOLEY, District J. This is a civil action brought by the state upon the relation of the attorney general and R. B. Murphy against J. I. Cahill, to determine the title to the office of member of the board of administration as between said R. B. Murphy and the defendant J. I. Cahill. The trial court made findings and conclusions in favor of the plaintiff. Judgment was entered accordingly and the defendant has appealed.

The material facts are as follows: On January 1st, 1921, the defendant Cahill was appointed by the then governor to fill a vacancy caused by the resignation of one Casey. On January 5th, 1921, Cahill duly qualified by taking and filing the requisite oath of office. His term of office expired July 1st, 1921. On or about August 1921, he was reappointed as a member of the board of administration for a term commencing July 1st, 1921, and ending July 1st, 1927. The defendant continued to exercise the functions of said office until on or about Feb. 27th, 1922, at which time the governor made an order declaring a vacancy to exist in the office for the reason that the defendant had failed to qualify for such office under the appointment made for the term commencing July 1st, 1921, and ending July 1st, 1927. On February 28th, 1922, the defendant tendered an oath of office for filing, but the secretary of state refused to receive and file it. Thereafter, on the 13th day of March, 1922, the governor appointed the relator, R. B. Murphy, to the said office of member of the board of administration, and said Murphy did forthwith on that same day duly qualify by taking and filing the required oath of office and furnishing, through the state bonding department, the proper bond.

The trial court found: "That the defendant J. I. Cahill on or about the 1st day of August, A. D., 1921, signed and subscribed a written instrument in the form of an oath of office; but that the said J. I. Cahill never took such oath, nor any oath nor was any oath ever administered to the said J. I. Cahill by any officer; and that the said J. I. Cahill never filed or deposited with the secretary of state, nor tendered for filing and depositing, subsequent to the said second appointment and prior to the 28th day of February, A. D., 1922, any oath for said office."

The entire controversy hinges upon this finding.

It is contended by the appellant:

1. That this finding is not supported by the evidence; and,

2. That in any event the statutory requirement that an oath of office be filed is directory only; that the failure to comply therewith did not *ipso facto* forfeit the title to the office; and that consequently the actions of the governor, declaring a vacancy and appointing a successor, are mere nullities.

So far as the first question is concerned, we are all agreed that the finding of the trial court that the defendant did not file an oath of office with the secretary of state is fully sustained by the evidence. The deputy secretary of state and the various employees in that office having such matters in charge were placed on the stand as witnesses and testified specifically that the oath of office had never been filed. The testimony on the part of the defendant tending to show that he did file such oath of office is not at all satisfactory. The evidence bearing on this question consisted of oral testimony. The testimony was not taken by deposition, but the witnesses appeared in flesh and blood before the trial judge. He saw them on the stand and heard their respective stories as given. He had the benefit not only of the spoken word, which is recorded on the printed page, but of the demeanor of the witnesses while they told their stories. The trial judge who had this advantage found in favor of the plaintiff. Upon the record before us we see no reason for disturbing such findings.

The second question presented involves a consideration and construction of the statutes of this state relating to the filing of an oath of office by an appointive member of the state board of administration, and the effect of failure to so do.

The statutes creating the board of administration provides that "the appointive members of said board . . . shall take the oath of office and qualify in the same manner as other state officials." Laws 1919, § 2, chap. 71.

The statutes bearing upon the subject of qualifying for office by state officers provide as follows (Comp. Laws 1913):

Section 661. "Each civil officer in this state before entering upon the duties of his office shall take and subscribe the oath prescribed in section 211 of the constitution. Such oath shall be indorsed upon the back of or attached to his bond, in case of an officer required to give bond, or indorsed upon the back of or attached to the commission, appointment or certificate of election, in case of an officer not required to give bond."

Section 662. "The bonds of all state and district officers shall be given to the state, shall be approved by the governor as to sufficiency and by the attorney general as to form, and such bonds, and a duplicate original of the oaths of all other such officers shall be deposited in the office of the secretary of state. The secretary of state shall keep a book in which shall be made a correct copy of such bond, which book shall be called the 'bond record' . . . ."

Section 681. "When the incumbent of an office is re-elected he shall qualify as above required. . . ."

Section 683. "Every office shall become vacant on the happening of either of the following events:

"1. Death of the incumbent.

"2. His insanity judicially determined.

"3. His resignation.

"4. His removal from office.

"5. His failure to discharge the duties of his office, when such failure has continued for sixty consecutive days, except when prevented from discharging such duties by sickness or other unavoidable cause.

"6. His failure to qualify as provided by law.

"7. His ceasing to be a resident of the state, district, county or township in which the duties of his office are to be discharged, or for which he may have been elected.

"8. His conviction of a felony or of any offense involving moral turpitude or a violation of his official oath.

"9. His ceasing to possess any of the qualifications of office prescribed by law.

"10. The decision of a competent tribunal declaring void his election or appointment."

Section 9300. "Every person who executes any of the functions of a public office *without having taken and duly filed the required oath of office,* or without having executed and duly filed the required security, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, he *forfeits his rights to the office.*"

Section 9301. "The last section shall not be construed to affect the validity of acts done by a person exercising the functions of a public office in fact, when other persons than himself are interested in maintaining the validity of such acts."

Section 9316. "Every person who having been an executive officer, wilfully exercises any of the functions of his office after his term of office has expired and a successor has been duly elected or appointed, and has qualified in his place, and he has notice thereof, is guilty of a misdemeanor."

Section 9318. "The various provisions of this chapter which relate to executive officers apply in relation to administrative officers in the same manner as if administrative and executive officers were both mentioned together."

It will be noted that the act creating the office in controversy here, specifically provides that an incumbent of such office "shall take the oath of office and qualify in the same manner as other state officials." Laws 1919, chap. 71, § 2. Section 661, Comp. Laws, 1913, expressly requires each civil officer of the state, before entering upon the duties of his office to "take and subscribe the oath of office prescribed in section 211 of the Constitution." That section further provides that in case the officer is required to furnish a bond, the oath of office shall be indorsed upon the back of or attached to the bond; and in case the officer is not required to furnish a bond that then the oath of office shall be indorsed upon the back of or attached to the commission of appointment or certificate of election. The following section—§ 662, Comp. Laws, 1913—provides for the filing of official bonds with the secretary of state, and the deposit with him of a duplicate original of the oaths of office of all officers not required to furnish bonds. In other words the section requires that the bonds, with the attached oath of office, of all state and district officers required to furnish bonds shall be delivered to the secretary of state for record; and that a duplicate original of the oath of all officers not required to furnish bonds shall be deposited with the secretary of state. That seems to be the plain reading of the statute, and has been the interpretation placed upon it during tthe course of the years. The legislative intention that the oath of office must be filed with the secretary of state is also evidenced by § 9300, supra, which inhibits every person from executing any of the functions of a public office, "without having taken and *duly filed* the required oath of office."

The legislative requirement with regard to the filing of the oath of office was not in any manner affected by the State Bonding Fund Act.

That act did not relate to the oath of office, but to the manner of furnishing surety upon official bonds, and, as has been noted, the law requires the oath of office to be filed as well where no bond is required to be furnished as where a bond is required.

This is not a case where an officer in qualifying has inadvertently failed to comply literally with the statute, as for instance, by filing a defective oath of office; but this is a case where there was not even an attempt on the part of the officer to qualify within the time prescribed by the statute.

It is contended by appellant's counsel, however, that statutory provisions like §§ 660, 661, 681 and 683, supra, are merely directory and that the failure to comply therewith does not *ipso facto* create a vacancy or forfeit the right to the office, but that such failure constitutes merely a ground which may be made a basis for forfeiture and enforced as such in a proper judicial proceeding. In support of this contention certain authorities are cited, and especial reliance is placed upon the decision of the supreme court of Washington in State ex rel. Lysons v. Ruff, 4 Wash. 234, 16 L.R.A. 140, 29 Pac. 999. That case involved a statute quite similar to § 683, supra, but apparently there was no statute in force in Washington similar to § 9300, supra. The case was decided by a divided court—the majority decision being supported by three of the five judges. Two of the judges dissented. The majority members held that the statute was directory and that the failure to qualify by filing the oath of office and bond within the time prescribed by the statute did not, of itself, work a forfeiture of the right to the office, but simply authorized the proper authority to declare such forfeiture and fill the office by appointment. In reaching this conclusion the majority members invoked the doctrine "that forfeitures are abhorred by the courts, and that when it is reasonably possible to construe the law so as to avoid a forfeiture, such construction will be adopted." The very principle, therefore, which the court made the controlling one in the Washington case has no application here, for here we are dealing with statutes which not only provide that the failure to qualify for office, by taking and filing the required oath of office, shall create a vacancy in such office (a vacancy which the statute makes co-ordinate with one caused by the death or resignation of the incumbent) but which further specifically declare that "every person who executes any of the functions of a public

office without having taken and duly filed the oath of office . . . is guilty of a misdemeanor; and in addition forfeits his right to the office." Comp. Laws, 1913, § 9300.

There can be no mistake as to the meaning of these statutes. It is difficult to understand how the legislature could more clearly have expressed its intention that the failure to take and file the required oath of office shall ipso facto create a vacancy in such office and work a forfeiture of all right to the office involved.

No case has been called to our attention where statutory provisions, like ours, have been construed as merely directory, or as affording merely a ground for forfeiture, available only when enforced in a proper judicial proceeding. On the contrary, statutes far less emphatic in their provisions than our own have been construed as mandatory and as fixing conditions precedent to the right to enter upon the office; and the right to the office itself held lost by a failure to perform the conditions within the time limited. See State ex rel. Berge v. Lansing, 46 Neb. 514, 35 L.R.A. 124, 64 N. W. 1104, 1109. See also State ex rel. Egan v. Schram, 82 Minn. 420, 85 N. W. 155; State ex rel. Bennetts v. Duncan, 47 Mont. 447, 133 Pac. 109; Murphy v. Hudson, 91 N. J. L. 40, 102 Atl. 896.

The judgment of the district court is affirmed.

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

Mr. Justice NUESSLE, and Mr. Justice JOHNSON, being disqualified, did not participate; Honorable CHAS. M. COOLEY, Judge of the First Judicial District, and Honorable A. G. BURR, Judge of the Second Judicial District, sitting in their stead.

THOMAS A. COLTER, Respondent, v. J. L. DILL, T. N. Henderson, et al., Appellants.

(193 N. W. 662.)

Appeal and error — duty of trial court to comply with mandate of supreme court; trial court without power to modify judgment remanded other than directed.

In a case appealed to the supreme court for a trial de novo under § 7846,

Comp. Laws 1913, it is *held* to be the duty of the lower court, on remand of the record to it, to comply with the mandate of the supreme court and to obey the directions therein. And where the supreme court directs that a judgment be modified in certain particulars, it is the duty of the court to modify the original judgment as, and only as, directed; and it has no power to make other modifications or changes in such judgment.

Opinion filed May 24, 1923. Rehearing denied.

Appeal and Error, 4 C. J. § 3271 p. 1221 n. 58; § 3272 p. 1223 n. 77.

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

Action to foreclose a mechanic's lien. From a judgment in favor of the plaintiff, defendants appealed, and the judgment was modified so as to adjudge certain mortgages to be prior to the mechanic's lien, 39 N. D. 463. Remittitur was sent down, and the judgment entered as directed. One of the defendants moved the trial court to modify the judgment so entered, and appeals from the order denying such motion.

Affirmed.

Palda & Aaker, for appellants.

B. H. Bradford, and *Bosard & Twiford*, for respondent.

CHRISTIANSON, J. This is a sequel to Colter v. Dill, 39 N. D. 464, 167 N. W. 720, wherein this court modified a judgment of the district court of Ward county. After the remittitur was sent down, the district court made an order for judgment in accordance with the mandate of this court. Judgment was entered pursuant to such order. Thereafter, the attorneys for the defendant, Henderson, moved that such judgment be amended in certain particulars, which will hereinafter be noted. The motion was denied and the defendant, Henderson, has appealed from the order denying such motion.

The nature of the litigation, and the judgment of this court, were stated as follows in the decision on the former appeal.

"This is an appeal from a judgment in favor of the plaintiff confirming his claim to a mechanic's lien and declaring it superior to the lien of purchase-money mortgages. The only question necessary to consider is in regard to the status of the liens claimed by the appealing mortgagees. The property consists of eight lots in the city of Minot. The defendant J. Olson was the owner of the eight lots and the presi-

dent of the German-American Bank. He made a contract with Christ Rudd, deceased, to sell him the eight lots at $500 a lot, and that the German-American Bank should loan him on each lot about $1,600 to pay the purchase price of the same and to improve the lots, and that Rudd should also give to Olson a small commission mortgage. Accordingly Olson made a deed of the lots to Rudd and at the same time took mortgages in accordance with the agreement. Olson retained the deeds and the mortgages in his own possession until he delivered them for record to the register of deeds on May 25, 1914, at 2:45 P. M. The delivery and recording of the deeds and mortgages was in all respects simultaneous. And until such delivery Rudd had no title or interest in the lots. As Rudd had no title until the delivery of the deeds and mortgages for record, it was in no wise possible for him, by any contract, to give a lien on the lots prior to the lien of the mortgages. However, in anticipation of obtaining the title to the lots, Rudd contracted with the plaintiff to do the work for which he claims a mechanic's lien, and the plaintiff commenced the work a few hours prior to the time of filing for record the deeds and mortgages. The work done prior to such filing was of little consequence, and it was not sufficient to give notice to anyone. It was done while Olson held his title and his deeds and his mortgages, and while he still had power to rescind the transaction. . . . The mechanic's lien must be and it is adjudged to be subject and subsequent to the lien of the appellant's mortgages.

"Judgment modified accordingly."

The defendant, Henderson, had purchased one of the eight houses from Rudd and was joined as a party defendant. The answer interposed by Henderson, aside from admissions regarding the corporate and representative capacity of some of the defendants, consisted of a general denial and a general averment that "he is the owner in fee simple of lot two (2), in block three (3), Springlake Park addition to the city of Minot, Ward county, North Dakota, free from any liens or encumbrances of any kind claimed by the said plaintiff herein."

The other defendants interposed answers challenging the validity of the mechanic's lien and further asserting that if the mechanic's lien was held to be valid, that then the mortgages in favor of Olson and the bank were liens prior to the mechanic's lien claimed by the plaintiff. The trial court held the mechanic's lien to be valid; that it was a lien

prior to the mortgages; that there was due thereon the sum of $2,622.04, and entered the usual decree of foreclosure ordering the premises covered by the lien to be sold to satisfy the amount adjudged due on the lien.

The defendants took a joint appeal from such judgment. On appeal it was asserted: (1) That the lien statement was false, and, hence, the lien void; (2) that the evidence was insufficient to establish any contract between the plaintiff and Rudd; (3) that if a valid lien had been established, it was inferior to the mortgages held by the bank and Olson; and, (4) that the plaintiff had waived his lien by accepting payment in full for one of the houses.

It will be noted that the contentions so advanced resolved themselves into two: 1. That there was no valid lien against any of the eight lots; and, 2. If there was a valid lien, it was nevertheless inferior to the liens of the mortgages.

This court, as already stated, ruled that the mortgages were prior to the mechanic's lien, and directed that the judgment appealed from be modified accordingly. The decision of this court was filed April 27, 1918. Neither party petitioned for a rehearing. The remittitur was transmitted to the district court on May 18, 1918.

On June 14th, 1918, the defendant Henderson petitioned this court to recall the remittitur to the end that this court might modify the judgment so as to apportion the total amount found due to the plaintiff in such manner as to render the house owned by the defendant Henderson subject only to a lien for the sum stated in the mechanic's lien statement as being the value of the services performed by the plaintiff in the construction of that particular house. Under well-settled principles of law, this court deemed itself without jurisdiction to recall the remittitur, (Hilmen v. Nygaard, 31 N. D. 419, 154 N. W. 529, Ann. Cas. 1917A, 282; 4 C. J. p. 1245) and the application was accordingly denied.

On or about June 21st, 1918, the district court made an order directing that the original judgment be modified and a new judgment entered in conformity with the decision of, and the mandate transmitted from, this court. Such order was at once delivered to the clerk of the district court, but no judgment was entered thereon at that time. Thereafter, and on or about December 7th, 1918, the defendant Henderson made application to the district court that the original judgment in the case

be amended "in such a manner as to apportion the amount of the claim of the plaintiff among the several lots in proportion to the enhanced value of the same produced by the means of the labor done or materials furnished, if any, under the lien which was the subject of the litigation herein."

The motion was addressed to the plaintiff and his counsel, and no notice of such motion was served upon any of the codefendants. The motion was brought on to be heard on or about December 16th, 1918, before Judge Leighton, who tried the case and rendered the original judgment therein.

Judge Leighton's term of office terminated in January, 1919. It appears that shortly before going out of office he signed a memorandum opinion granting the motion. It seems that no order (except as contained in the memorandum opinion) was made. In any event, no such order was either filed or served upon the adverse party, or his counsel, and there is no contention on this appeal that the memorandum opinion or order of Judge Leighton has any force or effect as such. Crane v. First Nat. Bank, 26 N. D. 268, 144 N. W. 96. No further action was taken in the matter until in May, 1922, when the plaintiff applied to the then judge of said district court for a writ of mandamus to compel the clerk of the district court to enter judgment in conformity with the decision of this court and the order entered thereon by the judge of the district court on June 21, 1918. The defendant Henderson, who is also clerk of the district court of Ward county, then made a motion, before the judge, who had issued the alternative writ of mandamus, for a modification and amendment of the judgment, similar to the one made in December 1918.

In support of the motion to amend the judgment the defendant Henderson has presented, among other things, the affidavit of Judge Leighton, wherein it is said: "It was the intention at all times to make such findings (the findings of fact) as would protect Mr. Henderson upon his house as I was satisfied from the testimony in said action that Mr. Henderson had paid for the same in full and that in so far as it was possible, that he should be protected in said action; that after the opinion of the supreme court came down the only question in my mind was whether as judge of the district court I had the jurisdiction to make further findings in said matter and having some question in my mind

at that time the findings were signed and afterwards upon motion the same were modified; it being my judgment then that the district court had such jurisdiction and for that reason and in view of the testimony in the action and it being apparent that Mr. Henderson had paid for the house in question I desired to protect him as fully as the law would permit; that it was the belief of the court that an apportionment should be made on the different lots and that no judgment should be entered making the judgment a lien against any one of the lots in question."

The motion for amendment of the judgment was denied, and a writ of mandamus issued. The defendant Henderson has appealed from the order denying his motion to amend the judgment.

In our opinion the order must be affirmed. The mechanic's lien involved in this case was a joint lien. By its terms it covered all the eight houses which the plaintiff had constructed. The complaint was framed on the theory that all the houses were subject to the entire lien. No request was made by any of the defendants for an apportionment of the amount due on the lien among the several houses. The district court rendered judgment that all of the houses be sold to satisfy the amount due on the lien. Manifestly this judgment and the findings of fact and conclusions of law on which it was based cannot be impeached or altered by the affidavit of the trial judge. On appeal to this court no complaint was made of this form of judgment, and no request was made by any of the defendants that the judgment be modified so as to apportion the amount due on the lien among the several houses, although the right to such apportionment (on the establishment of the proper facts) was quite forcibly suggested by plaintiff's counsel in the brief filed in this court on the former appeal. In answering the contention that plaintiff had accepted settlement in full for one house, and thereby waived his right to claim a lien on any of the houses, plaintiff's counsel said:

"Respondent does not concede that house number one or the house afterwards purchased by T. N. Henderson was settled for in full by Mr. Colter; on the contrary respondent contends that any and all payments made to him under his contract were made general, on the contract, which contract was for the building of the entire eight houses, and that there was no application ever made as to the amount of labor furnished and performed on any one of the several houses. Respondent sought to

prove by plaintiff that he had gone over the amount due on house number one with Mr. Rudd and made settlement on same (see Transcript page 52 lines 15 to 24), and also that plaintiff had represented to Henderson that he had no claim on house number one (Transcript page 53, lines 5 to 14), and also that plaintiff received a check showing the memo thereon "H-1, 2 & 3" meaning thereby paid on houses, one, two, and three (Transcript page 58, lines 4 to 13), but in each instance the appellants failed to prove such facts, and the undisputed testimony developed by such examination and as shown by such references is that no settlement was ever made on house number one, and that plaintiff never figured up entire cost of house number one with Mr. Rudd or ever received any money specifically to apply on the payment of his work and labor on this particular house as distinct or a part from payments made to him on his contract for the work and labor on the several eight houses under construction.

"There is also attempted to prove by Mr. Henderson that Colter had advised him that he made no claim on this particular house (Transcript page 127), but no testimony was offered to show the payment of the work and labor on this particular house and Colter's statement to Henderson was that he was building the houses all under one contract and had to file the lien against all of them to protect himself. Furthermore appellant Henderson, might, if he had so desired asked the court to apportion the total amount due between the seven houses still owned by Rudd, or direct that they should first be sold, so as to protect himself as against the amount due plaintiff on this lien, and upon showing that he had paid in full for house number one to Rudd and received a deed of same, and that Rudd still owned the other seven houses and that there had been enough paid to more than cover the amount of work and labor on house number one. The court under section 6818, could have, had the defendant Henderson prayed for such relief, and offered such proof, so apportioned the sum adjudged to be still due plaintiff, as against the other seven houses, or at least directed that the other seven houses should be first sold and the proceeds applied in payment or reduction of the lien, before offering for sale house number one. There is an entire lack of evidence of any release of house number one, and the fact that the lien was filed as against all of the eight houses and lots is the best evidence that plaintiff had not and never intended to re-

lease house number one and had never made settlement and received payment in full for the work and labor performed by him in constructing such house."

The case was appealed to this court for a trial de novo under § 7846, Comp. Laws, 1913, which provides:

"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."

This "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, 302. It is only in unusual cases, and where the court 'deems such cause necessary to the accomplishment of justice,' that a new trial may be ordered. Section 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 a second trial, and the risk of further errors that might necessitate a second appeal.' Christianson v. Farmers' Warehouse Asso. supra. . . .

"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 'deem 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 Section 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 make 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." Patterson Land Co. v. Lynn, 44 N. D. 251, 175 N. W. 211.

Much of the language quoted is applicable here. Upon the former appeal the case was tried anew in this court, upon all the proceedings had and evidence offered in the district court. In this court as in the trial court the defendants asserted: (1) That the evidence did not establish a valid mechanic's lien; and, (2) that if the evidence did establish such lien, it was not prior but subsequent to the lien of the mortgages held by the bank and Olson.

After due consideration this court rendered its decision to the effect that a valid mechanic's lien had been established, but that it was subsequent to the mortgages, and the judgment of the district court was ordered to be modified accordingly. This court intended to make a full and final determination of the matter and to adjudicate the respective rights of the parties to the controversy. This is not a case where it is sought to amend a judgment by correcting some clerical error; or where the court is asked to make some order relating to the mode of carrying into effect the judgment formerly entered. Here it is sought to amend the judgment in a matter of substance. That is, here it is sought to have the judgment altered so as to withhold from the plaintiff a right clearly conferred by the original judgment and grant the defendant Henderson certain relief not awarded by such judgment. In other words, it is sought to have a different result announced as regards material rights, both of the plaintiff and the defendant Henderson from that announced in the original judgment entered in this case. We are all agreed that the district court had no jurisdiction to make any provision relating to the merits of the case, or enter any judgment in respect

thereto other than that directed to be entered by this court. The directions of this court as to the judgment to be entered were binding upon the trial court and that court had no jurisdiction to determine whether, under the facts in the case, some other judgment might be more desirable. In other words, it was the duty of the trial court to carry out the mandate of this court. State ex rel. McClery v. Donovan, 10 N. D. 610, 88 N. W. 717; State ex rel. Wehe v. Frazier, 48 N. D. 381, 184 N. W. 876; Sibbald v. United States, 12 Pet. 488, 9 L. ed. 1167.

Appellant asserts that under the rule announced in Tyler v. Shea, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 472, the district court had jurisdiction to entertain the motion to amend the judgment. The scope of the motion involved in the case cited was wholly different from that of the motion in this case. The motion in Tyler v. Shea, in no manner affected the merits of the case, but related "solely to the mode of carrying out the decision of the court on the merits." 4 N. D. 389. The very language employed by the court in the opinion in the case cited implied want of power on the part of the trial court to entertain a motion to amend so as to affect the substantial rights of the parties as fixed by the judgment. The motion under consideration here is not one relating to the enforcement of the judgment, but one whereby it is sought to alter the judgment in a matter of substance.

Order affirmed.

BRONSON, Ch. J., and JOHNSON, BIRDZELL, and NUESSLE, JJ., concur.

STATE OF NORTH DAKOTA, Respondent, v. CLIFFORD A. McCARTY, Appellant.

(194 N. W. 335.)

Jury — objection to panel because dismissed and recalled held without merit.

In a prosecution for the larceny of certain calves it is *held*, for reasons stated in the opinion,

1. That the objection made to the jury panel because it was dismissed and recalled, is without merit.

Criminal law — testimony of witnesses whose attendance could not be procured, as given at former trial, properly admitted.

2. That the testimony of two witnesses, whose attendance could not be procured, as given at a former trial, was properly admitted.

Criminal law — admission of rebuttal testimony concerning other crimes of defendant held not erroneous.

3. That the admission of certain rebuttal testimony concerning the commission of other larcenies was not erroneous.

Opinion filed June 1, 1923.

Criminal Law, 16 C. J. § 1170 p. 603 n. 83, 84, 85; § 2116 p. 839 n. 76; Juries, 35 C. J. § 404 p. 363 n. 85.

In District Court, Hettinger County, *Nuessle*, J.

Prosecution for grand larceny of certain calves.

Defendant has appealed from judgment of conviction.

Affirmed.

Per Curiam opinion.

H. E. Haney, for appellant.

J. P. Cain, special prosecutor.

PER CURIAM. This is a prosecution for the grand larceny of certain calves. In June, 1920, a jury in Stark county returned a verdict of

Note.—As to the effect of admissibility in criminal trial of testimony given upon preliminary examination by witness not available at the time of trial, see note in 25 L.R.A.(N.S.) 868.

On admissibility of evidence given on a former trial or preliminary examination, see note in 140 Am. St. Rep. 775.

See also 8 R. C. L. 88; 3 R. C. L. Supp. 542; 4 R. C. L. Supp. 520.

guilty against the defendant. Upon appeal from the judgment of conviction this court, in April, 1921, granted a new trial for errors in instructions. State v. McCarty, 47 N. D. 523, 182 N. W. 754. The new trial was had in Hettinger county in December, 1921. Again the jury found defendant to be guilty. Defendant has appealed from the judgment of conviction. The facts have been set forth in the former opinion. They are substantially the same in the present record. In general, the basis of the prosecution is that defendant arranged with two confessing accomplices to steal certain unbranded calves on a ranch North of Belfield, North Dakota, and to transport the same about 18 miles distant southwest to defendant's ranch; that, pursuant to this arrangement, six calves, on November 16th, 1918, in the nighttime were taken and transported to defendant's ranch; that defendant received the same and paid to these parties $100 for their services. Defendant maintains that there is no corroboration of the testimony of the two parties who took these calves. This contention has been answered by the former opinion of this court. State v. McCarty, supra. Defendant made objection to the jury panel. From the record it appears that the trial court dismissed the jury, but within an hour, upon learning that this court had designated Judge Nuessle, now an associate justice of this court, to try the case, recalled the jury. The court had not adjourned. From the record it further appears that both parties passed peremptory challenge and stated to the court that they were satisfied with the jury. This objection, accordingly, is without merit. In the record it appears that the testimony of one Leeper and Jacobson, given at the former trial, was admitted in evidence and read to the jury. Further, it appears that Leeper had been sick in bed for some time and his attendance could not be procured; that attempts were made to serve subpœna upon Jacobson but he could not be found. There was further testimony to the effect that this Jacobson was in Montana at the time of the trial. We are satisfied that the court properly received this evidence. Felton v. Midland Continental R. Co. 32 N. D. 223, 237, 155 N. W. 23; State v. Moeller, 24 N. D. 165, 138 N. W. 981; see note in 25 L.R.A. (N.S.) 868. The court also received in evidence a ledger sheet of a bank which showed that on November 18th, 1918, a check for $100 was charged to his account. This exhibit had slight evidentiary value but no prejudicial error occurred in its admission.

Complaint is made of the instruction of the court that the possession, by the person charged, of stolen property, recently after the theft, if unexplained, is a circumstance tending to prove his guilt. This instruction considered with the rest of the court's instructions is well within the rule announced in the former opinion. State v. McCarty, supra.

During the course of the trial, defendant, who had previously testified in his own behalf that he received this property innocently, was asked on cross-examination, whether one of the alleged accomplices had stolen a gray horse and brought it to him. Some other similar questions were propounded involving the commission of other larcenies; all of which defendant denied. On rebuttal one of these alleged accomplices testified that defendant had him steal a black horse and some other horses. The trial court admitted this testimony on the theory that it was permissible to show a series of transactions, for the purpose of establishing knowledge or intent of any particular transaction. In his instructions to the jury, the court limited the consideration of this testimony to the establishing of a felonious intent or motive, and for purposes of throwing light upon the knowledge, intent, and purpose of defendant. In view of the relations as testified between the accomplices and the defendant, this testimony was admissible, in our opinion, to show guilty knowledge and intent, and thus to rebut the defendant's testimony. No error occurred in the court's instruction in regard thereto.

Upon the entire record we are satisfied that defendant was accorded a fair trial without occurrence of any prejudicial error. Four years have elapsed since the commission of the offense. Defendant has been accorded every opportunity to establish his innocence. The judgment, accordingly, should be, and is, affirmed.

BRONSON, Ch. J., and BIRDZELL, BURR, and JOHNSON, JJ., concur.

Justices NUESSLE and CHRISTIANSON, being disqualified, did not participate; Honorable A. G. BURR, Judge of Second Judicial District, sitting in their stead.

MRS. FRANK L. GOTCHY, Respondent, v. NORTH DAKOTA WORKMEN'S COMPENSATION BUREAU, Appellant.

(194 N. W. 663.)

Master and servant — procedure applicable on appeal from decision of compensation bureau.

1. Upon an appeal from a decision of the workmen's compensation bureau the cause is a proceeding not triable under the so-termed "Newman Act."

Master and servant — objection to time of filing compensation claim held without merit.

2. Where a claim was filed by a claimant after sixty days from the time of the injury and death of an employee but within one year after his death, and, where the bureau received such claim and dismissed the same upon the ground that the deceased was injured in the course of an employment, it is *held*, for reasons stated in the opinion, that objections made concerning the time of filing are without merit.

Evidence — declarations of employee injured in course of employment held admissible as part of the res gestæ.

3. Where no direct proof has been adduced concerning the means by which an employee was injured in the course of an employment, and where, his declarations, made after the time of an alleged injury, established that his head received a blow through coming in contact with an iron pulley while he was engaged in constructing a unit in an elevator, it is *held*, for reasons stated in the opinion, that the declarations were properly admissible as part of the res gestæ.

Master and servant — findings of trial court as to proximate cause of employee's death held conclusive.

4. Where an employee, a carpenter, had previously appeared to be active and healthy, and, while engaged in an employment, his head received a blow, more or less severe, from an iron pulley proximate, and where, thereafter, the deceased became ill, suffered an operation upon his cranium and thereafter died, and where, pursuant to a post-mortem examination and medical diagnosis made before and after his death, it appears that the deceased was suffering

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Note.—As to whether employees intermittently employed are employees within the meaning of Workmen's Compensation Acts, see notes in L.R.A.1916A, 120, 247, 365; L.R.A.1917D, 147; L.R.A.1918F, 215; 28 R. C. L. 767; 4 R. C. L. Supp. 1848; 5 R. C. L. Supp. 1561.

On time within which notice of injury must be given or other steps taken under Workmen's Compensation Statutes, see notes in L.R.A.1916A, 86, 244; L.R.A.1917D, 138; L.R.A.1918E, 559; 28 R. C. L. 825; 4 R. C. L. Supp. 1869; 5 R. C. L. Supp. 1579.

from a glioma which, through the superinducing cause of an external blow, might cause a hemorrhage so as to occasion his death, it is *held*, for reasons stated in the opinion, that the questions of the proximate cause of the employee's death was one of fact and that the findings of the trial court in that respect should not be disturbed.

Master and servant — carpenter intermittently employed by elevator company held an "employee" within compensation act.

5. Where the deceased, a carpenter, was intermittently employed by an elevator company in doing its carpenter work and general repair work and prior to the time of his injury had been engaged for some forty days in constructing a unit or leg for an elevator and doing some other general repair work, and where such carpenter was employed by the hour and his methods of prosecuting the work were in some respects subject to the control of the elevator company, it is *held*, for reasons stated in the opinion, that the decedent, at the time of his injury, was an employee of the elevator company engaged in the course of its business.

Master and servant — power of court on appeal from compensation bureau stated; power of compensation bureau after judgment on appeal, stated.

6. Upon an appeal from the decision of the compensation bureau, it is *held*, for reasons stated in the opinion,

(a) That the court has the power to determine the right of the claimant and to fix the compensation within the limits prescribed in the Compensation Act.

(b) That the court has not the express power to award a lump sum.

(c) That, after judgment, the bureau may not deny or reverse the right of the claimant thus established upon appeal.

(d) That, after judgment, the bureau may increase or decrease the award, or may award a lump sum, all pursuant to and consistent with the judgment rendered and the continuing obligations and duties imposed upon the bureau.

Opinion filed June 7, 1923.

Workmen's Compensation Acts, C. J. § 43 p. 52 n. 73; § 103 p. 106 n. 43; § 126 p. 121 n. 30; § 131 p. 124 n. 67, p. 125 n. 70 New; § 132 p. 125 n. 71; Evidence, 22 C. J. § 545 p. 455 n. 74.

In District Court, Adams County, *Lembke*, J.

Proceeding upon appeal from decision of compensation bureau to determine the right and the award of a claimant.

The bureau has appealed from a judgment in claimant's favor.

Judgment modified and proceedings remanded.

C. A. Marr, L. J. Wehe, Phillip Elliot, and *M. E. Remmen,* for appellant.

". . . Claimant walking along this dark passageway, miscalculated his distance, stepped forward and upon the upper end of the incline, and fell forward, because of the comparatively abrupt decline. But, whatever may have been the details of the fall, there is no question that the claimant fell, and there is no doubt that the right femur was broken at the extreme lower end; but the conclusion that this comparatively simple fracture 'necessitated the amputation of his right leg at or about the middle of the thigh' some inches above the fracture, is not sustained by the evidence, and this is the material question in the case. . . . Upon his being taken to the Roosevelt Hospital it was found that he had a osteosarcoma, popularly known as cancer of the bone, at the point of the fracture, and there is no dispute in the evidence that the amputation was made, not because of the fracture but because of the disease. Dr. Gillespie testified, and there was no contradiction, that there was no visible injury to the outside of the leg that he could find, and that 'the leg was amputated because the growth was malignant;' that if the accident had occurred, as described, and there had been no sarcoma at that point, no amputation would have been necessary. The diagnosis was made immediately after the accident, and the operation took place within eight days of the diagnosis and the undisputed evidence is to the effect that the operation was for the purpose of curing the diseased condition of the leg, not because of the fracture. Indeed, the fair inference from the evidence is that the fracture was the result of the disease rather than of the accident, though it was inferentially admitted that the false step hastened the break. But the loss of the leg was clearly due to the diseased condition. . . . It is not shown that the claimant was bruised in any way . . . to charge this disease to the industry, simply because it became manifest by reason of this the Workmen's Compensation Law, which sought to insure against inherent risks of certain classes of industry." Brady v. Holbrook, Cabot & Rollins Corporation, 178 N. Y. Supp. 504.

"It devolved upon the plaintiff to establish the fact that the deceased was not only injured in the manner claimed, but to produce evidence to show that he was injured by an accident that arose out of and in the course of his employment by the defendant. The law does not require that the case shall be established by direct evidence; circumstantial evi-

dence is sufficient. But the circumstantial evidence must be such as would justify an inference that the injury was due to an accident arising out of and in the course of the employment, and must not be left to speculation or conjecture.

The rule is that for statements of an injured person to be admissible in evidence, they must be shown to have been made at a point of time so close to the alleged injury as to be entirely spontaneous." Mayeur v. Crowe Coal & Min. Co. (Kan.) 186 Pac. 1035; Storm v. Thompson (Iowa) 170 N. W. 403; Smith v. State Workmen's Ins. Fund (Penn.) 105 Atl. 90; Meredosin Levee & Drainage Dist. v. Indus. Commission of Ill. (Ill.) 120 N. E. 516; Litts v. Risley Lumber Co. (N. Y.) 120 N. E. 730; Woodhall v. Irwin (Mich.) 167 N. W. 845; Parsons v. Ind. Accident Comm. (Cal.) 173 Pac. 585; Hungerford v. Bonn (N. Y.) 171 N. Y. Supp. 280; Pace v. Appanoose County (Iowa) 168 N. W. 916; Battey v. Osborne (Conn.) 115 Atl. Rep. 83.

Patten Hotel Co. v. Milner (Tenn.) 238 S. W. 75; Spring Canyon Coal Co. v. Ind. Comm. (Utah) 201 Pac. 173; Hunt v. Ind. Ac. Comm. of Cal. 185 Pac. 215; Central Locomotive & Car Works v. Ind. Comm. (Ill.) 125 N. E. 369; Pocardi v. Ott (W. Va.) 98 S. E. 69; Ohio Oil Co. v. Ind. Comm. (Ill.) 127 N. E. 744; Dochoff v. Globe Const. Co. (Mich.) 180 N. W. 414; Lingley v. T. Firth & Sons (Eng.) W. C. Ins. Rep. 6 Edw. 7.

"Plaintiff began to unload a car of coal for defendant February 21, 1920, and finished the task the next day. He began to unload another car February 23d, 1920, and was injured the following day before he had removed all of the coal. For these services he was paid $20 by check of defendant being 25c a ton. About a week earlier plaintiff had unloaded a car of coal for defendant in the same yards. During a year's time previously he had unloaded three or four cars and received 25c a ton. He was entitled to his pay when he unloaded a car and could then get it if he could find defendant's manager at the time. Plaintiff in each instance was employed to unload a particular car of coal. Between jobs he sometimes stayed around defendant's yards, and when a car of coal came in he asked for the unloading, was told the price and performed the service, but during some of the intervals he had worked for others." Bridger v. Lincoln Feed & Fuel Co. (Neb.) 179 N. W. 1020.

"Where the employment for one job cannot be characterized as permanent or periodically regular but occurs by chance, or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is casual. . . . The work he was to assist in doing was a particular and certain piece of work, which both he and his employer knew would require but a short time. There was nothing in the contract of employment nor in the relations of these parties, then or prior to that time, shown by the evidence, which would indicate that such employment was to be either continuous or recurring." Consumers Mutual Oil Producing Co. v. Indus. Commission, 289 Ill. 423, 124 N. E. 608; Aurora Brewing Co. v. Industrial Board of Ill. 115 N. E. 207; Holbrook v. Olympia Hotel Co. (Mich.) 166 N. W. 876.

F. M. Jackson, for respondent.

"A contention that the amount of an original award under the Workmen's Compensation Law fixed the weekly compensation too high a rate cannot be considered upon certiorari where not urged before the board in hearing." Byle v. Grand Rapids Co. (Mich.) 175 N. W. 416.

"It would be manifestly unjust to permit the case to turn upon a contention not raised at the trial and to which evidence was not directed." Doff's Case (Mass.) 125 N. E. 145.

"Counsel for the plaintiff in error further argues that the industrial board did not have jurisdiction of the proceedings because the record does not show that any notice was given to the employer within thirty days after the happening of the accident nor was any claim for compensation made within six months." Starrs v. Industrial Commission, 121 N. E. 267.

"We think it clear that on this record the plaintiff in error waived the right to raise any question of jurisdiction." American Mill Co. v. Industrial Board (Ill.) 117 N. E. 147.

The law was primarily intended for the protection and benefit of employees and its beneficent purpose should not be defeated by a strict or technical construction that would deprive the employee of compensation to which he would be clearly entitled without contest if he had prosecuted his claim with diligence." Bates & Rogers v. Allen (Ky.) 210 S. W. 467.

"It should not be overlooked that the act, and acts in different states, are universally considered as of a remedial character, the provisions of

which should be construed broadly and liberally in order to effectuate their purpose." Donahue v. Sherman (R. I.) 98 Atl. 109.

The act is to be construed in the light of its purpose, and so far as reasonably may be, to promote the accomplishment of its beneficent purpose. See also Young v. Duncan (Mass.) 106 N. E. 1; Dixon v. Russell (Wis.) 145 N. W. 762; Christopherson v. C. M. & St. P. Ry. Co. (Ia.) 109 N. W. 1077; Keys v. Cedar Falls (Iowa) 78 N. W. 227; Spevack v. Coaldale Fuel Co. (Iowa) 131 N. W. 654; Duffey v. Consolidated Block Co. (Minn.) 124 N. W. 609.

"Complaints of existing pain at a time long subsequent to the date of the injury" held admissible. Ward v. Ætna L. Ins. Co. (Neb.) 118 N. W. 70; Elby v. Ins. Co. 102 Atl. 209; Western Ass'n v. Munson (Neb.) 103 N. W. 688; St. L. S. W. Ry. Co. v. Moore, 173 S. W. 904; Schock v. Cooling, 141 N. W. 675; Britton v. Washington Water Power Co. 110 Pac. 20.

In last case declarations made eight days after accident were admitted. Kansas City S. Ry. Co. v. Clinton, 224 Fed. 897; Johnson v. State, 129 Wis. 146, 108 N. W. 897; Andrzejewski v. Northwestern Fuel Co. (Wis.) 148 N. W. 37; Puls v. Grand Lodge, etc. 13 N. D. 559; Ins. Co. v. Mosley, 75 U. S. 397; First Nat. Bank v. Indus. Commission (Wis.) 154 N. W. 847; Murphy v. George Brown Co. (N. J.) 103 Atl. 28; Southwestern etc. Co. v. Owen (Tex.) 198 S. W. 662; Patterson v. Ocean Accident Co. 25 App. D. C. 46; Starr v. Aetna Life Ins. Co. 83 Pac. 113; Vicksburg Railroad Co. v. O'Brien, 119 U. S. 99; Wigmore, Ev. § 1750; Mitchum v. State, 11 Ga. 625; Carr v. State, 43 Ark. 104; Travelers' Ins. Co. v. Sheppard, 85 Ga. 751; Retmier v. Cruse (Ind.) 119 N. E. 32; Van Keuren v. Dwight Devine & Sons, 165 N. Y. Supp. 1049; See cases cited in 15 N. C. C. A. 632; 17 N. C. C. A. 864; Schroetke v Jackson-Church, 193 Mich. 615; Indian Creek Coal Co. v. Calvert (Ind.) 119 N. E. 519.

In Utah Copper Co. v. Industrial Commission (Utah) 193 Pac. 25, under a statute excepting persons, "Where employment is but casual or not in the usual course," etc., the court held that the employment was not "casual" under the following facts.

The attention of the court is also called to the following cases on casual employment: (Ind.) 123 N. E. 120; (Colo.) 191 Pac. 125; (Ill.) 119 N. E. 902.

"We are of the opinion that the test of relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent." Tuttle v. Embury Martin Lumber Co. 192 Mich. 385, 158 N. W. 875.

BRONSON, Ch. J. This is a proceeding under the Workmen's Compensation Act by a claimant against the bureau. The bureau has appealed from a judgment of the district court in claimant's favor.

The facts are: The claimant is the widow of Frank Gotchy, deceased. There are four dependent children aged, respectively, six, eight, twelve, and fifteen years. For many years the deceased was a carpenter. He resided with his family on a farm about two miles distant from Reeder, North Dakota. The Reeder Co-operative Equity Exchange, a corporation, has maintained at Reeder for many years an elevator. There it is engaged in the general business of handling grain, flour, feed, and coal. For several years the deceased had worked for this exchange as a carpenter whenever his services were required, in doing repair work or in construction. About August, 1919, the exchange desired and determined to install a new leg in its elevator for purposes of facilitating the handling of grain. The deceased was employed by the exchange as a carpenter to do the work of construction. In August and September, 1919, he was thus employed. In doing this work he received some assistance from the secretary of the exchange and the son of the secretary. In making this construction it was necessary for work to be done underneath the elevator at the bottom of a bin. Access was secured through a hole in the floor and down a ladder. Proximate to the place there was an iron pulley about 2½ feet in diameter which was used in the operation of the elevator. No witnesses specifically saw any injury happen to the deceased; but, on September 4th, 1919, as he came up from this hole, he made the statement to the manager of the elevator, while rubbing his head like one who had bumped his head and while he appeared at that time to be in pain, that he had nearly "broke" his head; that his head was hit against this big pulley. When he returned from work that day he complained to his wife that he had been hurt and was struck on the head by a timber or pulley at the elevator. He complained of terrible pains in the back part of his head and of dizziness. His head

was tilted slightly forward. He acted like a sick man. His wife called the doctor over the telephone and applied home remedies. The next morning the deceased got up at 5:00 A. M. complained of headache and of being dizzy. Often he would hold his head with his hand. He returned to his work but came back that morning. He showed a lack of appetite and acted in an unnatural way, sitting down and holding his head in his hands. During the morning of September 15th, he met the secretary of the exchange in the driveway and complained to him that he nearly knocked off his head yesterday; that, as he was coming up from the first floor, he struck his head on the pulley. The wife testified that, up to that time, he had never been sick a day since she had known him and always had been in the best of health. On the second day he went back to the elevator and tried to do some work for a time. Then, during that day, he went to a local doctor in company with his wife. He was examined. He was given a prescription. Thence the doctor visited him at various times. He continued to suffer from severe headaches. Opiates were given to relieve the pain. The symptoms indicated irritation in the brain tissue or a lesion in the brain. Various tests were made. The patient became more or less comatose and physically wasted away. Finally he was taken to a hospital in Minneapolis for an operation. He was there about three weeks. There, in November, 1919, an operation was performed upon his skull. A piece of bone was removed. This relieved the pressure on the brain. Little relief resulted. The patient returned on November 29th, 1919. Gradually he became weaker; the coma became more pronounced. Finally, he died on February 10th, 1920. The local doctor removed his brain and sent the same to a pathologist and bacteriologist, a doctor at the University of North Dakota. This doctor made an examination. His testimony is to the following effect: In the back part of the cerebrum, on the right side, about the middle of the brain in the lateral ventricle there was a tumor, designated as glioma. The large blood vessel ascending had passed this growth and in that portion of its course an old blood clot was found. The cause of the clot was rupture of a blood vessel. The cause of the hemorrhage was a weakened wall of a blood vessel together with some external violence which would raise the pressure and thus cause the weakened wall to break. The secondary cause of death was cerebral hemorrhage. This tumor had grown around the artery and had weak-

ened the walls of the artery. It was quite possible that external violence resulted in the hemorrhage. It might have caused the rupture: His experience had taught him that a hemorrhage such as occurred is due primarily to an injury; that possibly the deceased might have lived throughout his life without a rupture occurring until some excitement or something raised the pressure so as to induce a rupture. How long this tumor had existed he could not state; whether six months or two years. His opinion was that the rupture of the blood vessel was probably occasioned by external violence. The local doctor who removed the brain found an adhesion of the scalp to the cranium bone on the right side about 3½ inches back, at right angles from the lobe of the ear. It was his opinion that the direct cause of the death of the deceased was hemorrhage superimposed by external violence. Further, he testified that a glioma is a malignant tumor of the brain tissue, cancerous in its nature; that best medical authorities assume that it is due either to chemical or physical irritation.

Another doctor testified to the following effect: He made a puncture of the spinal column. Upon examination the fluid therefrom disclosed intercranial pressure. A glioma is a tumor of rapid or slow growth. Under irritation it may become malignant and rapid in growth; without irritation it may be of very slow growth. It might come from application of violence without, and a blow on the head might produce such a condition; a violent blow some four or five months prior to the death of the deceased might have produced the exact condition that the pathologist at the university described. In all probability the hemorrhage of the deceased's brain was superinduced by external violence although otherwise he admitted that a tumor like glioma might spontaneously produce a hemorrhage.

Another doctor, a witness for the defense, testified to the following effect: His diagnosis could not be stated definitely; symptoms indicated hemorrhage of brain. This might result from a multitude of causes. The blood clot might have resulted from the hemorrhage caused by the glioma. He could not express any opinion as to the cause of the death. Glioma is not always caused by external violence. Real causes of tumors are unknown. Assuming that there had been violence, and assuming the symptoms described, violence might have been the proximate cause of the deceased's death.

On October 29th, 1920, the widow presented to the bureau a claim for compensation accompanied by a certificate of the exchange to the effect that the deceased had been an employee of the undersigned. On November 13th, 1920, the bureau made findings of dismissal without prejudice for the reason that the death of the deceased was not due to injury sustained in the course of employment. Within thirty days thereafter, the widow appealed to the district court from this decision of the bureau. On February 1st, 1921, the bureau, in response to a letter from claimant's counsel, gave advice concerning a rehearing before the bureau. The board stated it had no desire to take advantage of any technical points in regard to this claim. On March 21st, 1921, it likewise wrote claimant's counsel, to the effect that the bureau had denied motion for rehearing by the bureau; that this was a case which should go to the district court for decision and the bureau was willing to give any assistance in bringing the matter before the district court as there was no desire on the bureau's part to defeat claimant's rights, if, as a matter of fact, she was entitled to compensation. In the district court, the bureau first interposed a general denial to the petition of the claimant. At the trial, the bureau sought to amend its answer by averring that the claim was not filed within the time prescribed by the Compensation Act. The trial court refused this amendment. Upon motion made, however, the trial court did permit the bureau to amend its answer by averring that the employment of the deceased was casual and was not in the course of the trade or business of the Reeder Co-operative Equity Exchange. Trial was had in January, 1922.

In the evidence it appears that this exchange had paid a premium to the bureau and that its employees accordingly were insured under the act. But, in its returns, the exchange did not name the deceased as an employee nor make any return of moneys paid him in estimating or stating its payroll. The secretary of the exchange, however, thinks that, in the Federal income report, the exchange included the cost of operation, the expense, and the entire payroll, including amounts paid the deceased. In 1915 the deceased had constructed an enlargement of the office. In 1917, he built or put in a hopper scale. In 1919, when constructing this leg, he also put a new floor in the cupola, repaired the driveway and enlarged the pit or pan. The board of directors hired the deceased. The board had the right to discharge him if his services

were not satisfactory. There was an understanding between him and the president that if he could not do the work the right way, he would let the board of directors decide what to do. The deceased kept his own time; he was honest. On September 13th, 1919, the secretary paid him some $444 for work at $1 per hour. Until the deceased died, the exchange had employed no other carpenter for their repair or construction work. After or about the time of the completion of this work, the deceased also was engaged in doing some repair work for a mercantile company and in superintending the removal of a house for another party.

The trial court found, among other things, that on September 4th, 1919, the deceased was severely injured while working for the exchange and thence grew gradually worse until his death, on February 10th, 1920. That for more than twenty-five years prior thereto he had been in the best of health and was able to work at all times; that on September 4th, 1919, the deceased was working as a carpenter and general repairman for such exchange and had been such regular repairman for more than three years prior thereto; that the deceased died as a result of an injury received in the course of his employment which was covered by insurance under the Compensation Act; that on account of the financial condition of the claimant, their home being mortgaged, it was for the best interests of herself and children that a lump award be made. Such was ordered, including burial expenses, medical and hospital fees, attorney's fees, and costs. Judgment accordingly was entered, on April 6th, 1922, for a total of $10,161.00.

Issues.

The bureau contends, generally speaking, as follows:—

(1) On the record the claimant has failed to present her claim to the bureau either within the sixty-day limitation or the one-year limitation, as prescribed by the act. That concerning the one-year period, this requirement is jurisdictional; that concerning the sixty-day period, it was essential to show that for reasonable cause the bureau had allowed additional time. That the trial court erred in refusing to permit an amendment of the answer in these respects.

(2) The proof is insufficient to establish that the deceased received

any injury while engaged in the work as alleged. The statements of the deceased concerning the cause of his injury were hearsay.

(3) The proof is insufficient to show that the death of the deceased resulted from the blow or injury received.

(4) The deceased was not an employee of the insured employer, regularly employed in the course of the trade or business of his employer at the time of the injury.

(5) The trial court erred in awarding a lump sum and in determining the amount thereof. The trial court should have remanded the case back to the bureau with instructions to allow compensation according to law, or it should have entered the judgment for weekly payments pursuant to the Act.

Decision.

Method of Procedure: At the trial the parties stipulated that the cause be tried to the court without a jury under the so-termed "Newman Law" and that all evidence offered be received by the trial court without ruling. Thus was the cause heard and the evidence received. It is necessary to repeat, as this court has heretofore held, that in any case tried under the amended so-termed Newman Law, Laws 1919, chap. 8, it is the duty of the trial court, where objection is made, to rule upon evidence offered. People's State Bank v. Steenson, ante, 100, 190 N. W. 75.

Upon an appeal from the decision of the bureau, by a claimant upon the fund, what procedure is applicable?

The Compensation Act grants to the bureau "full power and authority to allow and determine all questions within its jurisdiction, and its decision thereon shall be final." Laws 1919, § 17, chap. 162. Otherwise, it provides, in case the final action of the bureau denies the right of the claimant to participation at all in the fund: (1) On the ground that the injury was self-inflicted, or, (2) On the ground that the accident did not arise in the course of employment, or, (3) Upon any other ground going to the basis of claimant's right, that the claimant, by filing an appeal in the district court may be entitled to a trial in the ordinary way; that, in such a proceeding the state's attorney shall represent the bureau; that the claimant shall file a petition in the ordinary form

against the bureau as defendant; that further proceedings shall be had, in such case, according to the rules of civil procedure that the court shall determine the right of the claimant; and, if it determines the right in his favor, shall fix his compensation within the limitations prescribed in the act; that the cost of such proceeding, including reasonable attorney's fees to the claimant's attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party; that either party shall have the right to prescribe error as in the ordinary civil cases. Laws 1919, § 17, chap. 162.

It may be observed that the statute accords the right of appeal from a decision of the board upon certain designated grounds. To the court is accorded the right to determine the right of the claimant and the amount of his compensation. The right is purely statutory. The judicial cause thus prescribed is a statutory proceeding. The statute, in terms, does not class the cause as a civil action nor accord the right of trial by jury. Otherwise, it must be remembered that the Compensation Act provides that all civil actions and civil causes of action and all jurisdiction of courts of this state over such causes are abolished except as in the act provided. Laws 1919, chap 162. However, the act provides in certain respects that an employer who fails to furnish a statement or certain information shall be liable *in a civil action* to a certain penalty. Section 5: That any employer who wilfully misrepresents the amount of the payroll shall be subjected to a multiplied premium *in a civil action.* Sec. 5, II: That in case of default in payment of premium by an employer it is a duty of the attorney general to bring *a civil action* against such employer. Sec. 8: That an employer who is not complying with the act shall be liable to their employees, etc., and in such *action* certain common-law defenses shall not be available to them. Sec. 10: That an employee, where the employer has not complied with the act, may, in lieu of proceedings against his employer, *by civil action,* file application with the bureau, etc. § 11.

An action is an ordinary proceeding in a court of justice, etc. Comp. Laws, 1913, § 7330. Every other remedy is a special proceeding. Comp. Laws, 1913, § 7331. Hence, mandamus is not triable de novo. State ex rel. Bickford v. Fabrick, 16 N. D. 96, 112 N. W. 74. So contempt proceedings are special proceedings. Noble Twp. v. Aasen, 10 N. D. 264, 86 N. W. 742. Likewise disbarment proceedings. Re Eaton,

7 N. D. 269, 272, 74 N. W. 870. It is apparent that this is not an ordinary proceeding; that the act has not specifically classified it as a civil action although otherwise it has mentioned proceedings to be taken for enforcement of the act through civil actions. Easily might the legislature have so prescribed if it so desired.

Accordingly, we are of the opinion that this appeal is a special proceeding pursuant to the Compensation Act; that it is not triable de novo upon appeal to this court.

The findings of the trial court, therefore, are presumed to be correct unless clearly opposed to the preponderance of the evidence. Richards v. Northern P. R. Co. 42 N. D. 472, 478, 173 N. W. 778; Stavens v. National Elevator Co. 36 N. D. 9, 161 N. W. 558; McLennan v. Plummer, 34 N. D. 269, 158 N. W. 269; State Bank v. Maier, 34 N. D. 259, 158 N. W. 346; McCormick v. Union Farmers State Bank, 48 N. D. 834, 187 N. W. 422.

Presentation of Claim: The Compensation Act provides that all original claims for compensation for disability or death shall be made within sixty days of injury or death; for any reasonable cause shown, the bureau may allow original claims for compensation for disability or death to be made at any time within one year. The claim involved was not filed within the sixty-day period but was filed with the bureau within one year after the death of deceased. The bureau, concerning this claim, permitted it to be filed, acted upon it, and denied it, only for the reason that the death of the deceased was not due to injury sustained in the course of employment. We are satisfied that the opinion of the bureau concerning the filing of the claim, upon this record, is without merit.

Sufficiency of Proof that Deceased Received any Injury: The means or method by which the deceased was injured externally does not appear by direct evidence. His declarations establish that he received a blow more or less violent by his head coming in contact with an iron pulley. The fact of the injury is established by his subsequent conduct and by evidence of the local doctor of a slight swelling on the scalp, sensitive to the touch. Whether this resultant condition was due to a latent glioma or was caused or superinduced by external violence was a question of fact. Under the circumstances, we are of the opinion that the declarations made to the manager, as a part of the res gestæ, were admis-

sible. Puls v. Grand Lodge, A. O. U. W. 13 N. D. 559, 572, 102 N. W. 165. It is certain in this record that the deceased appeared well and healthy before he was at work in this place under the elevator and that after he emerged therefrom his condition changed and thereafter he became and remained ill, until his death.

Sufficiency of Proof that Death Resulted from Injury Received: The fact that the deceased had a tumor designated as glioma is established. Also that this tumor serves to weaken arterial or blood vessels, whereby hemorrhages might occur and induce mortality. The doctors do not know how long this tumor may have existed. From the testimony of the doctors it does not appear probable that the blow received occasioned the glioma; yet, from their testimony, this glioma might have remained latent for an indefinite period, perhaps throughout decedent's ordinary life, and might have become malignant only through some external stress. All of them seem to agree that external violence might be a superinducing cause that occasioned the hemorrhage. Three of them testified to the effect that, pursuant to the symptoms, the diagnosis, and the previous history of the deceased, their opinion was that the hemorrhage was occasioned by external violence. In accordance with the testimony of the doctors, medical science is uncertain concerning the causes of this glioma. There is no violent disagreement among the doctors. All agree that it was either possible or probable that external violence was a superinducing cause of the hemorrhage. The record reveals that previously the deceased had been an active, healthy man. From his activities and his appearance, even his brain, excepting as the brain was exposed by microscopic examination, appeared to be a normal brain. Neither the record nor medical science, as afforded in the record, disclosed that this glioma was the efficient or the producing cause of the deceased's death. He received an injury; he became ill; and this illness progressed unto his death. The cause of his death could have been, and probably was, pursuant to the testimony of some of the doctors, the resulting and proximate effect of the injury received. Retmier v. Cruse, 67 Ind. App. 192, 119 N. E. 32; Indian Creek Coal & Min. Co. v. Calvert, 68 Ind. App. 474, 119 N. E. 519, 120 N. E. 709; note in L.R.A.1917D, 105. See § 3, chap. 162, Laws 1919; Laws 1921, chap. 141; Gilliland v. Ash Grove Lime & Portland Cement Co. 104

Kan. 771, 180 Pac. 793; Blackburn v. Coffeyville Vitrified Brick & Tile Co. 107 Kan. 722, 193 Pac. 351.

The Employment of the Deceased: The bureau earnestly maintains that the deceased was a contractor, not an employee; that he was carrying on an independent business in accordance with his own methods; that his relations with the exchange was that of a contractor and not as a servant. Under the Compensation Act, hazardous employment means any employment in which one or more employees are regularly employed in the same business. An employee means each person engaged in a hazardous employment under any appointment or contract of hire, but excluding any person whose employment is both casual and not in the course of the trade or business of his employer, etc. Laws 1919, § 2, chap. 162. State ex rel. Amerland v. Hagan, 44 N. D. 306, 175 N. W. 372, 375. Was the deceased an employee under this definitional statement? The record sufficiently discloses that the deceased was regularly employed as general repair man for the exchange. His employment, it is true, was intermittent; he was a carpenter: But, he worked regularly for the exchange whenever the exchange had carpenter work to do. At the time in question, the deceased had been engaged in this work for the exchange for a period of over forty days: He was performing work necessary in the conduct of the business of the exchange. He was paid by the hour. He received a check from the exchange for over $440. The manner of his work, the method of his pay, his general relations with the exchange, taken in conjunction with the assistance he received from other employees of the exchange, served to indicate that he was serving as an employee subject to the wishes and control of his employer. We are satisfied that the findings of the trial court should not be disturbed and that the evidence does not establish, as a matter of law, that the employment of the deceased was both casual and not in the course of the trade or business of the exchange, his employer. See Caca v. Woodruff, 70 Ind. App. 93, 123 N. E. 120; Tarr v. Heclar Coal & Coke Co. 265 Pa. 519, 109 Atl. 224; Utah Copper Co. v. Industrial Commission, 57 Utah, 118, 13 A.L.R. 1367, 193 Pac. 24; F. C. Gross & Bros. Co. v. Industrial Commission, 167 Wis. 612, 167 N. W. 809.

An Award in a Lump Sum: The bureau maintains that the power to make an award is conferred alone upon the bureau. The legislative

intent, of course, must be gleaned from the language of the act and the underlying purposes for which it was enacted. The act has incorporated provisions from many foreign acts and states. It is difficult, accordingly, to apply judicial interpretations of similar provisions in foreign jurisdictions, upon this act, peculiarly, in some respects, sui generis.

The act provides that, in case of death, or of permanent total, or of permanent partial disability, and if the bureau determines that it is for the best interest of the beneficiary, the liability for compensation to such beneficiary may be discharged by the payment of a lump sum. Sec. 3, H, chap. 141, Laws 1921 (Laws 1919, chap. 162). Otherwise, the act provides that compensation to a widow shall be paid until her marriage or death; compensation for a dependent child, until such child dies, marries, or reaches the age of eighteen years. § 3, G. A maximum is fixed for the compensation to be paid weekly. § 3, G. The conditional factors may be noted. Again, the act empowers the bureau, at any time, upon its own motion or on application, to review the award, and in accordance with the facts found on such review, to end, diminish, or increase the compensation previously awarded, or, if compensation has been refused, or discontinued, to award compensation. § 18. When an appeal is taken from the decision of the bureau, the court is empowered to determine two things: "The right of the claimant, and, if established, the fixing of the compensation within the limits prescribed in the act." § 17. This right of appeal, as may be noted, is limited. No right of appeal is granted from the recognition or allowance of a claim, or from the amount of an award made by the Bureau. In such cases, its determination is final. Otherwise, except as this limited right of appeal permits, the bureau has full power and authority to hear and determine finally all questions within its jurisdiction. § 17. The underlying purpose of the act is denominated to be the protection of injured workmen, their families and dependents and the provision of sure and certain relief; to that end all jurisdiction of the courts over personal injuries sustained by employees is abolished except as provided in the act. § 1. To accomplish these ends, a weekly method of disbursement is provided. § 2E, F, et seq. Protection is given to such compensation by rendering all assignments thereof void and by exemption of the same from all claims of creditors. § 22. The duty is imposed upon the bureau to collect, administer, and disburse the "fund."

To it, a large discretion is awarded. Its process and procedure is summary and simple: It is not bound by common law or statutory rules of evidence, nor generally by technical rules of procedure: It may make investigation in such manner as, in its own judgment, may be best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the act. § 3E. It thus has a continuing obligation and a continuing duty, after, as well as before, an award is made. This is properly so, in view of the conditional factors involved in an award. If the judgment of the court upon the amount of an award is the final and ultimate judgment, then, whenever an appeal is taken, this continuing duty and obligation of the bureau, concerning that claim and the award thereupon, is to that extent, abrogated. If the award in such case by the court is a lump sum, then the express power of discretion to so do is transferred from the Bureau to the Court, and the discretion of the bureau, as well as its continuing obligation and duty is thereafter abrogated. If every judgment of the court upon the amount of an award is thus final and ultimate, the court must reserve unto itself, a portion of this discretion and power granted to the bureau for the determination of the conditional factors, as they come into existence, and of increasing or decreasing the award, or, must deny and abrogate this discretion intended by the act to be exercised by the bureau. To make such constructions and interpretations of the Act would not be consonant with the underlying purposes of the act, and the continuing obligations, duties, powers, and discretions conferred, and intended to be conferred, upon the bureau.

Accordingly, we are of the opinion, that upon an appeal from the decision of the bureau, the court has the power to determine the right of the claimant and to fix the compensation within the limits prescribed in the act; that, after the determination of such right and of the compensation, the continuing obligations and duties of the bureau remain applicable in administering the right and in disbursing the compensation, pursuant to the act and pursuant to the powers and authority conferred upon the bureau. Further, that the express power to make a lump award, or to ascertain its necessity, is not conferred upon the court, and therefore, is not possessed. This does not mean that the bureau would possess, after such judgment, the right to deny or reverse the right of the claimant thus established upon appeal, but it does mean

that the bureau, after such judgment, may increase or diminish the award, or may award a lump sum, all pursuant to and consistent with the judgment rendered and the continuing obligations and duties imposed upon the bureau. It follows that the judgment must be modified so as to be consonant with this opinion. It is so ordered with costs of this court to the respondent.

CHRISTIANSON, JOHNSON, NUESSLE, and BIRDZELL, JJ., concur.

OLE OLNESS, Appellant, v. JAMES J. DUFFY and Percy D. Gage, Respondents.

(193 N. W. 113.)

Appeal and error — order for judgment not appealable.

An order for judgment is not appealable under Comp. Laws 1913, § 7841; appeal dismissed on the authority of Malherek v. Fargo, ante, 123, and other cases therein cited.

Opinion filed June 11, 1923.

Appeal and Error, 3 C. J. § 460 p. 611 n. 18.

Appeal from the District Court of McLean County, *Jansonius*, J.

Dismissed.

B. A. Dickinson, for appellant.

"The lien of an attachment on personal property of a bankrupt is not destroyed by a mere discharge of the debt secured by the lien, through a discharge under the present national bankruptcy act; and unless such lien is one which is itself declared void by said act it may be enforced through a modified form of judgment, as against the property against which the lien exists." Powers Dry Good Co. v. Nels Nelson, 10 N. D. 380.

"A discharge in bankruptcy leaves intact all liens except those specially stricken down by the bankruptcy act, the effect of a discharge being to release the personal liability only. Such discharge does not effect vested liens upon property acquired more than four months prior

to the proceedings in bankruptcy and the same may be enforced after a discharge is granted." John Leslie Paper Co. v. Wheeler, 23 N. D. 477; 3 R. C. L. 142; 7 C. J. 410; 42 L.R.A.(N.S.) 292.

"The rule that a mortgagor cannot set up an after-acquired title as against his mortgagee is not affected by the fact that he was declared a bankrupt before his acquisition of the outstanding title and has been discharged. This is true even though he acquires the outstanding title with money earned since his discharge. The covenants in his mortgage are not discharged by bankruptcy." L.R.A.1918B, 768; citing 10 Ala. 504; 21 N. D. 483.

"The discharge does not affect a mortgage previously made by the bankrupt for a valuable consideration on a contingent interest which subsequently vests." Olephant v. Eckerly, 36 Ark. 69, cited 7 C. J. 411.

"Where a mortgagor after his bankruptcy acquires a different title to the property, the bankruptcy proceedings did not prevent the newly acquired title from being considered as if it had been vested in the mortgagor at the time that the mortgage was executed." 76 Ind. 499, cited in 7 C. J. 411.

"A discharge in bankruptcy of one who has assigned his expectancy in an estate to secure a loan does not destroy the lien which equity imposes upon the property although the legal obligation to pay the debt is terminated." Bridge v. Kedon, 163 Cal. 493, 126 Pac. 149, 43 L.R.A.(N.S.) 404.

"Most of the cases that have passed under the effect of a discharge in bankruptcy upon an assignment of wages to be earned in the future under an existing contract terminable at will are cited in Citizens Loan Asso. v. Boston & M. R. Co.; and, as shown therein, there is a decided difference of opinion upon the question." Note in 14 L.R.A.(N.S.) 1025.

1. "An assignor's discharge in bankruptcy will not affect the right of a creditor who has not proved his claim to enforce a valid assignment of future wages under an existing employment, given without fraud, to secure a valid subsisting debt."

2. "An assignment of future wages under an existing employment is a lien, within the meaning of a bankruptcy statute preserving liens given in good faith and for a present consideration from the operation

of the act." Citizens Loan Asso. v. Boston & M. R. Co. 14 L.R.A. (N.S.) 1025.

"We have considered the contrary authorities of Re West (D. C.) 128 Fed. 205; Re Home Discount Co. (D. C.) 147 Fed. 538, and Leitch v. Northern P. R. Co. 95 Minn. 35, 103 N. W. 704, with the deference to which they are entitled. They proceed upon considerations as to the effect of an assignment of wages and the rights vesting thereunder in the assignee as well as public policy pointed out in the latter case, which are inconsistent with what we conceive to be sound reasoning, and opposed to the numerous decisions of this court cited concerning rights acquired under assignments of wages. In the absence of a decision to the same effect by the Supreme Court of the United States, we cannot accede to them as authoritative." 14 L.R.A.(N.S.) 1028; Mallin v. Wenham, 209 Ill. 252, 65 L.R.A. 602; Gregg v. Semford, 24 Ill. 17, 76 Am. Dec. 719; Edwards v. Peterson, 80 Me. 367.

"It is scarcely necessary to say that, if such an equitable charge in rem can be enforced against the assignor in bankruptcy, it must necessarily be enforceable against the bankrupt himself after his discharge, and especially in cases where the property which is subject to the charge did not get into the possession of the assignee, because at that time it had not been acquired by the bankrupt." Bridge v. Kedon, 43 L.R.A. (N.S.) 404.

E. T. Burke, for respondent.

"It is one of the primary canons of construction that all statutes shall receive reasonable interpretation, if the meaning of the statute is at all doubtful." 3 R. C. L. 117, 215, 236, ¶¶ 14, 51, 66.

"And in a majority of cases the mortgage contained covenants, and it was held, where a mortgage of land to which the mortgagor has no title or an imperfect title thus contains covenants, a title subsequently acquired by the mortgagor inures to the benefit of the mortgagee. The mortgagor is estopped by the covenants contained in the mortgage to assert a title as against the mortgagee or those claiming under him." L.R.A.1918B, 760, note b.

"Under these circumstances the debt of the husband was extinguished by his discharge in bankruptcy and thereupon her mortgage which was but a security for that debt disappeared with it and could not attach to these lands upon his subsequently purchasing them; and the

appellees claiming as his creditors under the mortgage from him to them were entitled to set up his discharge of bankruptcy against any lien claimed by her on the lands."

PER CURIAM. The notice of appeal in the instant case is to the effect that the plaintiff appeals from a part of an order made which orders that the defendants are entitled to the possession of the wheat described in the proceedings and which concludes with the statement "Let judgment be entered accordingly." The appeal is clearly from a part of the order for judgment. Under the statute and under numerous decisions of this court, such an order is not appealable. Comp. Laws 1913, § 7841; Malherek v. Fargo, ante, 123; 190 N. W. 176; Dibble v. Hanson, 17 N. D. 21, 114 N. W. 371, 16 Ann. Cas. 1210; Lough v. White, 13 N. D. 387, 100 N. W. 1084; Weber Case, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523; Field v. Great Western Elevator Co. 5 N. D. 400, 67 N. W. 147. There being nothing before this court for review, it follows that the appeal must be dismissed. It is so ordered.

BRONSON, Ch. J., and BIRDZELL, CHRISTIANSON, and JOHNSON, JJ., and KNEESHAW, Dist. J., concur.

NUESSLE, J., not participating, District Judge W. J. KNEESHAW, sitting in his stead.

CASPER F. RAASCH, Appellant, v. GEORGE O. GOULET, Respondent.

(194 N. W. 380.)

Money received — evidence held insufficient to sustain verdict for plaintiff in action for money received.

Action for money had and received. The record examined, and *held*, that on the showing made, by evidence introduced and offers of proof, viewing the same in the light most favorable to plaintiff, no recovery can be had.

Opinion filed June 16, 1923.

Money Received, 27 Cyc. p. 883 n. 35.

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

Action for money had and received.

Judgment of dismissal ordered and entered.

Plaintiff appeals.

Affirmed.

William Lemke and *Thomas Sullivan,* for appellant.

"Whether the action is in tort or contract must be determined by a construction of the complaint." 1 C. J. 1020, 1031.

"Where one person fraudulently procures money of another the law will imply a promise to repay it, and the injured party need not sue in tort, but may sue in assumpsit for money had and received. . . . Having money that rightfully belongs to another, creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise to pay; and the action always sounds in contract." Byxbie v. Wood, 24 N. Y. 607.

"Even where there is no express contract and the cause of action arises out of tort, the tort may be waived, and an action of contract brought in all cases where the law will imply a promise on the part of the wrongdoer to reimburse the party injured by his act." Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133.

"The right of the plaintiffs to waive their cause of action in tort and found their right to recover upon contract whether express or implied is unquestionable and there is no power either in the defendant or in the court to compel them to proceed upon the tort. . . . Conceding, however, that the complaint is doubtful and uncertain and states a cause of action maintainable on either theory, the only consequence of this would be to authorize the court to require plaintiffs to elect between such theories and to declare that upon which they choose to rely." People v. Wood, 121 N. Y. 522; Schick v. Suttle, 94 Minn. 135; Donn v. Finnegan, 53 Minn. 112.

Combs & Ritchie, for respondent.

"It is a fundamental principle that an agency can only exist by the will of the principal and the consent of the agent, and it is therefore essential to the formation of the relation that the principal shall either expressly or by implication, from conduct for which he is responsible, appoint the agent, and that the agent shall in some way accept the appointment. The law indulges in no naked presumption that an agency

exists, but, instead, presumes that a person is acting for himself and not as agent for another." 31 Cyc. 1638.

"Proof of fraud must be clear and convincing and be evidenced by facts which are inconsistent with an honest purpose." Reitsch v. McCarty, 35 N. D. 555, 160 N. W. 694.

"Fraud is not proven when good faith or an honest mistake may be as rationally and reasonably inferred from the evidence as fraud." Steinbach v. Bauclair, 38 N. D. 223, 164 N. W. 672.

"Fraud is never presumed, but must be affirmatively proved." 20 Cyc. 108.

"The fiction of an implied promise upon which an action of assumpsit may be founded will not be indulged, and a promise will not be implied where the defendant instead of receiving money as the money of the plaintiff for his use, claims and receives it as his own." 2 R. C. L. 35, note 5 and cases cited.

"He that answereth a matter before he heareth it is folly and shame unto him." Proverbs, chap. 18, verse 13.

NUESSLE, J. The plaintiff Raasch contracted to buy certain land belonging to the defendant Goulet. Plaintiff went into possession. He bought seed grain from the defendant which was sowed on the land. Later he was dispossessed by the defendant who appropriated the crop. Plaintiff then brought this action for money had and received to recover the money paid for the seed.

More fully stated, the facts as the same appear from the record, taking into consideration the offers of proof as made by the plaintiff, are substantially as follows: The plaintiff in 1915 owned land in Nebraska. The defendant Goulet owned land in Barnes county, North Dakota. The Lund Land Company, hereinafter referred to as the Lunds, was a real estate concern having offices at Valley City. In October, 1915 the plaintiff entered into a preliminary contract with the Lunds whereby he contracted to purchase from them for a stated consideration of $167,700, land in North Dakota, aggregating 2,580 acres, then in fact belonging to the defendant, and as a part of the consideration therefor he transferred or agreed to transfer to them his Nebraska land. The defendant had no knowledge of this transaction, neither had he sold the land or listed the same with the Lunds for sale at that time, nor

in any manner authorized them to act in the sale for him of the same. Thereafter and in February, 1916, the defendant entered into a contract with the Lunds for the sale of 3,220 acres of land for a stated consideration of $120,765, including that the subject of the Lunds' contract with the plaintiff. The contract for the sale of this land, however, was not turned over to the Lunds by the defendant, but was left in escrow with his attorney. The defendant surrendered possession of the property to the Lunds under this contract. On March 31, 1916 the Lunds entered into a final contract for deed with the plaintiff carrying out the terms of the October contract, and the plaintiff transferred his Nebraska land to them. The Lunds immediately mortgaged the property conveyed to them and appropriated the funds thus obtained. At the time of the consummation of the transaction between the plaintiff and the Lunds, it was arranged that they should procure tenants for the plaintiff for the season of 1916 on the North Dakota land bought by him, and the plaintiff should likewise procure tenants for them for the Nebraska land. This was done. The Lunds, acting for the plaintiff and in accordance with their arrangement with him, placed four tenants on the land he had bought. They advised the plaintiff that it would be necessary for him to procure seed, and that such seed could be had on the premises from the defendant. The plaintiff instructed them to procure the seed. He himself examined some of the seed and it was satisfactory. The seed was furnished the tenants. The plaintiff paid the defendant therefor. At the time that the seed was purchased, the defendant knew who was buying it and for what purpose, knew that the plaintiff had entered into some arrangement to buy the property from the Lunds, and advised the plaintiff that he, the defendant, had sold it to the Lunds, but did not say that he had given only a contract and not a deed. The defendant also introduced the plaintiff to some of the neighbors as the new owner. The seed was sowed on the land by the tenants according to plaintiff's directions. Some crop grew therefrom. This was harvested by the tenants. Subsequently the defendant canceled his contract with the Lunds. The plaintiff was not served with any notice of such cancelation. The defendant made claim to certain insurance money paid for damage to buildings on the land, and later dispossessed the tenants of the plaintiff. This was the first notice that the plaintiff had of the defendant's claim to the premises

adverse to him. The crop was harvested and threshed, and the defendant took the landlord's share. It does not appear, however, what those crops were or what they were worth. The plaintiff received none of the proceeds. The defendant has at all times since been in possession and use of the land under claim of ownership.

Plaintiff brings this action to recover the moneys paid by him for the seed, contending that the Lunds were the agents of the defendant in the whole transaction; that there was collusion and fraud on the part of the Lunds and the defendant whereby plaintiff was induced to procure and pay for the seed; that he has had no benefit from the transaction, and the defendant has had all the benefits thereof, and ought in equity and good conscience to account for the money so paid by plaintiff; and that, therefore, by reason of these facts, he is entitled to recover as for money had and received.

After establishing the facts above stated by evidence or by offers of proof, the plaintiff rested his case. The defendant moved for a directed verdict in accordance with the statute. The court denied the defendant's motion and of his own motion ordered that the case be dismissed on the ground that the plaintiff had not established a cause of action for money had and received. Judgment was thereafter entered on this order. From the judgment and the order thus made, the plaintiff appeals.

The appellant in his brief states *that all the facts entitling the plaintiff to recover upon his theory of the case were either submitted or offered in evidence.* So that for the purposes of deciding this appeal, the sole question is as to whether or not upon the showing as thus made by the plaintiff and appellant, the court erred in holding that he had not made such a case as to warrant a recovery for money had and received. There appears to be no contention between the parties as to the correctness of the rule which the appellant contends for, that is, that an action in assumpsit for money had and received lies whenever one person has received or has in his possession money which he is not in equity and good conscience entitled to retain. Their difference arises over the question of whether or not that rule can be invoked under the facts thus established. The trial court held that it could not; that there was not such a showing as would warrant the plaintiff in receiving the relief demanded in the action brought.

After a careful consideration of the whole record, taking into consideration the offers of proof as well as the matters otherwise established, and viewing the whole in the light most favorable to the plaintiff, it is clear to us that the trial court was right in holding that the plaintiff was not entitled to recover as for money had and received. While it is true, as the plaintiff contends, that the action is not an action in tort on account of fraud; nevertheless to sustain the action, the facts must be such as will establish fraud or iniquitous dealing on the part of the defendant, such as will establish an equitable right in the plaintiff to that which he seeks to recover. Plaintiff's theory is that he has waived the tort and is suing on the implied contract. Necessarily there must be a tort, or there can be no waiver. The defendant sold and the plaintiff bought the seed. Neither party ever contemplated that the defendant should repay to the plaintiff the purchase price paid by him. There are no facts established from which such an implication can arise. We do not believe that there is that in the record, considered as above indicated, which will warrant any finding of fraud with reference to any part of the transaction, or any bad faith on the part of the defendant toward, or intent to mislead or deceive, the plaintiff. The plaintiff contends that the Lunds, in entering into the transactions with the plaintiff, were acting as agents for the defendant; that the land transferred by the plaintiff to them was transferred to them for the defendant, and that any moneys that may have been obtained by mortgaging these lands were obtained for the defendant; that by reason of the conduct of the defendant, plaintiff was falsely led to believe that he was the owner of the land, and under that belief he bought the seed. We are of the opinion, however, that there is nothing in the record to justify these contentions. There is no proof of agency, unless it may be inferred or implied from the facts as stated. We do not believe that they justify any such implication or inference. It may be that the defendant had no right to dispossess the plaintiff or his tenants. It may be that the defendant was not entitled to the crops grown from the seed furnished by the plaintiff or any part of the same. It may be that he converted these crops. However, those questions are not for determination in this action or at this time. This action is to recover the money paid for the seed, and not for the value of the crops. If the plaintiff has suffered injury by reason of any wrongful acts of the defendant in dispossessing

him or in appropriating the crop, he has his right of action on account thereof; but on the record as made here, he is not entitled to recover as for money had and received on account of his purchase of the seed from the defendant.

The judgment must be affirmed.

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

BOTTINEAU COUNTY BANK, a Corporation, Respondent, v. GRANT STAFFORD and Bella Stafford, Appellants.

(194 N. W. 393.)

Principal and surety — demand note taken by creditor from principal debtor not extension of time such as will discharge surety for same indebtedness.

1. A demand note taken by the creditor from the principal debtor is not a contract for an extension of time such as will discharge the obligation of a surety for the same indebtedness.

Principal and surety — mortgage creditor not required to exhaust remedies on mortgage or judgment before proceeding against surety, at peril of exonerating him.

2. In the absence of a notice, under § 6683, Compiled Laws of 1913, the creditor is not required to proceed originally against the principal debtor, and, where he holds a real estate mortgage securing indebtedness and, where he obtains judgment against the principal debtor, he is not required to exhaust remedies on the mortgage or the judgment before proceeding against the surety at the peril of being held to have exonerated the surety under § 6681, Compiled Laws of 1913.

Opinion filed June 20, 1923.

Principal and Surety, 32 Cyc. p. 92 n. 98; p. 212 n. 34.

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

Note.—Demand note as extension of time releasing surety, see 21 R. C. L. 1025; 5 R. C. L. Supp. 1181.

Affirmed.

J. J. Weeks, for appellants.

W. H. Adams, for respondent.

BIRDZELL, J. This is an appeal from a judgment for $1,736.65 upon a promissory note. The case was tried in the district court of Bottineau county before a jury and a verdict returned in favor of the defendant. Subsequently the plaintiff moved for a judgment non obstante which motion was granted. The facts are as follows: The defendants gave to the plaintiffs their note for $1,230, dated November 9, 1918 and due October 1, 1919, which they secured by giving a real estate mortgage. Soon after giving the note the defendants sold the land to one Lagerquist who assumed and agreed to pay the mortgage indebtedness. Lagerquist subsequently, after the maturity of the defendants' note, gave to the plaintiff a demand note of $1,400, dated May 22, 1920, and covering the same indebtedness. Plaintiff subsequently brought action on this note and obtained judgment. This judgment has not been paid, nor the real estate mortgage foreclosed. In defense to this action, brought on the original note, the defendants allege an agreement between the plaintiff and Lagerquist extending the time of payment of the obligation without the knowledge or consent of the defendants, the failure to collect the judgment against Lagerquist and the failure to foreclose the mortgage. Upon this appeal it is argued that, as there is evidence supporting the defenses alleged in the answer, the trial court erred in setting aside the verdict of the jury and ordering judgment for the plaintiff.

The appellants' contentions upon this appeal are grounded upon a violation of the rights of the defendants as sureties. It is claimed that the assumption of the mortgage indebtedness by Lagerquist with the knowledge of the plaintiff resulted in creating the relationship of principal and surety between Lagerquist and the defendants and in imposing upon the plaintiff the obligation to respect the rights of the defendants as sureties. For the purpose of this opinion it may be assumed that the plaintiff was obliged to treat the defendants as sureties. Leach v. Nelson, 48 N. D. 1046, 189 N. W. 251; 3 Pom. Eq. Jur., 4th ed. § 1206; 1 Brandt, Suretyship & Guaranty, 3d ed. §§ 1 and 47. These rights, it is claimed, were violated by the plaintiff in taking a demand

note from Lagerquist, in reducing it to judgment and failing to collect the judgment and in failing to foreclose the real estate mortgage. None of these acts, in our opinion, involve any violation of the rights of the defendants as sureties. No right has been in any way impaired or suspended by anything the plaintiff has done. The taking of the demand note from Lagerquist did not operate to suspend the right of the sureties to pay the debt, for which they were liable primarily, and to pursue recourse by subrogation against Lagerquist. The latter's note, being a demand note, was not a contract for an *extension* of time and consequently afforded no obstruction to an immediate action by the creditor to recover the debt. Shuman v. Citizens State Bank, 27 N. D. 599, L.R.A.1915A, 728, 147 N. W. 388; Mercantile Trust Co. v. Donk (Mo.) 178 S. W. 113; 21 R. C. L. 1025.

The record does not show that any steps were taken by the sureties to require the creditors to proceed against the principal debtor under § 6683 of Comp. Laws, of 1913; nor does it show that, had the defendants performed their obligation by paying their note, they would have been embarrassed in any way through any act of the creditor. So far as this record shows, they could have availed themselves of all the security the creditor held at any time. Brioschi-Minuti Co. v. Elson-Williams Constr. Co. 41 N. D. 628, 172 N. W. 239. Thus, they were not exonerated under § 6681 of the Compiled Laws. In the absence of a notice, under § 6683, the creditor is not bound to proceed originally against the principal debtor nor to foreclose on securities held; but, where the form of obligation is such that the sureties may be sued in a separate action, the creditor may proceed against them in the first instance. 1 Brandt, Suretyship & Guaranty, 3d ed. § 2.

The judgment appealed from is affirmed.

BRONSON, Ch. J., and NUESSLE, CHRISTIANSON, and JOHNSON, JJ., concur.

REGENT GRAIN COMPANY, a Corporation, Appellant, v. WM. I. SADLER, Nellie B. Sadler, E. B. Bergum, Anna Bergum, Sadler Coal Mining Company, a Corporation, and The Equity Coal & Light Company, a Corporation, Respondents.

(194 N. W. 660.)

Corporations — mechanic's lien — evidence held to sustain finding that plaintiff in mechanic's lien action not entitled to personal judgment; finding that corporation had not assumed its grantor's debt sustained.

In an action to foreclose a mechanic's lien where the trial court found no valid lien to exist by reason of alterations made in the date of making an owner's consent, to a lien, it is *held*, for reasons stated in the opinion, that the findings of the trial court are supported by the evidence and that plaintiff is not entitled to a personal judgment against the contesting defendant for the amount of the debt involved.

Opinion filed June 20, 1923.

Corporations, 14 C. J. § 2982 p. 858 n. 97; Mechanics' Liens, 27 Cyc. p. 416 n. 71.

In District Court, Hettinger County, *Lembke*, J.

Action to foreclose a mechanic's lien.

Plaintiff has appealed from the judgment and an order denying a motion for a new trial.

Affirmed.

Jacobsen & Murray, for appellant.

P. B. Garberg and *W. F. Bruell*, for respondents.

BRONSON, Ch. J. This is an action to foreclose a mechanic's lien. Plaintiff has appealed from a judgment adjudging the mechanic's lien invalid. The facts are: One Bergum was the owner of a quarter-section of land in Hettinger county underlaid with coal. On June 3d, 1916, Bergum made a contract for the sale of this land with one Sadler. Sadler negotiated with plaintiff for the procuring of lumber to build certain buildings upon the land. Between June 3d, 1916, and February 12th, 1917, plaintiff furnished lumber and material to construct a dwelling house and several other small buildings upon this land. The amount of the materials so furnished, $801.93, was charged to Sadler. On Feb-

ruary 26th, 1917, there was filed in the clerk's office a mechanic's lien upon the land and buildings for this material; also, an owner's consent which contained an acknowledgment by Sadler that he made a contract on February 16th, 1916, with plaintiff and consented that a lien might be filed as security for the materials furnished. This was dated February 16th, 1916, and purported to show that Sadler acknowledged receipt thereof February 16th, 1916, at Regent, North Dakota. This consent bears evidence of alteration in that the figure "6" for the year 1916, as it appears in three different places, has been written over an apparent erasure of the figure "7." On April 21st, 1917, Sadler gave to one Childs an option for one year from April 18th, 1917, to purchase this land. The Sadler Coal Mining Company was incorporated. Sadler and Childs were officers and directors thereof. It received, on May 14th, 1917, an assignment of Childs' option, on August 28th, 1917, a conveyance of Sadler's interest, and on October 14th, 1918, a deed from Bergum. On April 14th, 1919, this Sadler Coal Mining Company conveyed by warranty deed the land to the defendant Equity Coal and Light Company, another subsequently formed corporation. This action was instituted in September, 1921, against Sadler and his wife, the Sadler Coal Mining Company, and the Equity Coal and Light Company. The Equity Coal and Light Company alone answered, denying the validity of the lien. After trial to the court, findings of fact were made to the effect that plaintiff furnished these materials to Sadler to erect certain buildings upon the land; that on February 16th, 1917, plaintiff procured the consent of Sadler to the filing of a mechanic's lien which was subsequent to the furnishing of all materials for the buildings; that the year 1917 in the owner's consent had been changed to 1916, and that the true date of making such consent was February 16th, 1917; that, further, from an abstract of title which describes a notice of intention to file a lien, the date of such owner's consent was February 16th, 1917. The trial court concluded that plaintiff had failed to comply with the statutory provisions and possessed, therefore, no valid lien. Judgment was entered accordingly. Subsequently, plaintiff made a motion for a new trial upon grounds of newly discovered evidence and surprise concerning the fact of this change in the date. This motion was denied.

Sadler testified to the effect that upon the sale of this land to the

Sadler Coal Mining Company the latter assumed and agreed to pay this mechanic's lien; that an abstract was furnished and that the lien was shown on this abstract and the attention of its officers called thereto; that one Childs, the general manager and an officer of this mining company, agreed to pay off the lien. Some officers of the plaintiff likewise testified to the effect that Childs and another officer of this Sadler Coal Mining Company had agreed to pay this lien. Mr. Childs testified to the effect that he was an officer of the Sadler Coal Mining Company and is now the general manager of the defendant Equity Coal and Light Company. He denied any agreement to ever assume or pay this lien in behalf of the Sadler Coal Mining Company. He admitted that an abstract of title was furnished concerning the title to the land. This abstract was produced and certain items thereof introduced into evidence. One of these items disclosed a notice of intention to file a mechanic's lien against Sadler in favor of plaintiff, dated February 16th, 1917.

The plaintiff contends that the trial court erred in finding that the written consent filed by Sadler had been changed and in determining that no lien existed; further, that it was error to receive in evidence portions of the abstract and that, in any event, plaintiff was entitled to a personal judgment against defendant Equity Coal and Light Company by reason of its having assumed Sadler's debt. We are of the opinion that the objection made concerning the abstract is without merit. In view of the testimony of Sadler concerning the abstract furnished, it was made admissible as a part of the res gestæ. Furthermore, as this action was tried to the court, the evidence which the abstract disclosed could have been otherwise secured if specific objection had been made. The clerk of the district court was a witness in this case. We are further of the opinion that the evidence is insufficient to warrant this court in finding that this defendant, the Equity Coal and Light Company, assumed or agreed to pay Sadler's debt. The other defendants have not appeared and are in default. The findings and order of the trial court are sustained by the evidence. The judgment is affirmed with costs to respondent.

CHRISTIANSON, BIRDZELL, NUESSLE, and JOHNSON, JJ., concur.

ELLA R. COUGHLIN, as Administratrix, Respondent, v. ÆTNA LIFE INSURANCE COMPANY, Appellant.

(194 N. W. 661.)

Judgment — new trial — trial court without authority to entertain motion for judgment notwithstanding or for new trial after time for appeal expired, unless proceedings commenced within limitations.

1. Following Bovey-Shute Lumber Co. v. Donahue, 43 N. D. 247, and prior decisions, it is *held* that under § 7966, Comp. Laws 1913, an action is terminated when the time for an appeal from the judgment has expired; and the trial court has no authority thereafter to entertain a motion for judgment notwithstanding the verdict or for a new trial, over the objection of the adverse party, unless the final character has been suspended by proceedings commenced within the time allowed by law for appeal from the judgment.

Judgment — new trial — final character of judgment not suspended because of motion for directed verdict.

2. The final character of the judgment is not suspended under the provisions of chapter 133, Laws 1921, because a motion for a directed verdict is made upon the trial of the cause.

Judgment — new trial — record held to show that motion for judgment notwithstanding or for new trial not made within time allowed for appeal from judgment.

3. In the instant case defendant contends that a motion for judgment notwithstanding the verdict or for a new trial was made, and, in effect, submitted within the time allowed for appeal from the judgment. For reasons stated in the opinion this contention is not sustained.

Opinion filed June 23, 1923.

Judgments, 33 C. J. § 117 p. 1187 n. 77 New; p. 1188 n. 80 New; New Trial, 29 Cyc. p. 928 n. 60.

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

Defendant appeals from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

Affirmed.

Lawrence, Murphy & Nilles, for appellant.

"If a motion is made within that time and continued by the consent of the parties or by action of the court until a later date, then the final character of the judgment is suspended." Gohl v. Bechtold, 37 N. D. 147.

"An application for a new trial on the judge's minutes is a motion. Cohen v. Krulewitch, 81 N. Y. App. Div. 147, 80 N. Y. Supp. 689." 28 Cyc. p. 4.

"A motion is properly an application for a rule or order, made viva voce to a court or judge. It is distinguished from the more formal application for relief by petition or complaint." 41 Cal. 650.

"The motion is not made until it is submitted to or brought within the breast of the trial court and some affirmative action taken thereon either by the court or the adverse party. The successful party cannot by his own act and by the mere service of a notice of hearing of a proposed motion for a new trial at such future time as he may see fit to designate, suspend and keep in abeyance the final and conclusive character of the judgment." Gohl v. Bechtold, 37 N. D. 147.

"The careful practitioner will either prepare and file his motion in writing, stating the grounds thereof, or have the same entered in the minutes. This is not necessary, however. The motion may be made orally. Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299." 28 Cyc. 4.

"A motion made in open court is equivalent to a written motion in the office. Seidel v. Hurley, 1 Woodw. 352." 35 Am. Dec. 3063.

"The grounds of the motion are often required to be stated in writing and filed. In practice the form of the application itself is often reduced to writing and filed. But making out and filing the application itself is not to make the motion." 41 Cal. 650. Taylor v. Northern Electric Ry. Co. (Cal.) 148 Pac. 545; Williams v. Hawley (Cal.) 77 Pac. 762.

"If a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. Aspen. Min. etc., Co. v. Billings (1893) 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 196; Voorhees v. John T. Noye Mfg. Co. (1894) 151 U. S. 135, 38 L. ed. 101, 14 Sup. Ct. Rep. 295; Northern P. R. Co. v. Holmes (1894) 155 U. S. 137, 39 L. ed. 99, 15 Sup. Ct. Rep. 28; Kingman v. Western Mfg. Co. (1898) 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786.

"The six months' time does not begin to run until a motion for a new trial, filed in due time, is finally disposed of. Alexander v. U. S.

(C. C. A. 9th Cir.; 1893) 57 Fed. 828; Louisville Trust Co. v. Stockton (C. C. A. 5th Cir.; 1896) 41 U. S. App. 434, 18 C. C. A. 408, 72 Fed. 1." Schumacher v. N. Ry. Co. 23 N. D. 236.

Notice of intention to move for a new trial may be waived. Gibson v. Berryman, 12 Cal. App. 330, 111 Pac. 926.

When both parties by stipulation waived notice of intention to move for a new trial, the court had jurisdiction to order a new trial. Id.

One who appears at the time and place set for a hearing of the motion for a new trial, and orally agrees to the brief of evidence filed with the motion, but who, after the judge has corrected and approved the brief of evidence moves to dismiss the motion for want of service, waives formal service of the motion. Summerford v. Kinard, 8 Ga. App. 253, 68 S. E. 955.

Where attorneys for the respective parties have signed a stipulation waiving notice of the time and place of hearing and passing upon a motion for new trial, the judge is justified in passing on the same without notice to the adverse party. Buckle v. McConaghy, 12 Idaho, 733, 88 Pac. 100.

"Service of notice of intention to move for a new trial may be waived." Curn v. Perkins, 40 Mont. 588, 107 Pac. 901.

"A valid stipulation concerning any matter properly before the court acts as an estoppel upon the parties thereto and is conclusive of all matters necessarily included in the stipulation." 36 Cyc. 1292.

"If a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts therein to his prejudice, the former is estopped, as against the latter to deny that the state of facts does in truth exist." 21 C. J. p. 1060.

" 'Estoppel' by silence arises where a person who by force of circumstances is under a duty to another to speak refrains from doing so and thereby leads the other to believe in the existence of a state of facts in reliance upon which he acts to his prejudice." 21 C. J. p. 1061.

"To deny appellant the means of properly presenting his appeal is in effect to defeat his right of appeal, and a construction so drastic as to produce such result is usually applied only in cases where the appellant is acting in bad faith or is guilty of gross laches."

The general rule laid down in the note to Northwestern Mut. L. Ins. Co. v. Neafus, 36 L.R.A.(N.S.) 1211, where the early cases upon the

question under consideration are gathered, to the effect that mere delay in passing upon an application for insurance cannot be construed in an acceptance by the insurer, is supported by the result reached in Dorman v. Connecticut F. Ins. Co., and is also supported by the only other case which has been disclosed passing upon the point since the writing of the note referred to.

Thus in Shawnee Mut. F. Ins. Co. v. McClure, 39 Okla. 535, 49 L.R.A.(N.S.) 1054, 135 Pac. 1150, where a soliciting agent of limited authority did not mail an application and the premium for fire insurance until four days after he received them, and an investigation of the risk was being made by the insurer when the property was burned two days after the application was forwarded, the court said that it could not be contended that the insurer held the application and premium so long, or otherwise conducted itself in such a way in reference thereto, as to be tantamount to an acceptance, remarking that it was not necessary to cite the many cases holding that mere delay in accepting an application does not raise a presumption of acceptance. Dorman v. Connecticut F. Ins. Co. 51 L.R.A.(N.S.) 873–875.

Nor does the mere retention of both application and the premium, without any action thereon, constitute a contract of insurance. Van Arsdale v. Young, 21 Okla. 151, 95 Pac. 778; Northwestern Mut. L. Ins. Co. v. Neafus, 36 L.R.A.(N.S.) 1211, and note (145 Ky. 563, 140 S. W. 1026); 1 Beach, Ins. 499; 1 May, Ins. § 43H.

An unaccepted application for insurance, accompanied by the premium, although retained without notice of objection for five days after its date, and until the applicant has suffered the loss against which he desired the insurance, is not a contract of insurance.

Acceptance of an application may ordinarily be inferred from the retention and application of the premium; but when there is evidence reasonably tending to show that there was no such acceptance in fact, the law does not imply acceptance from such retention; and the adverse finding and judgment in the trial court are conclusive against appellant's claim of acceptance. Dorman v. Connecticut F. Ins. Co. 51 L.R.A. (N.S.) 874.

On the contrary, all the authorities we have examined hold that when an application for insurance is made, and a receipt given as in this case, for the first premium, mere delay in acting upon an application that,

if acted on, would be rejected, does not fix liability upon the company from its date, when the application is made, subject to approval by the company, and it is expressly provided in the contract that the insurance shall not relate back, unless the application is accepted. There is quite a difference between an offer to enter into a contract that may or may not be accepted, and a contract that has been executed.

Without extending the opinion in quoting from the cases, we refer to the following as fully supporting the principles announced; New York L. Ins. Co. v. Levy, 122 Ky. 457, 5 L.R.A.(N.S.) 739, 92 S. W. 325; Providence Sav. Life Asso. Soc. v. Elliott, 29 Ky. L. Rep. 552, 93 S. W. 659; Hills v. Penn Mut. L. Ins. Co. 28 Ky. L. Rep. 790, 90 S. W. 544; Commonwealth L. Ins. Co. v. Davis, 136 Ky. 339, 124 S. W. 345; Travis v. Nederland L. Ins. Co. 43 C. C. A. 653, 104 Fed. 486; Mutual L. Ins. Co. v. Young, 23 Wall. 85, 23 L. ed. 152; Mohrstadt v. Mutual L. Ins. Co. 52 C. C. A. 675, 115 Fed. 81; Alabama Gold L. Ins. Co. v. Mayes, 61 Ala. 163; Misselhorn v. Mutual Reserve Fund Life Assn. (C. C.) 30 Fed. 545; 1 Cooley, Briefs on Ins. p. 426; Northwestern Mut. L. Ins. Co. v. Neafus, 36 L.R.A.(N.S.) 1211–1217.

Mere delay in passing upon an application for accident insurance cannot be construed into an acceptance by the insurer. 15 A.L.R. 1021.

"In an action against an insurance company for negligently failing to issue an accident policy, evidence as to the short time that elapsed between the making of the application and the time the insured was injured, and of the circumstances, held to justify a direction of verdict for defendant." Glendy v. National Traveler's Ben. Asso. 163 N. W. 352.

(1) "Mere delay in passing upon an application for accident insurance cannot be construed into an acceptance by the insurer.

(2) "No cause of action against an insurance company for delay in issuing the policy accrues to the administrator of the applicant upon the latter's instant death by accident before the policy is issued." Bradley v. Federal L. Ins. Co. 295 Ill. 381, 129 N. E. 171.

"In Wilken v. Capital Fire Ins. Co., 99 Neb. 828, 157 N. W. 1021, the court followed the decision in the Duffy Case, three justices dissenting, and in the later case of Meyer v. Central States L. Ins. Co. 103 Neb. 640, 173 N. W. 578, 19 N. C. C. A. 700, the same court declined to follow the Wilken Case, and held that an action of tort would not lie

for a refusal to make a contract. In National Union F. Ins. Co. v. School Dist. 122 Ark. 179, L.R.A.1916D, 238, 182 S. W. 547, the supreme court held a cause of action for negligence could not be predicated upon mere delay in passing upon an application for insurance." 1 C. J. pp. 184, 185; Letson v. Brown (Colo.) 52 Pac. 290; 1 C. J. § 325.

Causes of action not accruing in party's lifetime. Neither at common law nor under the statutes providing for survival of causes of action can a cause of action be held to survive in favor of or against the personal representatives of a deceased person, unless it accrued in favor of or against the decedent in his lifetime. Letson v. Brown, 11 Colo. App. 11, 52 Pac. 287; Hollenback v. Berkshire R. Co. 9 Cush. (Mass.) 108; Dayton M. E. Church v. Rench, 7 Ohio St. 369; Central National Bank v. Hume, 128 U. S. 195, 43 L. ed. 370, 9 Sup. Ct. Rep. 41.

"The beneficiary is the only party who can sue for the breach of a contract of insurance made for him. Harrison v. McConkey, 1 Md. Ch. 34; Fire Ins. Asso. v. Merchants & M. Transp. Co. 66 Md. 339, 59 Am. Rep. 162, 7 Atl. 905; Mutual L. Ins. Co. v. Stibbe, 46 Md. 311; North American L. Ins. Co. v. Wilson, 111 Mass. 542; Maryland Mut. Benev. Soc. I. O. R. M. v. Clendinen, 44 Md. 429, 22 Am. Rep. 52; Ruppert v. Union Mut. Ins. Co. 7 Robt. 155; Hogle v. Guardian L. Ins. Co. 6 Robt. 567; Brantley, Contr. p. 64; Barbour, Parties, p. 27; Owings v. Owings, 1 Harr. & G. 489; Small v. Schaefer, 24 Md. 143; O'Neal v. School Comrs. 27 Md. 239; Siegman v. Hoffacker, 57 Md. 325; 1 Poe, Pl. & Pr. § 312; 1 Saunders, Pl. & Ev. 5th ed. p. 168; Hendrick v. Lindsay, 93 U. S. 140, 23 L. ed. 857; Eakle v. Smith, 27 Md. 480; Ripley v. Astor Ins. Co. 17 How. Pr. 444; Coates v. Pennsylvania F. Ins. Co. 58 Md. 172." Ferguson v. Phoenix L. Ins. Co. 35 L.R.A.(N.S.) 845; Modern Woodmen v. Headle, L.R.A.1915A, 580; Stemler v. Stemler (S. D.) 141 N. W. 780, 781; Ferguson v. Phœnix Mut. L. Ins. Co. 35 L.R.A.(N.S.) 848; Neary v. Metropolitan L. Ins. Co. L.R.A.1918F, 312.

Fisk, Murphy & Nash, for respondent.

"In this court respondents have urged the same objections which they made in the court below, viz.: That the trial court was without authority to entertain the motion for a new trial. Questions similar or analogous to the one now under consideration, have been considered by this court in the following cases: Grove v. Morris, 31 N. D. 8, 151 N. W. 779;

Higgins v. Rued, 30 N. D. 551, 153 N. W. 389; Garbush v. Firey, 33 N. D. 154, 156 N. W. 537; Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707; Gohl v. Bechtold, 37 N. D. 141, 163 N. W. 725. The rule announced in those cases is to the effect that, when the time for appeal for judgment has expired, the trial court has no authority thereafter to entertain a motion for a new trial under the objection of the adverse party, unless the final character of the judgment has been suspended by proceedings commenced prior to the time for appeal has expired. In applying this rule this court held in Skaar v. Eppeland, supra, that where a motion for a new trial is duly noticed to be heard at a date prior to the expiration of the time for appeal from a judgment, but continued by consent of the parties and finally submitted and determined after the time for appeal from judgment has expired, the final character of the judgment is suspended by such proceedings, and the court has jurisdiction to determine a motion for a new trial, even though the time for appeal from judgment has expired. But in Gohl v. Bechtold, supra, this court held that the final character of the judgment is not suspended, so as to authorize the court to entertain the motion, by the mere fact that notice of motion was served prior to the time in which an appeal from the judgment has expired.

"We have again reviewed these decisions and the statutory provisions involved, and are satisfied that the rulings are correct, and that the interpretations placed upon the statutes give effect to the intention of the lawmakers. The question in this case, therefore, is whether the final character of the judgment might be, and was suspended by the ex parte order entered by the court on August 12, 1918, extending the time in which to move for a new trial until October 1, 1918. If it was suspended then the court has authority to entertain the motion; if it was not it had no such power. We are of the opinion that the trial court had no such power. We are of the opinion that the trial court had no power to extend the time in which to move for a new trial beyond the date when the action ceased to be pending under the express terms of § 7966, Comp. Laws, 1913." Bovey-Shute Lbr. Co. v. Donahue, 43 N. D. 247.

"This is an appeal from an order of the district court of Ward county granting defendants' motion for a new trial. The action was tried to a jury, which returned a verdict in plaintiff's favor. On December 11,

1915, judgment was entered pursuant to the verdict, and notice of entry of the judgment was duly served upon the defendants' attorneys on that same day. From time to time orders were made extending the time within which to settle the statement of case and moved for a new trial. The last order of extension which was made on April 18, 1916, extended the time in which to settle the statement and move for a new trial to the 18th day of May, 1916. No further or additional extension of time was either applied for or granted. On June 9, 1916, the defendants served a notice of motion for a new trial, notice to be heard on July 1, 1916. When such motion came on to be heard, plaintiff appeared specially and filed written objections to the hearing thereof on the ground that more than six months had elapsed since the notice of entry of judgment had been served, and that as no appeal from the judgment had been taken the action was no longer pending. . . .

"In the case at bar the motion for a new trial was not noticed to be heard within the six-month period. *The mere service of notice of motion within that time does not suspend the final character of the judgment.* . . .

"The statutes furnish ample opportunity for persons aggrieved with a decision to obtain a review thereof. And in our opinion, a party aggrieved must move for a new trial before the time in which an appeal may be taken from the judgment has expired. After that time no proceedings can be instituted for a reversal of the judgment over the objections of the adverse party. If a motion is made within that time and continued by the consent of the parties or by an action of the court until a later date, then the final character of the judgment is suspended. The motion is not made until it is submitted to or brought within the breast of the trial court and some affirmative action taken thereon either by the court or the adverse party. *This unsuccessful party cannot, by his own act and by the mere service of a notice of hearing of a proposed motion for a new trial at such future time as he may see fit to designate, suspend and keep in abeyance the final and conclusive character of the judgment.*" Gohl v. Bechtold, 37 N. D. 141.

CHRISTIANSON, J. This is an action upon a life insurance policy. There was a trial to a jury, and a verdict in favor of the plaintiff. Judgment was entered pursuant to the verdict on February 3, 1922, and no-

tice of entry thereof served, February 4th, 1922. No appeal was taken from the judgment. On September 5th, 1922, defendant moved for judgment notwithstanding the verdict or for a new trial. Upon the hearing of the motion, plaintiff appeared specially and filed written objections to the consideration thereof on the ground that more than six months had elapsed since the service of notice of entry of judgment; that as no appeal had been taken from the judgment the action was no longer pending, and the judgment final and no longer subject to review upon such motion. The trial court made an order denying defendant's motion, and defendant has appealed.

Questions analogous to the one presented here have been considered by this court in several cases. See Grove v. Morris, 31 N. D. 8, 151 N. W. 779; Higgins v. Rued, 30 N. D. 551, 153 N. W. 389; Garbush v. Firey, 33 N. D. 154, 156 N. W. 537; Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707; Gohl v. Bechtold, 37 N. D. 141, 163 N. W. 725; Bovey-Shute Lumber Co. v. Donahue, 43 N. D. 247, 175 N. W. 205.

In Grove v. Morris, supra; Higgins v. Rued, 30 N. D. 551, 153 N. W. 389, and Garbush v. Firey, 33 N. D. 154, 156 N. W. 537, this court held that when notice of motion for a new trial is served more than six months after the date of service of notice of entry of judgment, i. e., after the time for appeal from the judgment has expired, the district court is without authority to entertain such motion over the objection of the adverse party.

In Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707, we held that where a motion for a new trial is duly noticed to be heard at a date prior to the expiration of time for appeal from the judgment, but continued by consent of the parties, and finally submitted and determined after the time for appeal from the judgment has expired, the final character of the judgment is suspended by the pending proceedings, and the court has jurisdiction to determine the motion for a new trial even though the time for appeal from the judgment has expired.

In Gohl v. Bechtold, 37 N. D. 141, 163 N. W. 725, we held that the mere service within the six-month period of notice of a motion for a new trial noticed to be heard after the expiration of such period does not suspend the final character of the judgment so as to authorize the court to entertain such motion.

In Bovey-Shute Lumber Co. v. Donahue, supra, we held that the

final character of the judgment is not suspended by an ex parte application for an extension of time in which to move for a new trial, and an ex parte order entered thereon.

The soundness of the principles announced and the conclusions reached in these several cases is not questioned. Appellant, in effect, concedes that if no motion at all was made within the six-month period, the judgment became final and the court inhibited from entertaining a motion for a new trial or a motion in the alternative for judgment notwithstanding the verdict or for a new trial. Appellant, however, contends that here the motion was made within the six-month period and that the final character of the judgment was suspended by such pending motion. In other words, appellant contends that a situation exists which brings the case within the rule announced in Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707. This contention is predicated upon two propositions:

(1) That under chapter 133, Laws 1921, a motion for a directed verdict is in effect held in abeyance until after the return of the verdict, and ipso facto suspends the final character of the judgment (within the rule in Skaar v. Eppeland, supra) until disposed of by ruling of the court, after the return of the verdict.

(2) That in this case there was a specific arrangement between the parties at the time the motion for a directed verdict was made that a motion for judgment notwithstanding the verdict would be made upon each and all of the grounds stated in the motion for a directed verdict; and that after the return of the verdict and the entry of the judgment the parties understood that the motion for a directed verdict should be treated as a motion for judgment notwithstanding the verdict, and that it was so treated by them.

These propositions will be considered in the order stated.

(1) Chapter 133, Laws 1921, reads as follows:

"When at the close of the testimony any party to the action moves the court to direct a verdict in his favor, and the adverse party objects thereto, such motion shall be denied and the court shall submit to the jury such issue or issues, within the pleadings on which any evidence has been taken, as either or any party to the action shall request, but *upon a subsequent motion,* by such moving party *after verdict rendered in such action,* that judgment be entered notwithstanding the verdict,

or if the jury have failed to agree upon a verdict, for a directed verdict, the court shall grant the same if, upon the evidence as it stood at the time such motion to direct a verdict was made, the moving party was entitled to such directed verdict. An order for judgment notwithstanding the verdict may also be made on a motion in the alternative form asking therefor, or if the same be denied, for a new trial. If the motion for judgment notwithstanding the verdict be denied, the supreme court, on appeal from the judgment, may order judgment to be entered, when it appears from the testimony that a verdict should have been so directed; and it may also so order on appeal from the whole order denying such motion when made in the alternative form whether a new trial was granted or denied by such order." (Italics ours.)

In our opinion the statute does not have the effect contended for by the appellant. On the contrary the language of the statute seems to negative the construction for which he contends. It will be noted that the statute specifically requires that a "subsequent motion," i. e., a motion after return of the verdict, be made. It is only when such motion is made that the statute says, "the court shall grant the same if, upon the evidence as it stood at the time the motion to direct a verdict was made, the moving party was entitled to such directed verdict." The mere fact that a motion for a directed verdict is made in no manner suspends the final character of the judgment. If no proceedings are had after the return of the verdict looking toward having the correctness of the verdict reviewed, the judgment entered pursuant to the verdict has the same finality as it has in cases where a motion for a directed verdict is not made.

(2) Upon the second proposition affidavits of counsel for the respective parties and certain correspondence which passed between them was submitted to the trial court. It was contended on the part of the defendant that it was understood between the parties that the motion for a directed verdict should be deemed for all purposes an alternative motion for judgment notwithstanding the verdict or for a new trial. It was contended on the other hand by counsel for the plaintiff that there was no such understanding; that the only understanding between counsel was to the effect that when appellant desired to make his motion, plaintiff's counsel would be willing to accommodate him by agreeing upon some convenient date for the submission of the motion, and that

this all pre-supposed that such motion would in fact be made and submitted in the manner and within the time prescribed by law.

The trial court in a memorandum opinion said:

"The correspondence which passed between counsel subsequent thereto (to the trial) and which is made a part of the affidavit of Aubrey Lawrence has been examined by the court and the view we take thereof is that the defendant was concerned chiefly with finding a suitable date to argue a motion for judgment notwithstanding the verdict and that the counsel for the plaintiff was willing to agree to take up the matter at any suitable time within the time granted for appeal. After the expiration of the six months plaintiff's counsel considered the matter closed. Of course we do not speak authoritatively for either side. No motion was made in writing, nor any notice in writing served bringing the matter on for hearing within the six months."

We are inclined to agree with the conclusion which the trial court reached in consideration of the correspondence. As we construe the record, there was no motion made in this case until after the time for appeal from the judgment had passed and the case presented falls squarely within the rule announced by this court in Gohl v. Bechtold, supra, and Bovey-Shute Lumber Co. v. Donahue, 43 N. D. 247, 175 N. W. 205, and the authorities cited therein.

It follows that the trial court's ruling in denying the motion for judgment notwithstanding the verdict or for a new trial was correct.

The order appealed from is affirmed.

BRONSON, Ch. J., and BIRDZELL, NUESSLE, and JOHNSON, JJ., concur.

WANIE S. FAHLER, as Administratrix of the Estate of Leo S. Fahler, Deceased, Respondent, v. CITY OF MINOT, a Municipal Corporation, Appellant.

(194 N. W. 695.)

Master and servant — policeman held an "employee" within compensation act; "employment."

1. Section 2 of the Workmen's Compensation Act (Sess. Laws 1919, chapter 162), which defines "employment" as including employment by the state and all political subdivisions, and which defines "employee" as meaning every person engaged in a hazardous employment under any appointment or contract of hire, is construed and *held* to embrace policemen employed by a city.

Master and servant — noncomplying employer liable under compensation act regardless of fault.

2. Section 11 of the same act, which provides that employers who fail to comply with the provisions requiring payment of premiums shall not be entitled to the benefits of the act during the period of noncompliance "but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment," etc., and that they shall not avail themselves of the defenses of the fellow-servant rule, assumption of risk and contributory negligence, is construed in the light of cognate provisions and of the policy manifested by the entire act, and it is *held* that a noncomplying employer is liable to an injured employee within the act, or to his personal representatives in case of death, where the damages were suffered by reason of injuries sustained in the course of employment, regardless of questions of fault.

Master and servant — city not complying with compensation act held liable for death of policeman.

3. Where a city had not complied with the Workmen's Compensation Act and a policeman employed by it was killed in the course of his employment, the city is liable in damages to the personal representatives of the deceased on account of the death so occurring.

Opinion filed June 27, 1923.

Workmen's Compensation Acts, C. J. § 39 p. 49 n. 52; § 157 p. 136 n. 49; § 158 p. 136 n. 57; § 159 p. 137 n. 65.

Note.—On applicability of compensation acts to policemen, see note in L.R.A. 1918F, 191.

On right of firemen and policemen to recover under workmen's compensation acts, see notes in 10 A.L.R. 201; 28 R. C. L. 722; 4 R. C. L. Supp. 1838.

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

Affirmed.

John J. Coyle and *McGee & Goss*, for appellant.

"The compensation acts are a compromise between employers and employees." 28 R. C. L. 713, § 2.

"Both had suffered under the old system. The employers by heavy judgments of which half was opposing lawyer's booty; the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay some claims in the future where in the past there had been no liability. The servant was willing, not only to give up trial by jury but to accept far less than he had often won in court, providing he was sure to get a small sum without having to fight for it." 28 R. C. L. 713.

"The theory of the compensation acts is that the whole cost and expense of conducting the business, including compensation for injuries to employees, is added to the cost of the articles that are produced and sold; and hence, in the long run, such costs and expenses are borne by the consumer of the articles produced." Chandler v. Ind. Com. (Utah) 184 Pac. 1020, 8 A.L.R. 930. Corpus Juris Pamphlet on Workmen's Compensation Acts, § 5, p. 8; Griswold v. Wichita (Kan.) 152 Pac. 276, L.R.A.1918F, 187.

"Whether or not a county, city, or other municipal district or political subdivision is within the operation of the compensation statute, depends primarily upon the language of the particular statute involved, and also upon the particular work in which the employee was engaged at the time of his injury." Hochspeier v. Ind. Board of Illinois, 116 N. E. 121, L.R.A.1918F, 227.

"A sheriff is not an employee of the state within the meaning of the Workmen's Compensation Act which renders the state liable for injuries to its employees." Sibley v. State (Conn.) 96 Atl. 161, L.R.A. 1916C, 1087.

"A sheriff is not an employee of the county within the meaning of California Compensation Act." Mono County v. Ind. Com. 175 Cal. 752, 167 Pac. 377.

"A captain in the fire department of the city of Saginaw is, in the contemplation of the Michigan Compensation Act, an official and not entitled to compensation for injuries received while acting in the scope

of his employment." McNalley v. Saginaw, 163 N. W. 1015; Devney's Case, 223 Mass. 270, 111 N. E. 788; White's Case, 116 N. E. 481.

Nor is an election officer an employee within the California act, and covered by it. Los Angeles v. Ind. Com. 169 Pac. 270.

"Where under the statute, an employer must employ workmen in hazardous employment, which in turn must be carried on for pecuniary gain, the state, although included in the meaning of the word, employer, must, in order to be within the provisions of the compensation act, be employing workmen in hazardous occupations for pecuniary gain in like manner as other employers." Corpus Juris Pamphlet, page 46, under § 37, citing Allen v. State, 160 N. Y. Supp. 85.

"While it is conceded by all that the Workmen's Compensation Acts are to be given a liberal construction, some courts have invoked a rule that general legislation is intended primarily for the subjects and not for the sovereign, and that the rules of statutory constructions requiring investigation of the intent or purpose of the legislative enactment is to be conducted subject to the presumption that law-makers intended to legislate on the rights and affairs of individuals and that the state or the public will not be deemed within the purview of such enactment unless expressly named or included by fair implication. Again, a sovereign state is not bound at all to compensate an individual employee for injuries sustained while in its service and no right of recovery in view of such employment exists except by statute. Accordingly, the compensation acts are held as inclusive of the state as an employer to be at derogation of its sovereignty and should be construed strictly in such manner if possible as to preserve to the state its nonliability for injuries to those in its service." 28 R. C. L. 729, § 16.

"Some of the modern workmen's compensation acts especially include municipal employees among those entitled to claims and benefits. These laws are generally given a liberal construction, but it is necessary to refer to the law of any particular state to determine to the extent to which these laws apply to some municipal employees for the laws are by no means uniform. It would seem that those employees engaged in the performance of the governmental functions would not be covered by the law unless the intention to include them was clearly expressed in the law." White, Negligence of Mun. Corp. § 38, p. 64; Fassig v. State, 116 N. E. 104.

"It will be observed that the employee of such an employer (one who has not insured under the compensation act and paid his premiums) has two remedies and he *must elect which one he will* pursue. *He cannot have both.* He may sue his employer as at common law and in that suit he is permitted to recover whatever damages he is able to show he has sustained; or he may, in lieu of such suit, apply to the commission for *compensation* under the act. In the latter event, the board is required to proceed in like manner as in other claims." Hunter v. Colfax Coal Co. 154 N. W. 1037, Ann. Cas. 1917E, 803.

F. B. Lambert and *E. R. Sinkler,* for respondent.

A party cannot both demur and answer and when he answers he waives his demurrer. Pierson v. Minnehaha (S. D.) 128 N. W. 616.

If a defendant answers after demurrer is filed he waives his demurrer. For a long line of decisions supporting this see 39 Am. Dig. Cent. ed. col. 1822.

If after demurrer the defendant pleads he waives the demurrer. 16 Am. Dig. Dec. ed. p. 417.

"The contemporaneous and practical construction of the statute by the industrial commission, an administrative tribunal whose duty it is to carry it into effect, is entitled to great respect. Though not absolutely controlling, it is entitled to the most respectful consideration and ought not to be overruled without cogent reasons." Ginnochio v. Hydraulic Pressed Brick Co. 260 Fed. 564.

Webster's New International Dictionary defines "business" to be:

"That which busies, or engages time, attention or labor, as a principal serious concern or interest. A constant employment; regular occupation; work; as, the business of life; business before pleasure. Any particular occupation or employment habitually engaged in for livelihood or gain. A particular subject of labor or attention; a temporary or special occupation or concern."

"This word implies everything about which a person can be employed." People v. Commissioners, 23 N. Y. 244; Hall v. Sibisa (La.) 25 So. 141; Dunn v. People, 45 Ill. 403; United States v. Morris (N. C.) 25 Fed. Cas. 1211–14; Guthrie v. Cameron (Okla.) 41 Pac. 637.

"Compensation act is to be liberally construed." Frank v. Industrial Commission, 179 N. W. 740.

"In very early times there was no occasion to discuss the essential elements of a tort or wrong. *Wrong was then not essential to liability.* It was enough that the defendant's conduct, *although perfectly harmless* had occasioned harm to the plaintiff. Later it began to be suggested that in certain instances (in certain classes of cases) there was no liability unless there was fault." 30 A.L.R. 248; 27 A.L.R. 239; 22 A.L.R. 99; 59 U. Pa. L. Rev. 309; Pollock & M. History of English Law, 2d ed. 54.

"The early law asked simply did the defendant do the physical act which damaged the plaintiff. The law of to-day, except in certain cases based on public policy, asks the further question, was the act blameworthy." 30 A.L.R. 254.

"The employment creates a status involving relative rights and obligations, and it is properly for the legislature, acting within the bounds of fairness and reason, to determine the nature, extent, and application of those rights and obligations. If the lawmaking body determines that one of the incidents of that relation shall be that the employer must compensate his employee for an accidental injury received in the service, *an enactment to that end is neither arbitrary nor outside the scope of legislative authority.*"

"Admitting, however, that the compensation acts do create *liability without fault* the courts have uniformly held this to be no objection to their validity." 28 R. C. L. 752.

"The employee is declared to be entitled to the benefit of the statute, *regardless of negligence,* actual or imputed, on the part of the employer. . . . Under the compensation act, the issue is as to whether the injury arose out of the employment." 28 R. C. L. 788. Arizona Copper Co. v. Hammer, 250 U. S. 400, 63 L. ed. 1058; O'Donnell v. Heimann, 133 N. W. 208; City of Milwaukee v. Miller, 144 N. W. 188.

"The provisions of this section relate to actions for damages in the *civil courts* and are not applicable to proceedings before the industrial commission, under G. C. §§ 1465–74." Boddinger v. Champion, vol. 1, No. 7 Bul. Ind. Comm. 70; Skinner v. Stratton, vol. 1, No. 7 Bul. Ind. Comm. 103.

"In an action for damages an allegation that the defendant employs five or more workmen and that he has not contributed to the state insurance fund is proper and will not be stricken from the petition." Geiger

v. Brewing Co. 16 O. N. P. (N. S.) 445; Schwartz v. Telephone Co. 16 O. N. P. (N. S.) 129; Chamberlain v. Lukenheimer Co. 16 O. N. P. (N. S.) 614.

"In proceedings before the industrial commission under this section it is not necessary that the claimant should allege or prove negligence on the part of the employer or that the employer was guilty of any tort whatever." Kennedy v. Railway, 18 O. N. P. (N. S.) 526.

"A company having failed to pay its premium into the state insurance fund prior to the death of an employee injured in the course of employment is not entitled to the protection of the act and is not released from liability under this section." 2 Opinions of Atty. Gen. 1915, 1128.

"A statute is not invalid as conferring unequal privileges and immunities which abolishes the doctrine of assumption of risk and fellow servant in actions to hold employers liable for personal injuries to their servants in cases where employers refuse to take advantage of the act, but preserves them intact to those who come under the law." Borgnis v. Falk Co. 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489.

BIRDZELL, J. This is an appeal from an order overruling a demurrer to a complaint. The complaint alleges that Leo S. Fahler, while employed by the defendant city as a policeman and while engaged in the performance of his duties as such, met his death while attempting to arrest one Avery Erickson; that the defendant city and Fahler, as its peace and police officer, were subject to the provisions of chapter 162 of the Session Laws for the year 1919 (the Workmen's Compensation Law), but that the defendant city, in violation of the law and of its duty, failed to comply with the provisions of the law, and especially §§ 6 and 7 respecting the payment of premiums, and that, being in default, the defendant is not entitled to the benefit of the act during the period of noncompliance and is liable for all damages sustained through injury to or death of its employees in the course of employment. The demurrer presents two questions of law: first, Is a policeman an employee within the Workmen's Compensation Act? If so, the second question arises, namely, whether the city, not having complied with the act, is liable in damages to the legal representatives of a deceased

employee killed while acting in the course of his employment though through no fault of the city or of anyone acting on its behalf.

Section 2 of chapter 162, Session Laws of 1919, defines certain terms which must be taken into consideration in determining whether or not a police officer is an employee within the Compensation Act. "Employment," says § 2, "includes employment by the state and all political subdivisions thereof, and all public and quasi-public corporations therein, and all private employments.

" '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 agriculture and domestic service, and any common carrier by steam railroad.

" 'Employee' means every person engaged in a hazardous employment under any appointment or 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 trade, business, profession or occupation of his employer.

" 'Employer' means the state and all political subdivisions thereof, and all public and quasi-public corporations therein, and every person, partnership, association and private corporation, including any public service corporation, and the legal representative of any deceased employer, or the receiver or the trustee of a person, partnership, association or corporation, carrying on a hazardous employment.

" 'Injury' means only an injury arising in the course of an employment, including an injury caused by the wilful act of a third person directed against an employee because of his employment, but shall not include injuries caused by the employee's wilful intention to injure himself or to injure another. If the employer claims an exemption or forfeiture under this section the burden of proof shall be upon him."

In this connection it may be well to notice also Comp. Laws 1913 § 3783 which names the officers of cities incorporated under the commission form of government, as is the city of Minot. Among other officers enumerated is that of chief of police and "one or more policemen." An exhaustive argument is made in the brief of the appellant, the purpose of which is to demonstrate that a policeman is an officer and not an employee within the Workmen's Compensation Act. In view of the

statute last referred to (§ 3783) and of numerous decisions to the effect that a policeman is an officer, this much of appellant's argument may be deemed conceded for the purpose of this opinion; so, starting with the premise that a policeman is an officer, we must then inquire whether or not he is an employee within the Workmen's Compensation Act. It will be noted in the above quotations from that portion of the law devoted to the definition of terms, that there is an evident tendency toward generalization in definition rather than restriction. For instance, employment is defined to include employment by the state, by political subdivisions and by quasi-public corporations and private employments, thus apparently leaving no room to infer that *any employment* was to be excluded. The term 'hazardous employment" is defined in similar broad terms to include all employments where one or more employees are regularly employed, excepting only agriculture, domestic service and common carrier by steam railroad. Similarly, "employee" is defined as every person engaged in a hazardous employment under any *appointment, contract of hire* or apprenticeship express or implied, oral or written, etc., thus signifying by the use of the term appointment that one may even sustain the relation of employee in the absence of any contractual relation existing between him and his employer. These references will suffice to emphasize a distinction which, in our judgment, is apparent on the face of the law under consideration when compared with other acts in our sister states where it has been held that policemen were not workmen or employees within the meaning of their compensation laws.

Perhaps the strongest and most persuasive authority that has been brought to our attention in this connection is that of Mann v. Lynchburg, 129 Va. 453, 106 S. E. 371. In the act of Virginia which was under consideration in that case, employers were defined to include the state and any municipal corporation within the state or any political subdivision thereof, and the term "employee" was defined to include "every person . . . in the service of another under any contract of hire or apprenticeship written or implied." The court, in construing this language, said:

"The act, as its title shows, relates to industrial accidents, and its well-known purpose was to substitute for the unsatisfactory common-law remedies a speedier and simpler and more equitable form of relief for

personal injuries sustained by persons engaged in hazardous occupations. It would seem clear from the history and purposes and general provisions of the act that the Legislature did not have in mind as beneficiaries any other persons than such as are commonly understood as falling within a contractual relationship of master and servant. It often happens that cities and towns employ large forces of men in connection with municipal undertakings, such as the construction of sewers, the building of streets, the operation of rock quarries, and other similar and more or less hazardous occupations akin to those undertaken by individuals and industrial corporations. The legislature undertook to make an improvement upon the remedies hitherto existing in cases of employees receiving personal injuries, and who might or might not, according to the particular facts of the case, have a cause of action against the employer on the ground of negligence or breach of duty, and manifestly the idea was that this remedy should be provided for those who theretofore stood in such a relationship as that there might be in cases of negligence a liability on the employer. Griswold v. Wichita, 99 Kan. 502, L.R.A.1918F, 187, 189, 162 Pac. 276, Ann. Cas. 1917D, 31. The case of a city policeman does not, as we think, fall within the reason and purpose of the act, and this conclusion is greatly strengthened by the language which the legislature used in its enactment.

"It is no longer open to question in this state that a policeman is a public officer. See Burch v. Hardwicke, 30 Gratt. 24, 32 Am. Rep. 640; Smith v. Bryan, 100 Va. 199, 40 S. E. 652; Sherry v. Lumpkin, 127 Va. 116, 102 S. E. 658. And this is the holding generally in other states. See Blynn v. Pontiac, 185 Mich. 35, 151 N. W. 681, 683; Griswold v. Wichita, supra. The act in question, as we have seen, is limited to persons in service of the state or city under a contract of hire. A public officer does not perform his duties under contract, express or implied, but by virtue of the law creating the office. His compensation is a matter of statute or ordinance, and does not depend upon the amount or value of the services performed, but is incident to the office. Unlike an employee working under contract, an officer acquires no vested right to have the office continued during the time for which he is elected or appointed, since the authority creating the office may abolish the same during the term of the incumbent, or change the compensation and the duties to be performed. The following authorities may be cited as suf-

ficient in support of the foregoing propositions: Booker v. Donohoe, 95 Va. 359, 363, 28 S. E. 584; Nichols v. MacLean, 101 N. Y. 526, 533, 54 Am. Rep. 730, 5 N. E. 347; Mechem, Pub. Off. §§ 463, 855; United States v. Hartwell, 6 Wall. 385, 393, 18 L. ed. 830, 832; Hall v. Wisconsin, 103 U. S. 5, 26 L. ed. 302."

In arriving at this conclusion the Virginia court relied upon the persuasive decision of the supreme court of Connecticut in the case of Sibley v. State, 89 Conn. 682, L.R.A.1916C, 1087, 96 Atl. 161, where a similar statute was considered in its application to a sheriff. "Employee" was defined in the Connecticut act to mean any person who has entered into, or works under, any contract of service or apprenticeship with an employer. In a well considered opinion the Connecticut court distinguished, for the purpose of applying the act, between a person employed under a contract of service and an officer who was exercising for the public good a portion of the sovereign power of the state and for which he was entitled to receive the salary attaching to the office. Persuasive as are these authorities and similar ones coming to a like conclusion under different acts (Blynn v. Pontiac, 185 Mich. 35, 151 N. W. 681, 8 N. C. C. A. 793; Griswold v. Wichita, 99 Kan. 502, 162 Pac. 276, L.R.A.1918F, 187, Ann. Cas. 1917D, 31; Rooney v. Omaha, 104 Neb. 260, 177 N. W. 166; Ryan v. New York, 228 N. Y. 16, 126 N. E. 350; Chicago v. Industrial Commission, 291 Ill. 23, 125 N. E. 705), we are of the opinion that our law does not admit of a like construction. The pertinent sections of our law are, in our opinion, more analogous to the Minnesota act (Minn. Gen. Stat. 1913, § 8230), which reads as follows:

(Employee shall be construed to mean) "Every person in the service of a county, city, town, village or school district therein, under any appointment or contract of hire, express or implied, oral or written; but shall not include any official of any county, city, town, village or school district therein, who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term."

This act, it will be noticed, contains the same language as the North Dakota law in prescribing the basis of the protected relationship to be employment *under any appointment or contract of hire.* The second member of the sentence, by specifically excepting the officers who are

not to be included, gives a clear indication that officers are embraced within the relationship defined in the first clause. A policeman in the city of Duluth was held to be within the protection of the Minnesota statute. State ex rel. Duluth v. District Ct. 134 Minn. 26, 158 N. W. 790. Also, a fireman, State ex rel. Duluth v. District Ct. 134 Minn. 28, 158 N. W. 791, Ann. Cas. 1918B, 635. The Illinois and Michigan acts are similar to the Minnesota act, except that in them all officials of the state and of the political subdivisions are expressly excluded and policemen are held officials within the exception. Chicago v. Industrial Commission and Blynn v. Pontiac, supra.

Inasmuch as a contractual relationship does not appear to have been made the controlling element in the definition of employee covered by our act, and, moreover, inasmuch as the act expressly recognizes an employment as being created through *appointment,* we are of the opinion that a policeman is an employee of a city within the meaning of § 2 of the Workmen's Compensation Act. See McCarl v. Houston, 263 Pa. 1, 106 Atl. 104.

This brings us to the question as to whether or not the city, not having complied with the act, is liable in damages to the legal representatives of its deceased employee. Section 1 of the act, chap. 162, Laws of 1919, contains a preamble declaring that the prosperity of the state depends in a large measure upon the well-being of its wage workers and that, therefore, for workmen injured in hazardous employments and their families and dependents "sure and certain" relief is provided "regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as provided in this act; and it is further declared that civil actions and causes of action for personal injuries and the jurisdiction of the courts over such causes are abolished except as in the act provided."

Section 11 provides as follows:

"Employers subject to this Act, who shall fail to comply with the provisions of sections six and seven hereof, shall not be entitled to the benefits of this Act during the period of such noncompliance, but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injuries,

and in such action the defendants shall not avail himself or itself of the following common law defenses:

"The defense of the fellow-servant rule, the defense of the assumption of risk or the defense of contributory negligence.

"And such employers shall also be subject to the provisions of section eight.

"Any employee whose employer has failed to comply with the provisions of sections six and seven hereof, who has been injured in the course of his employment, wheresoever such injury has occurred, or his dependents in case death has ensued, may, in lieu of proceedings against his employers by civil action in the court, file his application with the workmen's compensation bureau for compensation in accordance with the terms of this act, and the Bureau shall hear and determine such application for compensation in like manner as in other claims before the bureau; and the amount of the compensation which said bureau may ascertain and determine to be due to such injured employee, or to his dependents in case death has ensued, shall be paid by such employer to the person entitled thereto within ten days after receiving notice of the amount thereof as fixed and determined by the Bureau;"

Further provision is made to the effect that if such amount is not paid, it will constitute a liquidated claim for damages recoverable with penalty. Elsewhere in the act (§ 7) all employers are required to pay annually into the workmen's compensation fund the amount of premium fixed by the Bureau, and upon default (§ 8) the premium is made collectible by civil action in the name of the people.

The exact question presented here, under the facts pleaded, is whether or not a city, against which there existed no common law liability to respond in damages, is chargeable under the Workmen's Compensation Act on account of its failure to comply with the act. Does § 11, which says that noncomplying employers "shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injuries," give a right of action where none would have existed at the common law. The state and its political subdivisions, employing officers or servants in carrying out their governmental functions, were not regarded as owing any duty to such employees for the neglect or violation of which they could be held in a

civil action, even one based on negligence. The employee bore all the risk of personal injury occurring in the course of the public employment in a governmental capacity.

On the other hand, a private employer was regarded in law as owing certain duties to employees regarding a safe place to work, safe appliances, the exercise of care in selecting fellow servants, etc. Where this duty was disregarded resulting in injury to the employee, there was a liability for the damages. The liability, in legal theory at least, was predicated upon the fault of the employer consisting in the failure to perform a duty which he was regarded as owing to the employee. This legal conception of liability resulted practically in visiting the consequences of injuries occasioned through the normal risks of an employment upon the employee, compensation, if any, for the assumption of such risks being presumably paid in advance through the fixing of the wages. Whether or not this presumption is more or less than fiction need not concern us here; the fact remains that compensation to the employee for injury was predicated upon a breach of duty and if he was unable to establish that a duty had been violated he was without remedy.

This basis for liability to compensate for injuries invited the defenses commonly expressed as the fellow-servant rule, assumption of risk and contributory negligence, all of which are predicated upon the idea that, though there may have been a breach of duty owing to an employee, he cannot recover if his injury were occasioned by the negligence of a fellow employee, through some risk that he should normally have contemplated, or, leaving aside the comparative negligence rule, if his own negligence contributed to the injury.

Running through all the compensation laws that have been enacted in recent years is recognition that the common law basis for compensation to the injured employee is unsatisfactory in that it results in the employee, in many instances, bearing the load of noncompensable injury, with its train of ill consequences socially. Thus they generally provide for some scheme of compulsory insurance in which the employee may participate regardless of all question of fault. The statutes generally make the occurrence of the injury in the course of the employment the sole basis of the employees' right to compensation, and, while in some laws employers are given an option to effect insurance in

favor of the employees, their failure to do so results practically in their carrying their own insurance since the common defenses against liability are taken away.

On account of the public interest thought to be subserved by the enactment of such laws, they have been sustained as against the constitutional objections that they are not a proper exercise of the police power; that they unduly restrict the liberty of contract; that they deprive persons of property without due process of law and that they deny the equal protection of the laws. New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; 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.

The philosophy of the substitution of compensation regardless of fault for the common-law liability is well expressed by Justice Pitney of the United State Supreme Court in the case of New York C. R. Co. v. White, supra, as follows (pages 204, 205 of 243 U. S., page 253 of 37 Sup. Ct. Rep. [61 L. ed. 675, 676, L.R.A.1917D, 1, Ann. Cas. 1917D, 629]).

"The provision for compulsory compensation, in the act under consideration, cannot be deemed to be an arbitrary and unnecessary application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing and contributing to the injury, the lawmaker reasonably may have been influenced by the belief that in modern industry the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions

for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence."

These general observations regarding the underlying theory of compensation statutes may properly be taken into consideration if they tend to throw light, as we think they do, on the meaning of our statute.

That it was the intention of the legislature in the act under consideration to provide compensation for all employees engaged in a hazardous occupation seems quite evident from some of the outstanding features of the law under consideration. In the first section, heretofore referred to, such a policy is in effect declared. In §§ 6 and 7 every employer subject to the act is required to contribute to the workmen's compensation fund in proportion to annual expenditures of money for the service of persons subject to the act, and in section 8 the premium is made collectible by civil action and the duty of collection imposed upon public officers. By § 9 employers who comply are exempted from liability to respond in damages for injury to or death of an employee occurring during a period covered by the premiums paid. By § 10 it is made the duty of the compensation bureau to disburse the fund to injured employees (or if dead, to their dependents) of employers who "have paid into the fund the premiums applicable to the classes to which they belong" and it is provided that the payments "shall be in lieu of any and all rights of action whatsoever against the employers of such injured or deceased employees." In § 8 it is further provided that the employer's compliance with the provisions of the act requiring payments to be made to the fund "shall date from the time of the payment of said money so collected as aforesaid to the state treasurer for credit to the workmen's compensation fund." These provisions of the law thus briefly sketched clearly indicate, in our opinion, an intention to give to every employee within the act a right to compensation for injury occurring in the course of employment regardless of all question of

fault. Since payments into the fund are compulsory, theoretically, every employee would have recourse to the fund, but at the same time the legislature considered the consequences of a failure on the part of the employer to contribute. It excludes his employees from the fund, and, in § 11, it holds the noncomplying employers to an enlarged liability by providing that they shall not be entitled to the benefits of the act during the period of noncompliance and, in addition, that they shall "be liable to their employees for damages suffered by reason of the injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injury." It will be noted here that no criterion of liability is laid down other than that the injury "be sustained in the course of employment." In view of the provisions referred to, it should be assumed that the legislature intended to place employees of noncomplying employers in a less favorable position with respect to compensation than those of employers who comply with the act. We think the contrary affirmatively appears.

To illustrate: If an employee be injured in the course of his employment by the "wilful act" (quoting from § 2) "of a third person directed against an employee because of his employment" the injury would clearly be one which the act defines as arising in the course of the employment, and for such an injury compensation is provided if the employer has complied with the act. If the employer has not complied with the act, however, not being liable for such an injury on any common-law basis, the employee would not be compensated unless the employer is made liable by § 11. We are clearly of the opinion that § 11, by providing that a noncomplying employer shall be liable to his employee for damages suffered by reason of injury sustained in the course of employment, makes the employer liable upon as broad a basis as the fund would be liable if the employer had complied. Otherwise construed the act would leave the employee of a noncomplying employer wholly without remedy in such a situation and he would be in this position by virtue of the failure of the employer to have paid the premiums for which he is made absolutely liable. We cannot discover within the four corners of the act any indication that the legislature intended that the employer, by defaulting in his premium obligation,

should be permitted to defeat the substantial right of compensation for an injury arising in the course of employment.

It is argued, however, that the act only gives to employees of employers who have complied with it this substantial right resting on the broad foundation of injury with or without fault and that it does not concern itself particularly with employees of noncomplying employers further than to withdraw from the employers the common law defenses. It is said that it is one thing to hold the fund liable for damages occurring without fault, as these damages are more or less limited, being assessed by the Bureau according to a scale embodied in the act; but that it is quite a different thing to hold an employer to a liability for all the damages sustained, to be assessed by a jury. It must be admitted that the act does exactly this with regard to all injuries for which the employer was liable on any common law basis and, with the common law defenses taken away, this class would include a very high percentage of the injuries actually occurring in private employment. So the extension to the few situations in which an employer may now be held though he be without fault, is not so broad as to suggest an absence of legislative intention to that effect. If the legislature saw fit, as it clearly did, to charge a noncomplying employer with damages, to be measured by a jury using competent legal standards, for an injury occasioned by his negligence but which would probably not have occurred but for the employee's contributory negligence, would it not, with equal reason, charge him in the same manner for an injury occurring in the course of the employment through the wilful act of a third person directed at him because of his employment. In this act, as we read it, more legislative concern is manifested lest an injured employee engaged in a defined hazardous occupation go uncompensated, than is exhibited towards an employer who neglects his or its obligations to pay premiums.

Since § 11 makes the sole criterion of the liability of a noncomplying employer the occurrence of injury in the course of employment, we think the act must be construed as placing the employee of such an employer in the same position he would have occupied had his employer complied with the act, except that such employee's claim is necessarily subject to the hazard of financial responsibility. Also, his damages may

be adjusted by the legal machinery for arriving at compensation instead of by the workmen's compensation bureau.

Counsel for the appellant has cited the case of Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1037, Ann. Cas. 1917E, 803, as reaching a contrary conclusion. An examination of the Iowa statute under consideration in that case and also of the opinion of the court, points clearly to the distinction between that case and the one at bar.

"Nothing," says Salinger, J., delivering the opinion of the court, (page 255) "thus far adverted to has attempted to make the employer pay damages for injuries suffered in and because of employment given by him, where he is in no manner blamable for such injury. If the act itself has created such absolute liability, it must be done, so far as anything like doing it in terms is concerned, by that part of it which is:

" 'It shall be presumed: (A) That the injury to the employee was the direct result and grew out of the negligence of the employer. (B) That such negligence was the proximate cause of the injury—and that in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence.' "

Continuing he said:

"This is not a provision the employer has not the right to show he was wholly free from blame, but that he must take the affirmative upon the claim that he is blameless—that the employee need not prove the employer was at fault, but the latter must show he was not."

Of course the legislature would not have authorized the presumption of negligence to be rebutted unless to its rebuttal the ordinary legal consequence was to attach.

Our attention is also directed to the Ohio case of Fassig v. State, 95 Ohio St. 232, 116 N. E. 104, 13 N. C. C. A. 845, as coming to a contrary conclusion. The Ohio statute under consideration in that case is in this respect identical with ours, except for a very significant omission in our statute. The similar wording of this section throughout compels the conclusion that this feature of our statute was taken from the Ohio law. Make the comparison:

Ohio.

Employers mentioned in subdivision two of section thirteen (1465-

60) hereof, who shall fail to comply with the provisions of section twenty-two (1465–69) hereof, shall not be entitled to the benefits of this act during the period of such noncompliance, but shall be liable to their employees for damages suffered by reason of *personal* injuries sustained in the course of employment *caused by the wrongful act, neglect, or default of the employer, or any of the employer's officers, agents, or employees,* and also to the personal representatives of such employees where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common-law defenses:

The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence.

And such employers shall also be subject to the provisions of the two sections next succeeding. (Italics ours.)

North Dakota.

Employers subject to this act, who shall fail to comply with the provisions of sections six and seven hereof, shall not be entitled to the benefits of this act during the period of such noncompliance, but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common law defenses:

The defense of the fellow-servant rule, the defense of the assumption of risk or the defense of contributory negligence.

And such employers shall also be subject to the provisions of section eight.

It will be seen that the italicized portion of the Ohio act expressly limits the liability of noncomplying employers to injuries caused by the wrongful act, neglect, or default of the employer, and this is the portion that is omitted in the North Dakota statute. This is not only sufficient to distinguish the Ohio case from the case at bar, but the comparison of the statutes affords a strong indication that the North Dakota legislature intentionally omitted the expression that would base liability of a noncomplying employer upon a neglect or breach of duty.

It has been suggested that if the legislature intended to impose upon a noncomplying employer an absolute liability for injuries occurring in the course of employment, there was no occasion to expressly enumerate the defenses of the fellow-servant rule, the assumption of risk and contributory negligence and to deprive the employer of the right to resort to them. Were all defenses to be excluded, it is said, why enumerate particular ones? In answer to this argument it is sufficient, in our opinion, to say that it is unnecessary to account for the reasons why the Legislature chose one method rather than another, but it is certain that by enumerating these defenses and rendering them unavailable, the intention was definitely expressed to make them unavailable as against whatever liability was imposed. In other words, it would not any longer be competent to defend upon the usual grounds upon which personal injury claims are contested.

The act in question is wholly devoid of any expression which would tend to show that the rights of a public employee within the act are any different as against his employer than those of a private employee. Hence, as the act clearly broadens the scope of the liability of a noncomplying private employer by rendering him or it liable for injuries for which there was no liability at the common law, similarly it gives to the public employee a right of action against his noncomplying employer on account of injuries for which it would not have been liable at common law. Whether or not the state would be excepted from this rule on account of the failure to embody a consent to be sued, is not involved here and not decided. For the foregoing reasons we are of the opinion that the complaint in the instant case states a cause of action and that the demurrer was properly overruled.

The order appealed from is affirmed.

BRONSON, Ch. J., NUESSLE, CHRISTIANSON, and JOHNSON, JJ., concur.

RANSON COUNTY FARMERS BANK, a Corporation, Appellant, v. C. E. CAVETT, Respondent.

(194 N. W. 388.)

Appeal and error — unnecessary to make motion for new trial to review sufficiency of evidence, where proper specifications made.

1. In a trial to the court without a jury where proper specifications of the insufficiency of the evidence are made, it is unnecessary to make a motion for a new trial in order to review the sufficiency of the evidence.

Banks and banking — bank held not liable for commissions due or moneys loaned by manager of land department, disconnected from operation of bank.

2. In a suit to recover upon promissory notes, where defendant has set up counterclaims for commissions due to him on land sales and for moneys loaned by him in operating a land department, and where it appears that defendant was appointed manager of such land department by a directors' resolution, which provided that bank funds should not be used in its land department, and where, pursuant thereto, defendant bought and sold lands upon contracts of sale, personally received moneys from purchasers and disbursed the same to original vendors, received notes from purchasers and used some of the same as well as his personal notes in financing such land department, without any showing that the bank received or retained actually any earnings or profits from the conduct of such land department, it is *held*, for reasons stated in the opinion, that the trial court erred in finding that the bank was liable for either commissions due to, or for moneys loaned by defendant.

Opinion filed May 8, 1923. Rehearing denied June 30, 1923.

Appeal and Error, 3 C. J. § 909 p. 988 n. 44; Banks and Banking, 7 C. J. § 223 p. 589 n. 32.

In District Court, Ransom County, *Allen*, J.

Action upon promissory notes by plaintiff bank.

Defendant set up counterclaims for commissions, expenses, and moneys loaned.

Defendant received judgment for excess of counterclaims over plaintiff's notes.

Plaintiff appealed from the judgment.

Reversed and remanded.

Lawrence, Murphy & Nilles and *Ego, Craig & Thompson*, for appellant.

"An agent having general authority to manage his principal's business has by virtue of his employment no implied authority to bind his principal by making, accepting, or indorsing negotiable paper." 21 R. C. L. 870.

"If, however, the agent exceeds his authority, and does acts not within the scope of his agency, he will not be permitted to recover from the principal for money advanced or for liabilities incurred in respect of such unauthorized acts." 21 R. C. L. 835.

"If the transaction of a business carried on by an agent for his principal absolutely requires the exercise by the agent of the power to borrow money in order to carry it on, then such power is impliedly conferred as an incident to the employment; but the fact that the act proposed is more effectual in the transaction of the business provided for does not afford a sufficient ground for the inference of such a power; it must be practically indispensable to the execution of the duties really delegated in order to justify its inference from the original employment. Where it is proved that there was no necessity for an agent to borrow money to effect any purpose of the agency, it will not be presumed, without evidence, that it was proper or usual, in the ordinary course of the business in which he was employed, to borrow money without express authority. Merely placing one in charge of a sales agency of a manufacturing concern with supervision of sales and local agents does not confer the implied power to borrow money for the concern; and it is immaterial that the principal is a corporation." 21 R. C. L. 863.

The question of the agent's implied authority to borrow money is closely associated with that of the execution of negotiable paper as it is through the execution of such instruments that the power to borrow is ordinarily exercised. In this case, as in that, the authority is one reluctantly to be implied. As has been said in a recent case, authority to borrow money is among the most dangerous powers which a principal can confer upon an agent. Whoever lends to one, claiming the right to make or indorse negotiable paper in the name of another, does so in the face of all the danger signals of business. He needs not lend or discount until assured beyond doubt that the principal has, in fact, appointed an agent who by the stroke of a pen, may wipe out his present fortune and bind his future earnings. The very nature of the act

is a warning; and, if the lender parts with his money, he does so at his own peril. If the power was not in fact conferred, he must bear the loss occasioned by his own folly. A power so perilous is not to be implied from acts which, in other matters less hazardous, might create an agency. *It must be conferred in express terms,* or be necessarily and inevitably inferable from the very nature of the agency actually created. So strict is the rule that it will not be presumed even from an appointment of one as general agent, unless the character of the business, or the duties of the agent, are of such a nature that he was bound to borrow in order to carry out his instructions and the duties of the office. 1 Mechem, pp. 722, 723.

"The right of action to recover money paid to the use of another accrues immediately upon the payment, *and not before.*" 27 Cyc. 842.

"The measure of damage in an action for money paid for the use and benefit of another is the sum actually paid by plaintiff." 27 Cyc. 845; Schofield v. State Nat. Bank, 97 Fed. 286, 287.

"Any sort of dealings by way of sale or exchange." Commerce, Traffic; May v. Sloan, 101 U. S. 231, 25 L. ed. 797; Re Pinkney, 47 Kan. 89, 27 Pac. 179; Hetz v. Maier (Tex.) 33 S. W. 710; L.R.A.1917A, pp. 753, 755, 780, 781, 788, 812.

"The enforcement of such right is not in affirmance of the illegal contract but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act." Parkersburgh v. Brown, 106 U. S. 487; Wald v. Wheelon, 27 N. D. 624; Montgomery v. Whitbeck (N.D.) 96 N. W. 529.

"But where the contract is illegal, that is a contract condemned or prohibited by law, or is malum in se, it is not enforceable but is to be regarded as void, for in such cases the corporation does more than perform an act in excess of its corporate powers." Elliott, Contr. ¶ 556; Re Guardian Mut. Fire Ins. Co. 107 Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868.

W. S. Lauder and *Kvello & Adams,* for respondent.

"The right of action (that is the right of action of the parties suing to recover money paid for the use of another) accrues immediately upon the payment (that is of the payment for the use of another) and not before." 27 Cyc. 842.

"An objection that an action was brought before the cause thereof

accrued, must be pleaded, and the objection must be urged at the trial." 1 Cyc. 475; Mahoney v. O'Leary, 34 Ala. 97; Johnson v. Meyer, 54 Ark. 442; Elder v. Rourke, 27 Or. 363.

"A contract of a corporation that is ultra vires, not because prohibited by positive law, or inherently vicious, and not because the corporation could not, under any circumstances, make the contract, but solely because of the existing circumstances and conditions under which it is made, is never void, and the plea of ultra vires will not avail either party to such contract when the contract has been fully executed by the other party." Tourtelot v. Whited, 9 N. D. 467.

"A loan made by a national bank upon real estate security, although prohibited by United States statute, is voidable, and not void, and the sovereign alone can be heard to object. Its ultra vires nature cannot be pleaded as a defense by the debtor." First Nat. Bank v. Messner, 25 N. D. 263.

"But we would reach no different conclusion even though we should assume that the act of the bank was ultra vires. It is one thing to assert that the bank cannot legally engage in the business of acting as agent, it is an entirely different thing to assert that when it has, in fact, assumed to act as agent, it shall not be held to the ordinary duties and obligations which govern such a relation. A bank may repudiate its promise to act as an agent when such promise is not binding, and in so doing, it will incur no liability. So long as the matter remains executory, it can fall back upon the defense of ultra vires. But a widely different question is presented when it has executed or pretended to execute the agency. So long as the business remains unfinished, the person dealing with the bank must take the risk of the refusal of the latter to proceed. He is bound to know that the act is ultra vires. But it is not a physical impossibility for a bank to act as agent. If it assumes to and does so act, and receives the proceeds of the sale it must account for them as agent. It has undoubtedly violated the law by exercising powers not conferred upon it. But this violation can be taken advantage of only by the sovereign authority which created the bank. . . . Indeed, in many cases this is the rule, although the act performed by the bank is in defiance of a positive statutory prohibition." Anderson v. First Nat. Bank, 5 N. D. 451–455; Bank v. Mathews, 98 U. S. 621; Bank v. Whitney, 103 U. S. 99; Thompson v. Bank, 146 U. S. 240;

Bank v. Birch, 130 N. Y. 221; Mitchell v. Tel. Co. (S. D.) 127 N. W. 582; Building Ass'n etc. v. Chamberlain (S. D.) 56 N. W. 897; 14 C. J. pp. 583, 584; 7 R. C. L. pp. 678–681 and cases cited; 70 A. S. R. 170; 111 A. S. R. 322, (subd. 10); 20 L.R.A. 765; 96 U. S. 258.

"Corporations are presumed to contract within their powers. The doctrine of ultra vires when invoked for or against a corporation should not prevail, where it would defeat the ends of justice or work a legal wrong." Railway Co. v. McCarthy, 96 U. S. 258; Sweeny v. United Underwriters Co. 29 S. D. 576; Ege v. Centerville Teleg. Exch. 33 S. D. 468.

"A banking corporation may acquire title to such note, even though the act of purchase be ultra vires; and unless the law expressly declares the act void the maker cannot interpose the plea of ultra vires as a defense in an action upon the note." Neilsville Bank v. Tuthill, 4 Dak. 295; 10 Cyc. p. 1158; Cases cited in 2 R. C. L. Supp. p. (bottom) 433; Sweeny v. U. S. Underwriters Co. (S. D.) 137 N. W. 379; Bank v. Bank, 15 N. D. 594; Bank v. Bakken, 17 N. D. 224; Bank v. N. W. Lime Co. 28 N. D. 479; Davenport v. Stone, 104 Mich. 521; Merchants Nat. Bank v. Citizens Nat. Bank, 10 Wall. 604; 1 Morse, Banks & Bkg. 5th ed. §§ 160–165.

Statement.

BRONSON, Ch. J. The plaintiff bank brought this action to recover on three notes made by defendant aggregating $5,481.31. Defendant, in counterclaims, set up commissions due, loans made, and expenses incurred, aggregating $4,770.41. Trial was had to the court without a jury. Upon findings, the trial court allowed to plaintiff the amount of the notes with interest, less a certain deduction aggregating $5,538.71; to defendant the counterclaims, for commissions earned and loans made with interest, aggregating $6,243.13. Judgment, accordingly, was entered in defendant's favor for the difference, amounting to $857.43. Plaintiff has appealed therefrom.

The facts are: Plaintiff is a state bank with a capital of $50,000 doing business at Lisbon, North Dakota. Its board of directors adopted a resolution, at the time therein stated, as follows:

"February 1st, 1919, at a special meeting of the board of directors,

at the call of the vice president, P. A. Suhumskie, was held on the above date at 2 o'clock P. M. in the office of the Ransom County Farmers Bank, Lisbon, North Dakota. Present, P. A. Suhumskie, J. B. Casey, L. O. Hatlie, Matt Linzbach, E. K. Savre. Matter of taking the land business up was considered. Motion made and seconded that the bank establish a land department to be operated separately from the bank and that all earnings received from this department be turned into the bank, that the funds of the bank be in no way whatever used in connection with this business as it should be self-sustaining, that G. E. Cavett be appointed to establish agencies wherever he may see fit and make contracts with them, that all land handled through this department to be handled on a commission of $5 per acre, no more and no less, $2 of this flat commission to be the commission of the agent selling the land in case the agent makes the sale and in case the land is sold directly by Mr. G. E. Cavett securing the purchaser he is to receive the commission of $2 per acre. Motion carried, all present voting yes. Motion by Casey, seconded by Savre, that Mr. Cavett be made manager of this department. Carried, all members present voting yes. Motion to adjourn. Carried. M. G. Suhumskie, Acting Secretary."

Defendant was present at this meeting. He accepted the proposal and proceeded to act.

Stationery and cards were secured which displayed this land department and defendant as manager. The names of nonresident landowners were procured from county officials. Land listing contracts were prepared, wherein the bank was designated as agent of landowners, for purposes of land selling. For defendant, in his work, there was made available clerical assistance and, to some extent, the office force in the bank. Although defendant maintained no regular office in the bank, he frequently was there and used the office force and furniture. Thus did the defendant act in this capacity until April 1st, 1921, when he was dismissed. During this time he was also in the employ of the state for a part of the time, doing work for the bureau of education. While manager, defendant purchased and sold, in toto, two sections of land. The purchases were made by contracts for deed running to defendant. These lands were purchased at the following prices per acre: One section, at $60; a half section at $65; another half section at $70. They were respectively sold at an advance of $5 per acre. Four different

sales of these lands are involved, namely, one half-section to Thompson; one quarter-section to R. E. Myers; three quarter-sections to I. L. Myers: one half-section to Davidson. To each of these parties, respectively, was given a partial payment contract of sale, by the bank, signed by defendant as manager. Each of these contracts evidenced a series of notes from $1,000 to $2,000, falling due consecutively for a number of years. At least, upon three of these contracts, an amendment dated March 6th, 1920, was made by defendant personally and the respective purchaser to the effect that in case poor crops made it impossible for the purchaser to complete his contract or to make arrangements to carry it, defendant agreed to take the land back without prejudice and to return payments already made. Defendant received from Davidson $1,000; from I. L. Myers $1,000; from R. E. Myers $500; from Thompson $500; a total of $3,000 in cash. It was necessary for him to have additional money in order to make payments to the original owners of the lands. Accordingly, he borrowed $2,000 from one Lund, his old friend in Iowa. To him he gave as collateral a Davidson note for $1,000, a R. E. Myers note for $1,000, and an I. L. Myers note for $635. Then, he borrowed $3,000 from a bank in Enderlin and gave his note for the amount secured by notes taken on these land deals. Then, he paid $2,000 upon this note, leaving a balance of $1,000 unpaid. Later, in March, 1920, he borrowed $2,800 more from the Enderlin bank and gave a note for the total borrowed, $3,800. He placed as collateral to this note certificates of deposit for $3,000 issued by the plaintiff bank to defendant and a Thompson note for $1,000. These certificates of deposit are dated March 17, 1920. He gave to plaintiff bank a Myers note for $2,000 and a Thompson note for $1,000 at the time when the certificates were issued. He also sold a note to a bank in Nome for $1,000. Thus, in all, he received through cash and loans, $9,800. He paid, in various sums, to original landowners, $11,088.51. The certificates of deposit were eventually paid by plaintiff bank to the Enderlin bank. This left a balance of $800 and interest on the Enderlin note that has not been paid. The $2,000 loan made by Lund has not been paid. Until April 1st, 1921, none of these notes taken in these land deals were turned over to the plaintiff bank or appeared as resources on its books, excepting the two notes given when the certificates were issued to defendant. But on April 1st, 1921, when defendant was dis-

missed he wrote a letter describing his actions and turned over all contracts and notes except those theretofore placed as collateral.

However, in January, 1920, at the annual meeting of the bank's stockholders, defendant made a report by letter to the bank concerning the business of this land department during the preceding year. This letter mentioned the lands hereinbefore referred to. It claimed a profit on land sales amounting to $6,400 of which the bank's commission was $3,840 and defendant's commission, $2,560. It listed expenses in postage and letter heads amounting to $5.12, and discount on two notes amounting to $35. It claimed, accordingly, a net profit to the bank amounting to $3,800.88. The stockholders, through motion made, accepted this report. The bank prepared a statement of its earnings. This statement showed bank earnings, $7,009.84; net earnings of the land department, $3,800.88; total earnings of all departments, $10,810.72. In percentages, of capital stock, the bank earnings were 14.01 per cent; land department earnings, 7.60 per cent. This statement was used in selling bank stock.

Pursuant to defendant's testimony, the bank, through its officers, knew about these land purchases and land sales; defendant explained that the bank at Enderlin needed some collateral and that it did not wish to take any more land notes; accordingly, the bank issued the certificates of deposit; then, he gave to plaintiff the land department notes hereinbefore mentioned, for $3,000; defendant took the certificates and presented them as collateral to the loan of $3,800 at the Enderlin bank. The bank also knew about the loan made from Lund.

Defendant further testified that, at the annual meeting when he was selected as manager, he stated that he was willing to act as manager if he received a commission of $2 per acre and his necessary expenses; during the time he was acting as manager he kept the papers in a private deposit box; the bank officers, however, had another key.

Mr. Suhumskie, vice president, and active officer of the bank, testified that the certificates of deposit for $3,000 were given to defendant as commission on the Myers and Thompson deals; that he did not know what became of these certificates after they were delivered to defendant; that defendant did not tell him about borrowing $3,800 from the bank at Enderlin; that the land notes amounting to $3,000 were taken

and certificates issued for them; that he did not keep track of the details of the land business.

Otherwise, some witnesses for plaintiff testified that there was no agreement to pay defendant's expenses. Defendant also offered proof of his expenses.

The facts, upon this record, must be gleaned from the various contracts, notes, certificates, letters, reports and evidence of the parties. No book record or account of all the proceedings of this land department or of the bank have been presented in the evidence.

The notes upon which suit was instituted represent other personal transactions with defendant. There is no controversy concerning the same upon this appeal. Defendant's counterclaims, accordingly, involve, upon the evidence adduced, commissions claimed of $2 per acre, for the sale of the 1,280 acres mentioned; expenses incurred in connection therewith; the loan of $3,800 ($800 balance) secured from the bank at Enderlin; and a loan of $2,000 secured from Lund in Iowa. The trial court allowed these counterclaims excepting that concerning expenses.

Issues.

The plaintiff specifies that the trial court erred in admitting certain testimony and exhibits concerning the counterclaims and in making its findings allowing such counterclaims; that the evidence is insufficient to justify the findings so made.

The plaintiff contends that defendant had no authority from plaintiff to borrow money; that the loans made by defendant have not by him been paid; hence he has suffered no detriment and has no right of recovery; that the entire transaction concerns an engagement in real estate transactions which are ultra vires and prohibited by law; that, furthermore, defendant has failed to prove any right to recover commissions from the bank.

The defendant maintains that, since this is an action at law in which no motion for a new trial was made, this court cannot review the sufficiency of the evidence to sustain the findings; that the bank, having deliberately entered into the real estate business, is bound to reimburse defendant for his commissions and his advancements by reason of ben-

efits received and retained by the bank; that defendant never has been paid any amount for commissions earned by him and consequently he is entitled to recover his commission of $2 per acre for all the land sold by him for the bank; that, concerning the loans, the counterclaim is asserted, not to recover money paid out for the use of the bank, but to recover for money loaned by defendant to the bank; that the money, represented by these counterclaims concerning the loans, was paid out by defendant for the bank in its land business: that, concerning the claim of ultra vires, the transactions involved herein are completed transactions. The contract under which defendant seeks to recover his counterclaims is not prohibited by positive law. Accordingly, that the principle of law applies that, the contract having been completed and the bank having appropriated the fruits thereof, it will not be permitted to urge that the contract was ultra vires and therefore void; that the statutory provision prohibiting the employment of bank assets or funds in real estate is a statutory regulation which would permit, for its violation, seizure by the public examiner and a closing of the bank; that there is no statutory regulation prohibiting a bank from borrowing money and, since this land department was created by and belonged to the bank, it was liable to the defendant for the loan made by him to it; that the state might have interposed against this engagement in the land business; but, since the bank was permitted to carry on such business, it would be inequitable to permit the bank now to take advantage of the statute and escape its liability upon a completed contract.

Decision.

The contention of defendant, that, in a trial by the court without a jury, it is necessary to move for a new trial in order to review the sufficiency of the evidence, merits attention only through its novelty. Before and after the enactment of the Practice Act, Laws 1913, chap. 131, this court has continuously reviewed the sufficiency of the findings by a trial court, where proper specifications concerning the evidence have been made, without any motion for a new trial. Maclaren v. Kramar, 26 N. D. 244, 50 L.R.A.(N.S.) 714, 144 N. W. 85 (an able brief was presented by respondent in the foregoing case on this very question; yet, the judgment was reversed); Feil v. German Farmers Mut. Ins.

Co. 28 N. D. 355, 149 N. W. 358 (in this case, the necessity of specifying upon an appeal from the judgment, the insufficiency of the evidence was emphasized); Updegraff v. Tucker, 24 N. D. 171, 139 N. W. 366; Bergh v. John Wyman Farm Land & Loan Co. 30 N. D. 158, 152 N. W. 281; Shellburg v. Wilton Bank, 39 N. D. 530, 167 N. W. 721, 723; McCormick v. Union Farmers State Bank, 48 N. D. 834, 187 N. W. 421; Bleeker v. Johnson, ante, 156; 190 N. W. 1010; Botnen v. Eckre, 41 N. D. 514, 171 N. W. 95. In fact, the Practice Act, chap. 131, Laws 1913, in connection with § 7842, Comp. Laws, 1913, plainly so provides. Thus, in appellate procedure as above indicated have the bar and this court so construed the statutes without question.

Is the evidence sufficient to warrant the finding of the trial court that defendant is entitled to recover from the bank $2,560 as commissions for selling 1,280 acres of land?

In our opinion, disregarding the question of ultra vires or law prohibitions, the contract of the parties and their acts taken thereunder furnish the answer.

The contract-resolution specifically provides that this land department should be operated separately from the bank; that the funds of the bank were to be in no way whatever used in connection with the business, as it should be self-sustaining; that all earnings received from this department should be turned into the bank; that defendant should receive $2 per acre commission in cases where he sold the land directly.

The record clearly discloses that defendant made no demands for any commissions until after he was dismissed as manager.

When he made his report at the stockholder's meeting in January, 1920, all of the land that he did sell while manager was then sold. He then made a list of it. In his report he showed the bank's commissions to be $3,840 and his commissions $2,560. Specifically, in that letter he stated to the bank that he had handled the business on personal credit so as not to draw on the bank for funds; that all commissions bear 6 per cent interest so that any discount would be more than balanced by the time commissions were worked out. In that letter he made no demand for any commissions. Furthermore, upon the record it is apparent that the notes taken in these land transactions were held by the defendant. He used them for purposes of this land department which he was managing. None of these notes were taken into the bank or ap-

peared in the resources of the bank so far as this record discloses excepting the two notes amounting to $3,000 that were given to the bank on March 17th, 1920, when defendant procured from the bank the certificates of deposit for $3,000 for use as collateral in the loan made at the Enderlin bank.

The statement, that the bank issued, showing the net earnings of the land department to be $3,800.88, was entirely a statement on paper showing merely paper profits. At that time when the statement was made or at any other time while defendant was manager, there were in fact no earnings realized in cash or turned over to the bank unless it be considered that the notes turned over by defendant after his dismissal as manager then represented or comprehended bank earnings as well as defendant's commissions.

But, attached to the contracts of sale made by defendant, at least to three of them, was the stipulation that, in case of poor crops which would make it impossible for the purchaser to complete his contract and in case arrangements could not be made to carry the same, defendant agreed to take the land back without prejudice and to return the payments already made. The conditional features of such stipulation requires no discussion. It is evident that the earning of commissions, either for the defendant or for the bank, as well as the permanency of any sale made, was made dependent upon the happening of future events and was indeed speculative. It does appear, under these facts and circumstances, not only that there was no commission that was definitely earned and payable; but also, under the contract and acts of the parties, that there was no intent to fasten any liability upon bank funds for the commissions involved. We are clearly of the opinion that the evidence is insufficient to establish any right of defendant to recover the commissions involved from the bank.

Is the evidence sufficient to establish that defendant loaned to the bank $3,800 ($800 balance) through the transaction had with the Enderlin bank, and $2,000 through the transaction had with his friend Lund in Iowa?

Again we are clearly of the opinion that the contract and acts of the parties furnish a complete answer to this question. The resolution of the board of directors was specific to the effect that bank funds should not be used in this land department. The very fact that plaintiff did

borrow money from his friend Lund and from the Enderlin bank; that he did use cash moneys received from payments made upon land contracts and did sell or pledge land notes; all such acts disclose an intent to abide by this contract relation contained in the resolution. Defendant's letter containing a report to the stockholders in January, 1920, concords with this action thus taken by the defendant in procuring personal loans through which to carry on this department. The further fact, that these notes were not turned into the bank and handled by the bank as a banking transaction so as to float loans to handle this land department, further discloses acts and intent not to engage bank funds in the operation of this land department.

If it be argued that the issuance of the certificates of deposit to defendant and the reception of the two land notes by the bank for such certificates, does evidence, in one instance, at least, the use of bank funds in order to float a loan for this land department, the answer is that this specific relaxation or deviation, if such, from the contract and understanding, did not thereby become a general relaxation or deviation for all other loans that defendant had made for this land department. Defendant is not seeking to recover the $3,000 involved through these certificates. This amount has been paid upon his loan. This transaction affords no basis for an understanding, nor a sufficient basis for an estoppel, that bank funds should be liable for all loans that defendant made or might make in the conduct of such land department.

Accordingly, we are of the opinion that defendant cannot recover from the bank for these loans thus made by him and that, pursuant to the contract and acts of the parties, no principle of estoppel can be invoked which will permit such recovery upon the pleadings and evidence in this case.

Therefore, we are of the opinion that the trial court erred in its findings. The counterclaims of defendant should be dismissed. The findings of the trial court, upon the notes of defendant, in favor of the plaintiff should be and are sustained. The judgment, accordingly, is reversed and remanded for further proceedings and entry of judgment in plaintiff's favor consonant with this opinion, together with costs.

BIRDZELL, JOHNSON, CHRISTIANSON, and NUESSLE, JJ., concur.

FARMERS & MERCHANTS STATE BANK OF TOLNA, a Corporation, Appellant, v. H. L. STAVN and Lena Stavn, Respondent.

(194 N. W. 689.)

Appeal and error — judgment — discretion of trial court in vacating default judgment for surprise, mistake, or excusable neglect not disturbed unless abuse shown.

1. An application to vacate a default judgment on the ground of surprise, mistake, or excusable neglect is addressed to the sound judicial discretion of the trial court on the particular facts existing in the case, and the trial court's ruling will not be disturbed on appeal unless an abuse of discretion is shown. State Bank v. O'Laughlin, 37 N. D. 532.

Evidence — as between parties to negotiable instrument, defense of no consideration may be established by parol.

2. As between the immediate parties to a negotiable instrument, absence of consideration therefor is a defense and may be established by parol.

Evidence — parol evidence admissible to show instrument given without consideration.

3. While parol evidence of a contemporaneous agreement or understanding is inadmissible to contradict, vary, or explain the terms of a negotiable instrument, it may be introduced to show that the instrument was given without consideration.

Opinion filed July 5, 1923.

Appeal and Error, 4 C. J. § 2825 p. 840 n. 33; Bills and Notes, 8 C. J. § 1018 p. 744 n. 36; Evidence, 22 C. J. § 1159 p. 1165 n. 77; § 1669 p. 1255 n. 53; Judgments, 34 C. J. § 677 p. 429 n. 79.

Appeal from an order of the District Court of Nelson County opening and vacating a judgment as to the defendant Lena Stavn, *Cooley*, J.

Affirmed.

Flynn, Traynor & Traynor, for appellant.

"During the trial, however, defendant was permitted to introduce testimony to the effect that the cashier of the plaintiff bank agreed with the defendant, that the defendant would not be required to pay the

Note.—On admissibility of parol evidence to show failure of consideration of negotiable instrument, see 3 R. C. L. 943; 1 R. C. L. Supp. 928; 5 R. C. L. Supp. 210.

note, but that if the defendant would sign the note for a short time until Chase could go through and receive bankruptcy, that then after Chase had been so discharged in bankruptcy, the bank would then take a note signed by Mr. Chase alone, and release the defendant from liability. This testimony was all admitted over plaintiff's objection that it was incompetent and tended to contradict and vary the terms of a written instrument. We think this testimony was improperly received." First St. Bank v. Kelly, 30 N. D. 94; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362; Sargeant v. Cooley, 12 N. D. 365, 117 N. W. 576; Rieck v. Daigle, 17 N. D. 365, 117 N. W. 346; 17 Cyc. 589, 644; 2 Enc. Ev. 453; Dan. Neg. Inst. 80; 4 Am. & Eng. Enc. Law, 2d ed. 146.

Murphy & Toner, for respondent.

NUESSLE, J. This is an appeal from an order granting the defendant's application to vacate and set aside a default judgment. The judgment vacated was one ordered against the defendant Lena Stavn and her husband, H. L. Stavn. The summons and complaint were served on the defendant Lena Stavn on October 4th, 1922. The judgment was entered on November 13th, 1922. The application for an order opening the judgment and allowing the defendant Lena Stavn to answer was made on December 26th, 1922.

The action is brought to recover on a promissory note. The defendant Lena Stavn resided with her husband in Nelson county, North Dakota. Service of the summons and complaint were made by leaving the papers with the defendant Lena Stavn at her residence, the defendant H. L. Stavn then being away from home. Thereafter and within due time an answer was interposed on behalf of both of the defendants by an attorney. This answer was not properly verified and the plaintiff's attorney refused to admit service for that reason and returned the papers. No other steps were taken to interpose an answer, and on November 13th judgment was entered by default against both of the defendants. The defendant Lena Stavn on December 26th made and served her notice of motion to vacate the judgment and for leave to answer. She made and served an affidavit of merits and a proposed answer. The motion as originally made was on the ground that there had been no service of papers upon her, but she later made an amended

application based on the ground that she had failed to answer by reason of surprise, mistake and excusable neglect. Her showing as made by affidavit is that the papers were served by one of the officers of the plaintiff bank; that he brought such papers to her at her residence, her husband then being absent in Minnesota; that there were two bundles of papers; that when he appeared she said she would sign no papers for him; that he told her he did not wish her to sign anything but that the papers he had were for her husband in connection with the Minnesota land deal; that she took such papers, and later at her convenience, without examining the same, sent them forward to her husband in Minnesota; that she did not know that she was being sued until after judgment had been entered, and therefore, she consulted no one with reference to the matter and took no steps to interpose an answer. She makes no showing as to when she obtained knowledge as to the fact of entry of judgment against her; neither does she set out any reason as to why her application to vacate and for leave to answer was not made earlier. Her husband makes affidavit that he directed his attorney to interpose an answer for himself and the defendant Lena Stavn, but that he did so without consulting her and without her knowledge. The attorney who attempted to make and serve the answer likewise makes affidavit that he did so at the request of H. L. Stavn and without any other authority in so far as the defendant Lena Stavn was concerned, and without consulting her, but that had he known she had a defense he would have answered for her.

The counter affidavits of the plaintiff are to the effect that service was made upon the defendant Lena Stavn by handing to her copy of the summons and complaint at her residence, and that service of summons and complaint in this action and also in another action were made upon the defendant H. L. Stavn by handing the papers to her at the same time; that there were three bundles of papers. The allegations of the affidavit of Lena Stavn with respect to what was said and done are expressly denied, and there are various other abrupt contradictions in the affidavits.

The proposed answer of the defendant Lena Stavn admits the execution and delivery of the note sued upon, and "alleges that the note . . . was given to the plaintiff without any consideration whatsoever and under the following circumstances and upon the following agree-

ment and not otherwise; that before the giving of the said note and during the negotiations leading up to the giving of the same, the plaintiff, in order to induce the defendant to sign said note, stated and represented to the defendant that the defendant H. L. Stavn was indebted to the plaintiff in the sum of $2,000 for money advanced to the last named defendant for use in his mercantile business in which said defendant H. L. Stavn had executed and delivered to the plaintiff a certain mortgage mortgaging to plaintiff certain real property owned by the defendant H. L. Stavn in the state of Minnesota for the purpose of securing said note; but that said mortgage could not be filed for record in the state of Minnesota unless the same were signed by this defendant, she being the wife of said defendant, and that said plaintiff wanted the signature of this defendant upon said mortgage and note for no other purpose than to have such mortgage and note executed in such manner that the same could be filed for record in the state of Minnesota, and for no other purpose whatsoever, and positively assured this defendant that her signature for said note would not be used for any other purpose whatsoever, and positively assured and stated to this defendant that she would never be asked or required to pay said note or any part thereof, and that relying up the statements of said plaintiff aforesaid and for the purpose of accommodating said plaintiff and for no other purpose whatsoever and entirely without consideration, this defendant signed said note."

After a consideration of the showing thus made by the respective parties, the district court made its order opening the default and permitting the defendant to answer on payment of terms on the ground that such judgment was rendered through mistakes, surprise and excusable neglect. This appeal is from that order.

It is the appellant's contention that the proposed answer does not set up a meritorious defense, and second, that even though it does, that there was an abuse of discretion on the part of the trial court in granting the defendant's application. This court, in State Bank v. O'Laughlin, 37 N. D. 532, 164 N. W. 135, speaking through Judge Christianson, said:

"Under our statute (Comp. Laws 1913, § 7483) an application to be relieved from a default judgment on the ground of mistake, inadvertence, surprise, or excusable neglect is addressed to the sound judicial

discretion of the trial court on the particular facts existing in the case, and consequently the ruling will not be disturbed on appeal unless it is plain that the trial court abused its discretion in determining the motion. See Wakeland v. Hanson, 36 N. D. 129, 161 N. W. 1012.

"The rules of law governing applications of this kind are well settled. While it is true that such applications are ordinarily granted where the moving papers disclose a good defense upon the merits, and a reasonable excuse for the mistake, inadvertence, surprise, or neglect which occasioned the default, it is also true that the moving party must show himself entitled to the relief which he seeks. And to do this he must show: (1) That he has a good defense upon the merits; (2) a reasonable excuse for the mistake, inadvertence, surprise, or neglect which occasioned the default; and (3) reasonable diligence in presenting the application to vacate after knowledge of the judgment."

We are of the opinion, after careful examination of the proposed answer in the instant case, that it does set up a good defense. We have no concern here as to whether or not the matters pleaded can be substantiated by evidence. The allegations of the answer or affidavit of merits cannot be controverted in this proceeding. Wakeland v. Hanson, supra. The appellant urges that under the authority of First State Bank v. Kelly, 30 N. D. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044, the proposed answer is bad in that it pleads a defense based upon a parol agreement contrary to the express terms of the note sued upon. We do not believe, however, that this contention is sound. There is no question but that the rule is that parol evidence is inadmissible to vary or contradict the terms of a promissory note as between the parties thereto in the absence of fraud or mistake; and while that rule is followed and approved in the Kelly case, it is not at all inconsistent with the further rule therein stated and approved that as between the immediate parties to a negotiable instrument, absence of consideration therefor is a defense and may be established by parol. This rule is expressly pronounced by our statute, Comp. Laws, 1913, § 6913; and independently of the statute, is the law. See Dan. Neg. Inst. 6th ed. § 81A and cases cited; 8 C. J. p. 744 and cases cited; Brannan, Neg. Inst. Law, § 28 and cases cited; First State Bank v. Kelly, supra; Davis v. Sterns, 85 Neb. 121, 122 N. W. 672; McCourt v. Peppard, 126 Wis. 326, 105 N. W. 809. The appellant's position is that the answer pleads a parol

agreement on the part of the plaintiff that the defendant would not be called upon to pay the instrument in question. It is true that such an agreement is pleaded but only as a circumstance touching the real defense pleaded, that is, absence of consideration. While parol evidence of a contemporaneous agreement or understanding is inadmissible to contradict, vary or explain the terms of a negotiable instrument, it may be introduced to show that the instrument was given without consideration. See note in 43 L.R.A. 474; 3 R.C.L. p. 924. As we read the proposed answer all that is pleaded therein is pleaded with the idea and purpose of establishing absence of consideration.

This being our view of the proposed answer, it becomes necessary to further consider the record for the purpose of determining whether or not the other requirements imposed by the rule heretofore quoted and as stated in State Bank v. O'Laughlin, supra, have been met by the defendant. There is no showing on the part of the respondent in her moving papers as to when she was apprised of the fact of entry of the judgment against her. Neither is there any showing as to why the application was not made prior to December 26th, some six weeks subsequent to the date of the entry of such judgment. That being the case, the question is whether or not we can at this time say that a delay of six weeks without excuse offered therefor is so inconsistent with reasonable diligence on the part of the applicant as to warrant us in holding that there was an abuse of discretion on the part of the trial court in vacating the judgment. We do not believe that we should so hold. Neither do we believe, the trial court having adopted the defendant's theory as to the facts with reference to her excuse for the default, that we can say that he acted arbitrarily in so doing. It is not a question of what this court would find and do were it passing on the application in the first instance, but rather whether that which the trial court found and did was unreasonable. In other words, since the whole matter is addressed to the sound judicial discretion of the trial court, on the showing as made, we do not believe that we are warranted in saying that there was an abuse of that discretion, and therefore, the order appealed from must be affirmed, with costs to the respondent.

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

RUSSELL GRADER MANUFACTURING COMPANY, a Corporation, Respondent, v. FARMERS' EXCHANGE STATE BANK OF SANGER, NORTH DAKOTA, a Corporation, Appellant.

(194 N. W. 387.)

Banks and banking — bank held liable for check, under agreement to honor when payable.

Where a bank received a check for $500, dated May 28th, 1918, payable on September 1st, 1918, to plaintiff's order and where, pursuant to and in reliance upon an oral agreement and a subsequent letter by the bank agreeing to pay the same on September 1st, 1918, plaintiff shipped to the maker of the check a road grader, it is *held*, that the transaction was an independent undertaking in the nature of a letter of credit by the bank upon which it was liable.

Opinion filed June 20, 1923. Rehearing denied July 6, 1923.

Banks and Banking, 7 C. J. § 237 p. 594 n. 94.

In District Court, Oliver County, *Berry*, J.

Action to recover the amount of the check.

Defendant has appealed from the judgment and an order denying a motion for a new trial.

Affirmed.

J. A. Hyland, for appellant.

The rule is that the drawee of a bank check cannot be held liable upon a claimed contract of acceptance to the principal, unless the language used clearly and unequivocally import an absolute promise to pay, and it must clearly be shown that the bank intends to make such promise. Epsy v. First Nat. Bank, 18 Wall. 604; Michie, Bank & Banking, § 145; Clarke Nat. Bank v. Bank of Albion (N. Y.) 52 Barb. 592; Cook v. Bank, 52 N. Y. 96; Cloften v. Bank, 25 N. Y. 293; Morse, Banking, 3d ed. §§ 152, 413.

First National Bank of Atchison v. Commercial Savings Bank, 87 Pac. 746.

"That a bank is authorized to lend its money and not its credit, and. if a bank could lend its credit as well as its money, it might, if it received compensation, and was careful to put its name only to solid

paper, make a great deal more than any lawful interest or its money would amount to. If not careful, the power would be the mother of panics, and if no compensation was received, there is the additional reason, if any is needed, that such power is in derogation of the rights and interests of stockholders, and at all events could only be exercised with the consent of all. Indeed, lending credit is the exact opposite of lending money, which is the real business of a bank; for while the latter creates a liability in favor of the bank, the former gives rights to a liability of the bank to another." Morse, Banking, 152; Thelmany v. Iowa Paper Bag Co. 108 Iowa, 333, 79 N. W. 68; Swenson Bro. Co. v. Comm'l Bank, 98 Neb. 702, 154 N. W. 233.

"Where a post-dated check is certified by the cashier of the bank on which it is drawn to be good, by indorsement thereon, before the day of its date, the instrument, upon its very face, communicates facts and information to persons receiving the same that the cashier in making such certification was not acting within the known limits of his power, and that he was greatly exceeding them." Clarke Nat. Bank v. Bank of Albion, 52 Barb. (N. Y.) 592.

Sullivan, Hanley & Sullivan, for respondent.

The bank is liable to the holder when it accepts or certifies the check. Comp. Laws, 1913, ¶ 7073.

"It is immaterial so far as the liability of a bank certifying a check is concerned whether or not the makers have a deposit in such bank sufficient to meet the same." Security St. Bk. v. St. Bank, 31 N. D. 454, 154 N. W. 282.

If the statement which the drawee of a check makes in response to an inquiry concerning the check is a promise to pay the same, or is couched in language which imports a promise to pay, and the party inquiring takes the check in reliance upon such statement and for a valuable consideration, the drawee will be liable to him. Garrettson v. North Atchison Bank, 39 Fed. 163, 7 L.R.A. 428.

In Collidge v. Payson, 2 Wheat. (4 L. ed. 185) Chief Justice Marshall states the rule that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise. 8 L.R.A.(N.S.) 1149;

Henrietta Nat. Bank v. State Nat. Bank, 80 Tex. 648, 26 Am. St. Rep. 773; 5 R. C. L. 519, ¶ 41; 2 Pet. 170, 182; 7 L. ed. 386; Violett v. Patton, 5 Cranch, 142, 4 L. ed. 61.

"I have come to the conclusion that the defendant bank was not a guarantor and did not make itself a surety or guarantor on the check in this case, which is plaintiff's exhibit No. 4, but that the defendant bank by its letter certified that the check would be paid on September 1st, 1918, and became primarily liable for the payment of said check; and I base my decision on the law laid down in this recent case which distinguishes the case of Border Nat. Bank v. Amer. Nat. Bank from the case of Bowen v. Needles, 87 Fed. 430. The plaintiff's attorneys may therefore draw an order in conformity with this opinion." 2 Pet. 170, 182; 7 L. ed. 386; Violett v. Patton, 5 Cranch, 142, 4 L. ed. 61.

BRONSON, Ch. J. One Dunahey gave to plaintiff an order for a road grader. Plaintiff refused to accept the order or ship the grader unless payment therefor or the assurance of payment was made. Then, through a telephonic conversation, defendant bank advised plaintiff that they would take Dunahey's check for the first payment of $500 and pay plaintiff the money on September 1st, 1918. Dunahey executed a check dated May 28th, 1918, not cashable until September 1st, 1918, drawn on defendant bank, and payable to the order of plaintiff for $500. On May 28th, 1918, defendant bank wrote to plaintiff: "Mr. Chas. I. Dunahey, of this town, has given us a check for $500, payable to your order and drawn on this bank. The check is payable September 1st, 1918, and is to apply then as a first payment on a grader which Mr. Dunahey is buying from your firm. The check will be paid on that date." On May 31st, 1918, defendant bank again wrote to plaintiff: "Answering your letter of May 28th in regard to order of Mr. Chas. Dunahey, will say that a letter was written to your Fargo office some time ago regarding this matter, which we think will be satisfactory." Accordingly, plaintiff shipped the grader on June 6th, 1918. This check first came into the hands of plaintiff between November 5th and November 18th, 1918. Then it was sent through plaintiff's bank with a draft for collection. It was returned unpaid and marked "not sufficient funds." No testimony was given by defendant's officers concerning the method by which the bank handled this deal with Dunahey or

under what circumstances it issued the letter or had the telephonic conversation with plaintiff. This suit was instituted to recover $500 upon the check and defendant's agreement. Trial was had before a jury. Both parties moved for a directed verdict at the close of the testimony. The court thereupon dismissed the jury and made findings in plaintiff's favor. Defendant has appealed from the judgment entered thereupon and from an order denying a motion for a new trial.

It is the contention of defendant that the transaction constituted a guaranty of the check in excess of the bank's powers. That, in any event, the transaction, if deemed a certification or acceptance of a check, was in excess of banking powers for the reason that the check, being postdated, carried its face notice that any certification or acceptance, if made, was made without funds in the bank to meet the same and, therefore, was simply a loaning of the bank's credit, citing Swenson Bros. v. Commercial State Bank, 98 Neb. 702, L.R.A.1917F, 1066, 154 N. W. 233, and Bowen v. Needles Nat. Bank (C. C.) 87 Fed. 433.

Upon the record plaintiff required defendant's definite undertaking for payment before shipping the grader. Pursuant to the telephonic conversation, the bank specifically agreed to take Dunahey's check and to pay plaintiff the money on September 1st, 1918. Defendant's letters, considered with this telephonic conversation, confirmed this agreement. The obligation was definite. The check was delivered to defendant bank. Defendant in its letter, agreeing to pay the same advised plaintiff of its receipt. Plaintiff thereupon shipped the grader. No evidence was offered to show that defendant made this undertaking without consideration or without first obtaining required security from Dunahey. The transaction may properly be considered as an independent undertaking in the nature of a letter of credit within banking powers. Border Nat. Bank v. American Nat. Bank (C. C. A.) 282 Fed. 73; 7 C. J. 594, 595. See subdiv. 7, § 5150, Comp. Laws, 1913. The judgment is affirmed with costs to respondent.

CHRISTIANSON, NUESSLE, JOHNSON, and BIRDZELL, JJ., concur.

CHARLES SIMON, Respondent, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Appellant, and John P. Frantz and Jacobsen & Murray, Copartners, Respondents.

(194 N. W. 706.)

Former case held controlling.

Applying the rules of law as stated in Simon v. Chicago, M. & St. P. R. Co. 45 N. D. 251, which control the decision in the instant case, it is *held* that the evidence sustains the findings of the trial court in favor of the plaintiff upon all the facts necessary and material to establish a right to recover a judgment.

Opinion filed June 20, 1923. Rehearing denied July 6, 1923.

Appeal from the District Court of Hettinger County, North Dakota, *Berry*, J.

Affirmed.

E. L. Grantham and *Jacobsen & Murray*, for appellants.

"A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided and on a second review all questions which appeal on the record and have not already been decided, are open for consideration." Mut. L. Ins. Co. v. Hill, 193 U. S. 549, 48 L. ed. 788; Schmidt v. Beiseker (N. D.) 120 N. W. 1096.

"A conclusive answer to such contention is the fact that this precise question was squarely raised and decided on the former appeal adversely to appellant's contention and such decision whether right or wrong, is now the law of the case." Schmidt v. Beiseker (N. D.) 120 N. W. 1096; Barney v. Winona & St. P. R. Co. 117 U. S. 228, 29 L. ed. 858; Alcorn v. Bieseke (Cal.) 111 Pac. 98; Trower v. San Francisco, 169 Pac. 617.

"The doctrine of the law of the case is limited to rulings on questions actually presented and considered on the former appeal." Hunter v. Porter (Idaho) 77 Pac. 434.

"The doctrine of law of the case extends only to the questions squarely presented and distinctly passed upon on the former appeal." Hunter v. Porter, 77 Pac. 434.

"On a second appeal, the appellate court is bound by a former decision on points necessarily determined, but on matters not essential or questions not considered it is not bound. Wastl v. Montana Union R. Co. 61 Pac. 9.

We are unable to see why this action was commenced. It was instituted some four years after the grain on which the plaintiff claimed a lien had been shipped out of the state. The lien could not then be foreclosed by a sale of the subject-matter. An action for damages could then have been maintained against all persons who wrongfully interfered with the wheat to plaintiff's damage, and in such action, the plaintiff could show the fact that he had a lien as a basis for recovery for any conversion of the wheat. See Mares v. Wormington (N. D.) 79 N. W. 441; Greenleaf v. Mpls. St. P. & St. Ste. M. R. Co. 30 N. D. 112.

Should be submitted to a jury. Bibson v. Chi. Mil. R. Co. (Iowa) 98 N. W. 474.

We quote paragraph three of the opinion, second column, p. 475 of that report: "The court correctly presented the case to the jury on the theory that the attorney bringing the action and giving the notice had only a lien for services rendered, of the recovery stipulated for in the contract." Sweeley v. Sieman (Iowa) 98 N. W. 571.

We quote from the opinion, p. 571: "It requires no equitable proceeding for its establishment. It has been held that the attorney may enforce such a lien as an ordinary judgment creditor may proceed summarily against a sheriff who has collected the money on execution, or he may bring a suit at law against the client or the adverse party or both, or, if there be a specific fund he may proceed by motion and order to get the necessary amount set aside for the payment of his claim." Barthell v. C. M. R. Co. (Iowa) 116 N. W. 813.

We quote from first paragraph p. 814 of that case: "Four points are relied upon for reversal. First it is contended that the trial court erred in denying the motion to transfer to the equity calendar. This point is ruled by our previous cases, which hold that the action is at law." Farry v. Davidson (Kan.) 24 Pac. 419.

"Attorneys must proceed in an independent action to establish their lien, and collect their fees." Farry v. Davidson, 24 Pac. 419.

Upon this issue over the objection of Farry all the time, the case was tried by a jury, resulting in a verdict for Whitney and Donaldson for $280. Farry v. Davidson (Kan.) 24 Pac. 420; Egan v. Burnight (S. D.) 149 N. W. 176.

"In a proceeding by an attorney to enforce his lien against the parties to the action, he will get an absolute judgment against his client for

the amount he is entitled to and alternative judgment against the other defendant that he pay the amount covered by the lien if such amount is not collectible out of the client. The judgment need not, however, provide that execution shall first issue against his client, although all the proceeds of the settlement have been paid to him, where it is expressly found that he did not appear, that he was without the jurisdiction of the court, and that he was financially irresponsible." 6 C. J. 803.

Where, in an action against attorneys to recover $2,500 which they retained as fees, plaintiff alleged that they were entitled to retain $1,000 for their services, and defendants' answer nowhere averred that plaintiff assented to defendants' view that $2,500 was a reasonable fee, but only alleged that defendants retained $2,500 as a reasonable charge, what was a reasonable fee, in the absence of agreement was for the jury. Childs v. Littlefield (Mass.) 91 N. E. 1017; (N. D.) 100 N. W. 1084.

"It is true that the complaint and cross complaint refer to the same thing or subject-matter, the lots, but they are not connected with the same controversy concerning the lots. The cause of action which one defendant may set up against his codefendant by a cross complaint must be one arising out of or having reference to the subject of the original action." Yance v. Boyce, 28 N. D. 187.

"When the plaintiff alleges an express contract as a basis for recovery he cannot recover on an implied contract or quantum meruit. This question has been so recently passed upon by this court that no discussion is necessary. It is apparent in the case at bar, that, if the plaintiff might recover upon quantum meruit, the complaint contains no allegations of the value of the services, hence, no foundation is laid for such a recovery." Lowe v. Jensen, 22 N. D. 148; Southworth v. Rosendahl (Minn.) 158 N. W. 717; Egan v. Burnight (S. D.) 149 N. W. 176; Mares v. Wormington (N. D.) 79 N. W. 441.

"In our judgment the trial court exceeded its authority in permitting an entirely new cause of action to be sent out in the complaint by way of an amendment." Mares v. Wormington (N. D.) 79 N. W. 441.

"According to the weight of authority, if there is an entire failure to state the cause of action in the original pleading, no amendment so as to state a cause of action is permissible." 31 Cyc. 407, 409, ¶¶ 2, 11.

"Every attorney enters into the service of his client subject to the rule that the client may dismiss or supersede him at will; that if he makes a contract for future services to his client it is necessarily subject to such rule, and made with the full knowledge that he may never perform such services, for the reason that his client may not keep him, and that in that event he will not be paid therefor, but will be entitled to compensation only for the services he has actually rendered." 113 App. Div. 810, 812, 99 N. Y. S. 1059, 204 Fed. 435; Martin v. Camp (N. Y.) 114 N. E. 46; see Lawler v. Dunn (Minn.) 176 N. W. 989.

"Where judgment creditor agreed to pay M. 25 per cent of the amount recovered on judgment, and M. employed other attorneys to institute proceedings for collection, but made no assignment of any interest in his contract, the other attorneys must look to M. for compensation for services performed under and by virtue of their employment by M." Millsap v. Sparks (Ariz.) 188 Pac. 135; Clearwater County State Bank v. Ricke, 163 N. W. 793; Ellis v. Frawley, 161 N. W. 364; Anker v. C. & Great Western Ry. Co. (Minn.) 167 N. W. 278; Zanker v. Chicago, G. W. R. Co. 174 N. W. 841.

"A judgment in a former suit between the same parties is not conclusive in a subsequent action involving different issues, where it does not appear that the identical question sought to be concluded was necessarily tried and determined in such prior litigation." Norton v. Emerson, 30 N. D. 258; Senneff v. Sharpe (Iowa) 174 N. W. 491.

"The circumstances to be considered in determining the compensation to be recovered are the amount and character of the services rendered; the labor, time and trouble involved; the nature and importance of the litigation or business in which the services were rendered; the responsibility imposed; the amount of money, or the value of the property affected by the controversy, or involved in the employment; the skill and experience called for in the performance of the services; the professional character and standing of the attorney; the results secured." 6 C. J. § 331, p. 750; Trimble v. Kansas City R. Co. 201 Mo. 372, 100 S. W. 7.

"While it is true that the time taken in the performance of legal services should be taken into consideration, in fixing the value thereof, yet, it is of minor importance."

"It must be remembered, however, that the value of services per-

formed, by an attorney, cannot always be measured with the same degree of exactitude as can a bushel of wheat or a ton of coal. Education, experience, skill, judgment and knowledge are important factors." Kirchoff v. Bernstein (Or.) 181 Pac. 746.

"To ascertain the number of hours dedicated by an attorney to the business in hand, and then to make an allowance therefor, at so much per hour, is not an appropriate method for the determination of the value of the professional services rendered by him." Haussermann v. Rahmeyer, 12 Philippine, 350.

"Where the amount of attorney's fees is not fixed, to determine what the plaintiff is equitably entitled to recover, he may prove what is ordinarily charged in such cases." Stanton v. Ambray, 93 U. S. 548, 23 L. ed. 983; International Harvester Co. v. State Bank, 166 N. W. 507.

W. F. Burnett and *V. H. Crane,* for respondents.

"It has been held that, unless an action at law is expressly authorized by statute a court of equity is the only court having jurisdiction to enforce such liens." 6 C. J. 800, ¶ 416.

"The constitutional right to trial by jury does not extend to a proceeding to enforce an attorney's lien." Standige v. Chicago R. Co. 254 Ill. 524, 40 L.R.A.(N.S.) 528.

"Amendments of the pleadings after remand will not be permitted in a cause which was tried de novo on appeal." 4 C. J. 1227.

"A state court has jurisdiction of an action by an attorney to enforce his lien on the proceeds of a settlement made by the parties to an action brought by him as attorney in a court of the state, although before the settlement the action had been removed to a Federal court." 6 C. J. 801.

"It is quite clear however that such removal did not affect the plaintiff's lien upon the cause of action sought to be enforced as the lien existed by operation of law. The right to the lien did not depend in any way upon the decision or judgment of the United States circuit court; the lien attached upon the commencement of the action in the supreme court of the state of New York and upon the settlement attached to the fund in the hands of the defendant, which determined the cause of action and the relation between the plaintiff and defendant was not different from that in any case in which the defendant had in its hands a fund to which a lien had attached." Oishei v. Penn. R. Co. 117 App.

Div. 110–116, 102 N. Y. S. 368, 85 N. E. 1113; State ex rel. Miller v. People's State Bank, 22 N. D. 583, Ann. Cas. 1915D, 805; Ansel v. Kyger (Ind.) 110 N. W. 559; Duryea v. Edinger (Mich.) 134 N. W. 978; Wagner v. Freeny (Md.) 90 Atl. 774; Haight v. Freese, 165 Fed. 430; Grier v. Union Nat. L. Ins. Co. 217 Fed. 293; Finch Van Slyck v. La Suer Co-op. Co. (Minn.) 159 N. W. 826; 3 C. J. 625, ¶ 481; State v. State Bank (Nev.) 137 Pac. 400; Senneff v. Sharpe (Iowa) 174 N. W. 491; State ex rel. Dolman v. Dickey (Mo.) 231 S. W. 582; 6 C. J. 761, ¶ 353.

Jurisdiction of state courts. 6 C. J. 800; Laughlin v. Union P. R. Co. (Mo.) 196 S. W. 398.

"The decision of an appellate court is binding and conclusive upon the parties, as to the matter adjudged, in subsequent litigation between them in the same or any other court, and this is true even though the appellate court has since decided differently in other cases." 23 Cyc. 1221, d.

"An adjudication on any point within the issues presented by the case cannot be considered a dictum." 15 C. J. ¶ 344, p. 952.

"On the other hand, all the propositions assumed by the court to be within the case, and all questions presented and considered and deliberately decided by the court leading up to the final conclusion, are as effectively passed upon as the ultimate question solved, and the judgment is authority upon all points assumed to be within the issues which the record shows the court deliberately considered and decided in reaching it." 15 C. J. ¶¶ 329–335, p. 940; Moran v. Simpson, 173 N. W. 769.

"Inferior tribunals are found by the conclusions of the court of last resort, and cannot treat them as dicta on the theory that the questions determined were not properly raised by the record and were not necessary to the determination of the case." 15 C. J. ¶ 344, p. 953.

"It is the general rule that the decision of an appellate court is the law of the case in further proceedings in the cause in the trial court and in all subsequent stages of the action or proceeding. The rule is especially applicable where the appellate court has remanded the cause with specific directions as to the steps to be taken by the lower court; and such rule holds good regardless of whether the decision of the appellate court is right or wrong, it being said that is only where the decision is

deemed erroneous that the doctrine of 'the law of the case,' becomes at all important."

"The lower court cannot rehear or reconsider the matter decided by the appellate court, and it is the duty of the lower court to follow the decision of the appellate court, its action being deemed erroneous when at variance with the decision, and not erroneous in this respect when in accord therewith." 4 C. J. 1213, ¶ 3266, b.

"While the rule that the decision of an appellate court is the law of the case in subsequent proceedings in the same cause does not extend to matters not decided, even though the appellate court may have made some statements or remarks in respect thereto, it does apply to and comprehend all points presented and decided and necessarily involved, regardless of whether or not such points are specially noted in the opinion, syllabi, or mandate; and some courts go to the extent of holding that the decision of an appellate court is the law of the case, although a matter is not essential to the decision of the case on appeal, if it is important for the purpose of a new trial, and in that view passed on, it becomes the law of the case." 4 C. J. ¶ 3267 (m), p. 1216.

Amendment of the pleadings after remand will not be permitted in a cause which was tried de novo on appeal. 4 C. J. 1227, ¶ 3280, p. 1227.

Where, on remanding a cause, the appellate court has expressly or in effect given directions as to the issues to be tried, the new trial may and should be full and complete as to such restricted issues. 4 C. J. 1240, ¶ 3302, c.

PER CURIAM. The decision of this case upon the former appeal is reported in 45 N. D. 251, 177 N. W. 107. The facts are briefly stated in the opinion of the majority, in the specially concurring opinion of Justice Robinson and with especial fullness in the dissenting opinion of Justice Christianson, in which Justice Birdzell concurred. We deem it unnecessary to restate all the facts here. The record on this appeal contains substantially the same testimony as appears in the record on the former appeal, except for some changes in the testimony of defendant Frantz, made, as he now claims, to correct statements made by him upon the former trial, which he now says were false and were, he asserts, made under the advice and solicitation of the counsel

who represented him at that time and in the personal injury action against the railroad company, defendant and appellant here. He now exonerates respondent Simon from any misconduct in connection with the making of the contract of employment.

The record on this appeal also shows that, in connection with the deposit and bond referred to on 45 N. D. 261, 262, 177 N. W. 107, Jacobsen & Murray furnished a bond to the First National Bank of Mott, in order to be able to check out the sum of $11,000, received in settlement of Frantz's claim against the Chicago, Milwaukee & St. Paul Railway Company, appellant herein. The record shows that they did in fact check this amount out of the bank and had done so prior to the proceedings had herein pursuant to the mandate on the former appeal.

The action was dismissed by the trial court as against Jacobsen & Murray and from the order of dismissal no appeal is taken by defendant Frantz.

The appellant railroad company contends that the trial court erred in holding that there was a fund in its possession to which a lien could attach, and denying its demand for a jury trial upon the general question of the employment of Mr. Simon by Frantz and his right to an attorney's lien; in overruling objections to testimony during the trial; in sustaining objections to offers of proof; in making findings 3, 4, 6, 7, 8, 8½, 9, 10, 11 and 12; and in ordering judgment for the plaintiff Simon and for the defendant Frantz against the appellant railway company.

Appellant strenuously contends that it is not in possession of the fund of $2,750; that same has been fully paid by it to Jacobsen & Murray; and that there being no fund, no lien could attach and that there is no liability against the appellant in this form of action.

It is true that the appellant paid the full amount of $11,000 to Jacobsen & Murray, the attorneys for Frantz, and took an indemnity bond from Frantz, in form indemnifying it against the claim of Mr. Simon up to $2,750, 25 per cent of the settlement. The money was, by agreement of the parties to the personal injury action, deposited in the First National Bank of Mott, which attempted to become a surety on this indemnity bond. In order to induce the bank to permit a withdrawal by check of the amount deposited, Jacobsen & Murray furnished the bank an indemnity bond and Jacobsen & Murray did, in fact, check out

all of this $11,000, paying all of it to Frantz, except the sum of $3,200, retained as counsel fees and being in fact somewhat less than the 33 1-3 per cent, stipulated in their agreement with Frantz. The appellant now contends that the indemnity bond, on which the bank is surety, is ultra vires and that the Jacobsen & Murray bond furnished no protection to it.

Upon this state of the record, can it be said that there is a fund in the custody of the railway company to which an attorney's lien may attach?

On May 18, 1917, Judge Amidon made an order in the Federal court of the district of North Dakota, dismissing the action started by Mr. Simon for J. P. Frantz against the appellant railway company. This order contained the following provision:

"And it is further ordered that 25 per cent of the amount agreed upon to be paid to the plaintiff in settlement of his claim for damages in this suit, be retained by the defendant, pending the further order of this court upon the claim of Charles Simon, Esq., for legal services rendered the plaintiff upon this claim for damages, determining the amount due said Charles Simon, under his contract with the plaintiff."

It is said in the majority opinion on the former appeal that "Frantz had the undoubted right to discharge the plaintiff (Simon) as his attorney, either with or without reason." This is correct. Frantz, however, had no right to discharge Mr. Simon summarily from the case, so as to affect detrimentally his right to compensation earned for services performed for the client and it was the duty of the Federal court to protect him in its order of dismissal. Kellogg v. Winchell, 51 App. D. C. 17, 16 A.L.R. 1159, 273 Fed. 745. This Judge Amidon did in his order of dismissal and the trial court correctly found this to be a fact.

Pursuant to this order, it was the duty of the defendant railway company to *retain* 25 per cent of the settlement in order to protect Mr. Simon on account of anything that might be due him for services rendered Frantz. Here there was in fact a fund to which respondent's lien could and did in time attach. Instead of retaining this amount, however, the appellant took a bond from Frantz, executed by his attorneys, Jacobsen & Murray, with a national bank as surety thereon, purporting to indemnify it against any claim for fees that Mr. Simon might

have, and thereupon paid the entire amount to Jacobsen & Murray, who, in turn, checked it out of the bank (the purported surety in the bond). Frantz testified, and the trial court found, that he had no knowledge of the transaction. Appellant now contends that this bond is void because national banks cannot go into the surety bonding business. Without discussing the validity of this bond, it is proper to say that this argument comes with poor grace from appellant at this time. Were Mr. Simon in the Federal court seeking to enforce his claim for services rendered, and if the railway company then and there interposed such a defense as we are here confronted with—that the fund has been paid out in fact and a void bond accepted—the answer of that court would doubtless be prompt and decisive. In neglecting to retain the fund, as ordered by the Federal court, the appellant, if not actually in contempt of the order above set out, would at least have no standing in equity on the proposition that there being no fund, no lien could attach. Appellant is clearly seeking to take advantage of its own misconduct in disobeying the order of the Federal court dismissing the action. It is elementary that this it cannot do in a court of equity. It can be in no better position here than if it were in the court that made the order it has disregarded. It was a stakeholder, under the order of dismissal and as a stakeholder we shall regard it in this case. If it chose to let the fund pass out of its possession and elected to accept a bond for its own protection, the appellant did so at its peril and the consequences cannot in any manner, directly or indirectly, be visited upon the respondent. We, therefore, hold that there was a fund, in contemplation of law, in the possession of the appellant to which a lien could and did in fact attach for the value of the services of respondent to Frantz.

Is appellant entitled to a jury trial?

When this case was here on the former appeal, this court sent it back for further proceedings and ordered additional parties to be brought in. On the theory that a "complete determination of the controversy cannot be had without the presence of other parties," the court had this power, under § 7412, Comp. Laws, 1913. "This provision is a mere adoption of a well-known equitable rule, and relates primarily to equitable actions. . . ." 31 Cyc. 471. In an action at law, the New York courts have held, the plaintiff cannot, under this statutory provision, be required to bring in other parties whom he has not elected to

sue. Chapman v. Forbes, 123 N. Y. 532, 26 N. E. 3. This court arrived at the same conclusion in Bolton v. Donovan, 9 N. D. 575, 84 N. W. 357. This view was also taken by the United States circuit court for the district of South Carolina, in Springfield F. & M. Ins. Co. v. Richmond & D. R. Co. 48 Fed. 360, construing a statute of South Carolina substantially the same as § 7412, Comp. Laws, 1913.

It must therefore be clear that on the former appeal this court necessarily determined the identical question here raised by appellant and held that that was an action in equity and answered the contention, then, as well as now, strenuously made, that defendant was entitled to a jury trial, adversely to appellant. We, therefore, hold that the court below did not err in denying appellant's demand for a jury trial. This court, in the former appeal, impressed upon the further proceedings ordered in its decision, notwithstanding appellant's claim that it was entitled to a jury trial, an equitable character and the trial court proceeded correctly in accordance with the mandate.

Are the findings of facts, specified as erroneous, supported by competent evidence?

In finding number three, to which exception is taken, the court finds that Frantz employed Simon. This was regarded as an established fact on the former appeal and the contract is in evidence here. This finding is established by competent documentary proof, as well as by oral testimony. Finding four relates to the commencement of an action by Mr. Simon for Frantz against the railroad company and the service on it of notice of claim of lien. The correctness of this finding is established by undisputed record evidence. In the sixth finding the court finds that Jacobson & Murray procured the defendant John P. Frantz to discharge the plaintiff (Simon) as his attorney, on the 31st day of December, 1916. It would be unprofitable to set out in detail the conduct of defendant Murray in this connection. It is sufficient to say that the correspondence between Jacobsen & Murray and J. P. Frantz, at that time—some written in the German language by Murray to "Lieber Freund" Frantz, though the latter understood and wrote letters in English—together with the testimony of Frantz himself, conclusively show that, as hinted by Federal Judge Amidon, Frantz was much "wrought upon" by some one and in fact discharged Simon because of such influence. Frantz wrote Simon from Mobridge hospital very

friendly letters with reference to the activities of Mr. Simon in commencing suit for him in his behalf generally. Then, almost over night, and without any reason apparent in the record, other than the influence of Jacobsen & Murray, Frantz changed and sent Simon "rather insulting letters," as said by Justice Robinson, 45 N. D. p. 258, 177 N. W. 107, on the suggestion of and dictated by Mr. Murray. This finding is amply supported in the record. Findings seven and eight refer to the dismissal of the action started by Simon, that such dismissal was conditioned upon the retention of $2,750 to protect Simon under his contract and the settlement of $11,000 subject to Simon's lien for services rendered. These findings are supported by documentary evidence and are indisputably correct.

Finding number eight states that the defendant railway company and the firm of Jacobsen & Murray entered into an agreement, without the knowledge of Frantz, whereby the sum agreed upon as settlement in the personal injury suit was paid to Jacobsen & Murray, and that, in order to get control of this fund, this firm executed a bond, as attorneys for Frantz, with the First National Bank of Mott as surety, to indemnify the railway company, and that such arrangement was a fraud on the defendant Frantz. The existence of such an undertaking is shown to have been established on the former trial and is referred to in the majority opinion at p. 255 of 45 N. D., 177 N. W. 107. The evidence on this appeal supports the finding that such undertaking was entered into and the finding is correct. Frantz's name was signed to this undertaking by Jacobsen & Murray and without his knowledge or express consent. Neither does it appear that he was advised that by conniving at the disbursement of the fund ordered by Judge Amidon to be retained, he was, in effect, a party to a transaction in violation of an order made for the protection of the rights of Mr. Simon, an officer of the Federal court.

The ninth finding has reference to the value of the services performed by the plaintiff Simon, found by the court to be the sum of $1,250. This is amply supported by evidence and the trial court knew the facts and circumstances and was competent to form a judgment upon the value of the services in that community.

The tenth finding is as follows: "That the defendant John P. Frantz is the owner of the remainder of the said fund of $2,750 as payment of

the claim of the plaintiff Charles Simon." This finding cannot be sustained. The record shows that Frantz entered into a contract with Jacobsen & Murray to conduct litigation for him on account of his injuries and that their compensation thereunder was to be 33 1-3 per cent. They procured a settlement of $11,000 which at the time was satisfactory to him. He signed a receipt and release in full. The railway company paid the amount of $11,000 to Jacobsen & Murray, his attorneys in the transaction, and they in turn have, the record shows, paid him all of this amount except the sum of $3,200, which is somewhat less than 33 1-3 per cent, which was the percentage they were to receive according to the contract of employment. No judgment against the railway company and in favor of Frantz could properly be entered by the court below. Whatever legal grievance the defendant Frantz may have, arising out of these transactions, is not against the appellant herein.

The eleventh finding is to the effect that Jacobsen & Murray declared in open court that they had no interest in the fund of $2,750. On this point the record is as follows:

Mr. Burnett: I am seeking to get at your interest in the $2,700, if you have any, which the railroad company should have retained under the lien, and must have retained under the order of the court.

Mr. Murray: You are seeking for no personal judgment against Jacobson & Murray?

Mr. Burnett: Not unless you have some interest in the fund, not unless you have the money that belongs in the fund, but if you have the money we would like to have you pay something.

Mr. Murray: I will say to the counsel for the plaintiff that the defendants, Jacobsen & Murray, now state in open court that they have no interest in any supposed fund; that they have been compensated in full long prior to the commencement of this action by John P. Frantz for services rendered him, and upon that statement ask that the action be dismissed as to them, the firm of Jacobson & Murray, on the statement that we have no interest in any purported fund. (P. 756).

We think that the finding is clearly supported by the record.

We have carefully examined the record and read the transcript and the testimony and we conclude that the findings of the trial court as

to the facts of this case, necessary to establish a cause of action in favor of the plaintiff, Mr. Simon, and against the defendant railway company, are amply supported by competent evidence and we approve the same. This disposes of appellant's following specifications of errors: Specifications 5, 6, and 7. We have disposed of specification 1, alleging error for refusing a jury trial, and specification 8 referring to the granting of judgment in favor of defendant Frantz and against the appellant railway company, has been disposed of in favor of the appellant.

We have read the record and find, with reference to specifications 2 and 3, that no prejudicial error was committed in the admission or exclusion of evidence. We do not think any material evidence was excluded. Sess. Laws, 1919, chap. 8. The court was extremely liberal to both sides and permitted the introduction of much evidence that was irrelevant and immaterial and the offers of proof that were excluded, in the view we take of this case on this appeal were wholly irrelevant and immaterial. In any event, the case is tried anew in this court and there is sufficient competent evidence in the record to require a judgment for plaintiff. Nichols & S. Co. v. Stangler, 7 N. D. 102, 72 N. W. 1089.

With reference to specification 4, it was not error to deny appellant's motion for a dismissal of the action at the close of the plaintiff's case.

Appellant railway company has filed a supplemental brief in which it contends that the bond given by the First National Bank of Mott to indemnify it for turning the money over to Jacobsen & Murray is ultra vires; that it furnishes no protection to appellant whatever; that because the bond is ultra vires the sureties on the bond are not liable and that the bond of Jacobsen & Murray to the bank is conditioned upon payment by the bank; and that since the bank can never be compelled to pay under the bond, because it is ultra vires, therefore Jacobsen & Murray can never be compelled to pay or indemnify anyone. The Jacobsen & Murray bond is to indemnify only the First National Bank and not other parties who signed with the bank. We do not understand the materiality of this contention, conceding the legal propositions to be sound. The bonds were prepared under the direction of Jacobsen & Murray and were accepted by the appellant railway company as satisfactory. If the bonds do not protect the appellant, it is its own fault

and not the fault of Mr. Simon or of Mr. Frantz. The order of the Federal court was that a *fund* should be *retained* and did not contemplate a surety bond. The inference is justifiable from the record before us that counsel who prepared these bonds, knew at the time that they were of questionable legality and that, as to the First National Bank, the bond was ultra vires. The money having been paid, the fund being gone, appellant is in no position now to take advantage of its own wrong, or profit by its own negligence.

Was the value of the services proved?

On the former appeal this court held that Mr. Simon was entitled to recover, either on the quantum meruit theory, or the actual damages sustained by the breach of the contract. Upon this point, the trial court found that the services rendered by Mr. Simon, to the defendant John P. Frantz, under the contract, found by the court to have been entered into with said Frantz, but broken by Frantz upon the procurement of defendants Jacobsen & Murray, were of the reasonable value of $1,250 and that Mr. Simon was entitled to judgment for this amount against the defendant railway company, with interest from July 1, 1917, at the legal rate of 6 per cent. We have carefully examined the record and we find that the evidence amply sustains the findings made as to the making of the contract, the breach thereof and the value of the services rendered thereunder, and we have no hesitancy in approving them. The record shows in considerable detail the nature and amount of work done by Mr. Simon. Upon the question of the proper fee or charges, the "courts are also qualified to form an independent judgment . . . and it is their duty to do so." Re Freund, 171 Ill. App. 570, 572; Metheny v. Bohn, 164 Ill. 495, 45 N. E. 1011; 6 C. J. 761, 762. In any view of the evidence, the finding as to value and the proper charge is correct and we decline to disturb it.

A stipulation was entered into and filed before the trial court decided this case, to which the attorney for the respondent, Simon, and the attorney for the respondent, Frantz, were parties. It was there agreed that the services of Simon were reasonably worth $2,750, and that judgment for this amount might be rendered. The court found, however, that the services were reasonably worth $1,250 and we see no reason for disturbing this finding.

Appellant further contends: "The complaint alleges an express con-

tract and full performance; the evidence shows a discharge of the plaintiff and nonperformance of his contract. Over the objections of the defendant, plaintiff introduced testimony tending to establish by quantum meruit. There is a fatal variance between the proof and the proceedings."

In the opinion on the first appeal this court say, at page 257 of 45 N. D., at page 108 of 177 N. W., after setting out the employment and discharge of Mr. Simon: "In such event the plaintiff, as an attorney, is entitled to receive payment for services rendered in behalf of his client, measured either by quantum meruit, or by damages actually sustained through breach of the contract." The court then ordered the case remanded for further proceedings "consonant with this opinion."

One of the purposes of the remand order was to ascertain the compensation to which Mr. Simon was entitled by virtue of his employment by the defendant Frantz. As quoted above, the court said he was entitled to recovery upon quantum meruit or the actual damages sustained through breach of the contract. The issue was thus made by this court and there was, in reality, only one question before the trial court, pursuant to this mandate, namely, the compensation to which Mr. Simon was entitled. It was also provided, as heretofore stated, that additional parties be brought in so that the rights of all concerned might be litigated and determined. The respondent, however, was not interested in any controversy that might exist or arise between the defendant Frantz and his attorneys, on the one hand, and between Frantz and the appellant railway company, growing out of the settlement, on the other.

When the case was remanded to the district court, the district judge made an order, intending to comply with the mandate, directing the service of summons and complaint upon the new parties required to be brought in. While this may not have been necessary, it was, at least not improper. The parties thus served were charged with knowledge of the decision of the supreme court in that case and of the law announced in that decision. They, therefore, must be presumed to have known and understood the purpose of serving the summons and complaint on them and that purpose was to bring them in as parties to determine the rights of all concerned under the mandate of this court, and particularly to ascertain the compensation to which Mr. Simon was entitled, either upon quantum meruit or as actual damages for breach of the contract of

employment. This court, therefore, made the issue and in effect directed the trial court, in so far as Mr. Simon was concerned, to ascertain but one thing, and that was the amount of his compensation. Of this all the parties, defendants and appellants herein, had actual knowledge and could not be misled by the character of the pleadings in the first action which are in all substantial respects identical with the new complaint that was served, pursuant to the order of the district court when the mandate went down. It is clear, and we so hold, that the rule relied upon by counsel for the appellant, to the effect that there can be no recovery upon the theory of quantum meruit when the pleading alleges an express contract and the performance thereof, has no application to the situation here presented. On this point, therefore, the contention of appellant is without merit.

The appellant also contends that the contract of the respondent Simon was "champertous and was procured by fraud," and, therefore, respondent is not entitled to recover the value of his services. It is the same kind of a contract but not so onerous in its terms, which the attorneys for the appellant, Jacobsen & Murray, had with Frantz, under which they still retain nearly 33 1-3 per cent of the settlement, and entered into with him after they induced him to discharge Mr. Simon. We have carefully examined the record and we find that it clearly establishes that the contract with Mr. Simon, respondent herein, was entered into in good faith and before there was any contract with Jacobsen & Murray for the prosecution of the claim of J. P. Frantz arising out of his injuries. The undisputed evidence shows that the defendant Frantz sent for Mr. Simon and asked him to take this case for him and Mr. Frantz himself so testifies.

The judgment of the trial court in favor of the respondent Simon and against the appellant railway company is affirmed, while the judgment in favor of the defendant Frantz and against the appellant railway company is reversed and set aside. The respondent Simon to recover costs on this appeal. The railway company, appellant, and the respondent, Frantz, each to pay own costs of this appeal.

BRONSON, Ch. J., and BIRDZELL, JOHNSON, and CHRISTIANSON, JJ., and COFFEY, Dist. J., concur.

Mr. Justice NUESSLE, being disqualified, did not participate; Honorable J. A. COFFEY, Judge of the Fourth Judicial District, sitting in his stead.

FIRST NATIONAL BANK OF McVILLE, NORTH DAKOTA, Appellant, v. MRS. JOHN RIDEN, Respondent.

(194 N. W. 336.)

Chattel mortgages — evidence held to sustain finding for defendant in foreclosure.

In an action upon a promissory note and to foreclose a chattel mortgage where the issue involved concerned the question whether a note and mortgage have been surrendered and canceled by the taking of a new note and mortgage, it is *held*, for reasons stated in the opinion, that the findings of the trial court are well supported by the evidence.

Opinion filed June 23, 1923. Rehearing denied July 6, 1923.

Chattel Mortgages, 11 C. J. § 485 p. 695 n. 80.

In District Court, Stutsman County, *Jansonius*, J.
Action upon a promissory note and to foreclose a chattel mortgage.
Plaintiff has appealed from a judgment in defendant's favor.
Affirmed.
W. J. Courtney, for appellant.
C. B. Craven, for respondent.

BRONSON, Ch. J. This is an action upon a promissory note and to foreclose a chattel mortgage. The facts are: On September 27th, 1918, defendant made a note for $700 to the Citizens State Bank of Pingree and secured the same by chattel mortgage upon certain cattle. On October 1st, 1919, the note involved in this action, namely, a note for $780 in renewal of such $700 note and interest, was made to such bank by defendant and a new chattel mortgage given as security. This latter note and mortgage were purchased on November 12, 1919 by plaintiff bank. On December 1st, 1920, another note for $780 and chattel mort-

gage were made by defendant to plaintiff although made payable to such Citizens State Bank. It renewed the previous note for $780. This note bears an indorsement of $200 paid January 13th, 1921. On April 13th, 1921, another note for $697.44 was made by defendant and her husband to plaintiff bank. This was pursuant to a letter of plaintiff bank to defendant which letter submitted a statement of notes at the plaintiff bank signed by defendant and inclosed such new note for her signature. This new note covered the balance due, namely, $580 on the previous note, together with interest. The husband of defendant on May 1st, 1921, made to plaintiff bank a note for $900. On October 19th, 1921, at defendant's home, a new note for $1,600 combining into one note the previous notes of $900 and $697.44, was made by defendant and her husband to plaintiff bank. A new chattel mortgage was executed to secure the same covering practically all the personal property of defendant and her husband. Defendant's testimony is to the effect that at that time a full settlement was had of all indebtedness then existing between her and plaintiff bank; then the note for $780, involved herein, was surrendered; likewise the notes, for $780, dated December 1st, 1920; for $697.44, dated April 13th, 1921; and for $900, dated May 1st, 1921. Defendant found the original $700 note among her papers. She understood that it was satisfied as well as the chattel mortgage when the first note for $780 and chattel mortgage were given. The testimony of plaintiff through some of its officers is to the effect that this note for $780 must have been left unintentionally with defendant; that their practice was to retain an old note when accompanied by security as collateral to a new note, and all security possessed, until notes were ultimately paid; that the bank had no intention of surrendering this note and canceling the same. Plaintiff did not introduce into evidence the chattel mortgage which secured the note for $780 dated October 1st, 1919. It did introduce in evidence a chattel mortgage, dated December 1st, 1920, which secured the note for $780 dated December 1st, 1920. After trial to the court, findings were made to the effect that plaintiff on October 19th, 1921, received the note for $1,600 in full payment, satisfaction, and discharge of all debts and obligations then due and owing from defendant and her husband and that the note in suit had been paid, settled and discharged. Accordingly, judgment was entered dismissing plaintiff's action. From this

judgment plaintiff has appealed. The contention is made that the renewal of the note and the taking of the new mortgage did not operate to release the old note and mortgage; that the evidence is insufficient to disclose any clear understanding or agreement so to release or cancel the old note. The sufficiency of the facts to support the findings is the sole question presented. Upon a review of these facts we are clearly of the opinion that the findings are well supported by the evidence. The judgment is affirmed with costs to the respondent.

CHRISTIANSON, BIRDZELL, NUESSLE, and JOHNSON, JJ., concur.

FIRST NATIONAL BANK, OF GLASGOW, MONTANA, a Foreign Corporation, Respondent, v. W. J. CARROLL, Appellant.

(194 N. W. 669.)

Bills and notes — defense of no consideration held not sustained.

In an action upon a promissory note where the defense was asserted that no consideration was given and that the note was executed to secure bondsmen upon an undertaking which had been discharged through litigation, it is *held*, for reasons stated in the opinion, that no defense to the note has been established.

Opinion filed July 6, 1923.

Bills and Notes, 8 C. J. § 1359 p. 1048 n. 21.

In District Court, Ward County, *Lowe*, J.

Defendant has appealed from the judgment entered upon an order directing judgment notwithstanding the verdict.

Affirmed.

J. E. Burke, for appellant.

F. B. Lambert, for respondent.

"It is a well-established rule of law that a cause of action based upon an implied promise on the part of the principal to reimburse his surety for any loss sustained by the latter by reason of his suretyship arises in

favor of the surety immediately upon his payment of the debt of the principal." 134 Am. St. Rep. 557, note.

"Upon such a payment of the principal debt by the surety he becomes a simple contract creditor of the principal."

"When the relation of principal and surety exists between the parties, a previous request to the surety to pay is not necessary to authorize him to discharge the obligation and to give him a right of action for the amount paid. *It is not necessary for the surety to wait until suit has been brought against him, or until a judgment has been obtained before paying the obligation.* He may pay at once when the obligation has matured."

"The following cases are cited: White v. Miller, 47 Ind. 385; Hollinsbe v. Richey, 49 Ind. 261; Hazelton v. Valentine, 113 Mass. 472; Ollin v. Greenleaf, 3 N. H. 270; Williams v. Williams, 5 Ohio, 444."

Northern Trust Co. v. Bank, 25 N. D. 74–80.

"A surety is entitled to charge his principal with the costs of a suit for the collection of the debt which he was compelled to pay." Owings v. Owings, 26 Ky. 590; Apgar v. Hiller, 24 N. J. L. 812; Bonney v. Seeley, 2 Wend. 481; Elwood v. Diefendorff, 6 Barb. 398; Feanster v. Withrow, 12 W. Va. 611.

"A surety may recover of his principal legal costs incurred in litigation instituted by principal, and in which the surety has joined, when such costs have been paid by the surety." Whitworth v. Tilman, 40 Miss. 76.

"The principal in a note is liable to his surety for the costs incurred in proper but unsuccessful defense." Bennett v. Dowling, 26 Tex. 660.

"It is well settled in this state that a surety may recover of his principal costs which he has incurred and paid in litigating in good faith the claim upon which he is surety." Denver v. Baxter, 30 Vt. 467.

"A surety can recover from his principal all reasonable expenses and necessary costs that he has incurred on account of the relation; and if the principal and surety are sued together, the surety is justified in expecting that the principal will satisfy the claim and can recover the costs of the suit which he is compelled to pay." 32 Cyc. 274.

"The surety can recover for attorneys' fees paid by him in defending a suit if such defense was made with the consent of the principal." 32 Cyc. 275.

"The surety is entitled to recover the costs of proceedings against his principal to enforce the liability of the latter to him." 32 Cyc. 275.

"A promissory note, the consideration for which is an agreement of settlement of a claim, cannot be defeated by showing that the claim was in fact one which could not have been sustained, where it was made in good faith." McGlyn v. Scott, 4 N. D. 18, 59 N. W. 460.

"Parol evidence of a conversation at the time of entering into a written contract is inadmissible to vary the terms of the contract." Gile v. Interstate Motor Car Co. 27 N. D. 108, L.R.A.1915B, 109–145, 145 N. W. 732.

"Parol evidence as to negotiations or conversations prior to the execution of the written instrument is not admissible to vary or explain it, as it is presumed that the entire actual agreement of the parties is contained therein." Harney v. Wirtz, 30 N. D. 292, 152 N. W. 803.

BRONSON, Ch. J. This is an action upon a note. The defense is that the note was given without any consideration; that certain parties had signed a cost bond for $300; that, in the litigation resulting where the bond was used, Carroll obtained a judgment in his favor thus automatically canceling the bond; that, if the bondsmen have paid anything, it was paid without the knowledge of Carroll. A verdict was returned in defendant's favor. Subsequently, upon motion made, the trial court ordered judgment in plaintiff's favor notwithstanding, the verdict. This is the second time the case has been before this court. First Nat. Bank v. Carroll, 46 N. D. 62, 179 N. W. 664. The facts, necessary now to be stated, are: In May, 1910, Carroll started an action in Montana against one Wigmore and a live stock cattle company concerning a cattle deal. Carroll, being a nonresident, furnished in February, 1912, an undertaking for costs in the sum of $300 signed by one Coleman and Truscott. Shortly thereafter, in February, 1912, Carroll secured a judgment in this action for $483. Later, in April, 1912, the trial court in Montana set aside this judgment in Carroll's favor and rendered a judgment for costs against Carroll amounting to $309.70. In October, 1916, Wigmore and this live stock cattle company brought an action against Carroll's sureties to recover this judgment for costs. The sureties appeared through attorneys and made a motion for change of venue; also, a demurrer to the complaint. The court in Montana

ordered on January 13th, 1917, a change of venue from Hill county to Valley county upon payment of costs. Then, in April, 1917, Wigmore and the live stock cattle company amended their complaint. The sureties again demurred thereto. Thus was the action against the sureties pending in Montana. On December 12th, 1917, defendant Carroll gave the note in suit to Coleman, one of the sureties. Carroll testifies to the effect that Truscott, one of the sureties, was worried and wanted him to advance some money. Carroll responded that he did not have the money. Coleman then told him that the costs would amount to so much and he asked Carroll to sign a note for it to satisfy Truscott. Coleman advised Carroll that he had paid attorneys for fighting this suit upon the undertaking. Carroll admitted in his testimony that he never paid any judgment for costs in that action and that he never paid the attorneys because they never asked him for any money; that he expected to pay this note "if he (Truscott) got stuck for it." On March 4th, 1918, Coleman sold this note to plaintiff and received a credit in his account with the bank for $502, the face of the note. This credit was made in an open checking account. The note was duly endorsed by Coleman. Carroll testified to a conversation that he had with one Lewis, vice president of plaintiff bank, on the day he executed the note, to the effect that he had given a note to Coleman to satisfy Truscott; that Lewis advised him that it was better to keep Truscott satisfied. In March, 1918, Carroll wrote plaintiff bank to the effect that the note was given Coleman because he was a bondsman; that it was to be held by Coleman; that he was not supposed to pay the judgment; that it was not to be run through a bank; that his attorney would meet with the bank's attorneys at Plentywood, Montana, on March 12th and that they would arrange to finish the lawsuit. It requested the bank not to send the note for collection until they got things arranged according to agreement. The bank answered this letter to the effect that it knew nothing in regard to the agreement and that they expected the note to be paid on March 12th when it became due. This action was instituted in June, 1918. Coleman died in May, 1919. Otherwise, in the evidence it appears that Coleman had paid $202 as attorneys' fees at the time this note was executed; that, later, his son paid the amount of the judgment for costs against Carroll through a settlement made with Wigmore and the live stock cattle company.

In many respects defendant has failed to comply with rules of the court concerning the preparation of briefs. The appeal might properly be dismissed for such failures but it will be considered on its merits. Upon inspection of the facts it is apparent that the defense interposed in the answer has wholly failed. A judgment for costs was rendered against Carroll in Montana. His sureties were liable upon the undertaking furnished by him at the time when he gave this note. At that time one of the sureties already had paid for attorneys engaged in the litigation. The record fully discloses that expenses were incurred by the sureties and attorneys were engaged by them in the course of the litigation considerably anterior to the time this note was given. A consideration existed for this note at the time it was executed by Carroll. Plaintiff paid full consideration for this note. There is no reason either in law or in equity why Carroll should not be held liable upon this note in response to the undertaking and considerations paid, not only by the bank but by Carroll's sureties, in his litigation in Montana. The judgment is affirmed with costs to the respondent.

BIRDZELL, CHRISTIANSON, NUESSLE, and JOHNSON, JJ., concur.

SLOPE COUNTY, a Political Subdivision of the State of North Dakota, and O. F. Metcalf, Auditor of Slope County, North Dakota, Appellants, v. J. S. DOUGLAS and the State Bonding Fund of the State of North Dakota, Appellants.

(194 N. W. 385.)

Depositaries — all funds in custody of treasurers of municipal corporations must be deposited in qualified public depositaries.

1. Chapter 56 of the Session Laws of 1921, providing for legal depositaries of public funds, is construed and *held* to require the deposit of all funds in the custody of the various treasurers of municipal corporations in public depositaries qualifying under the act.

Counties — treasurer and bondsmen liable for funds left on deposit in banks not qualifying as public depositaries.

2. Where, at the time of the taking effect of the depositary law (chapter 56, Laws of 1921), public funds where on demand deposit in banks which did

not meet the requirements of the law, and where the deposit was allowed to remain in the noncomplying banks until they failed three months afterward, the treasurer and his bondsmen are liable for the loss sustained.

Counties — evidence held to show no settlement between county treasurer and commissioners or successor whereby unauthorized deposits of county funds were accepted as cash.

3. The evidence is examined and *held* to show that there was no settlement had between the county treasurer and the county commissioners or between the county treasurer and his successor in office on the basis of the unauthorized deposits being accepted as cash.

Opinion filed May 22, 1923. Rehearing denied July 7, 1923.

Counties, 15 C. J. § 138 p. 516 n. 38; § 197 p. 521 n. 19; § 211 p. 529 n. 92 New; Depositaries, 18 C. J. § 67 p. 591 n. 69.

Appeal from the District Court of Slope County, *Pugh*, J.

Judgment modified and affirmed.

William Langer, and *C. P. Brownlee*, State's Attorney, for plaintiffs-appellants.

George F. Shafer, Attorney General, and *Charles Simon*, Assistant Attorney General, attorneys for State Bonding Fund of the State of North Dakota.

T. B. Torkelson, for defendant-appellant Douglas.

BIRDZELL, J. This is an action to recover certain moneys belonging to Slope county, which were deposited by the defendant Douglas, as county treasurer, in the First State Bank and the Slope County Bank of Amidon. The action is against both the county treasurer and the State Bonding Fund, as surety on his official bond. By stipulation the case was tried before the judge of the district court without a jury. A judgment was rendered in favor of the plaintiff for $24,576.51 plus interest and costs. From this judgment the plaintiff appeals, assigning error in the failure of the trial court to grant a judgment for the full amount of the bond, $50,000. The defendants also appeal, specifying as error the findings of the trial court to the effect that there was no settlement made with the board of county commissioners at the time of the retirement of the defendant Douglas as county treasurer, in finding that the defendant Douglas was unable to deliver to his successor, on May 1st at the expiration of his term, any of the money on deposit in

either the First State Bank or the Slope County Bank; and in holding the defendants to be liable for monies deposited in the banks mentioned subsequent to March 8th, 1921.

The undisputed facts are: Douglas was elected county treasurer of Slope county in November 1918, assuming charge of the office May 7, 1919, retiring two years later. He was bonded by the defendant State Bonding Fund in the sum of $50,000, the bond being in the usual form, conditioned for the faithful discharge of the duties of the office and the rendering of "a true account of all moneys and property of every kind that shall come into his hands as such officer and pay over and deliver the same according to law." In January, 1919, the board of county commissioners designated the First State Bank and the Slope County Bank as county depositaries. They qualified by furnishing bonds as required. From time to time moneys were deposited in these banks and in the Bank of North Dakota after its organization in the summer of 1919. Section 7 of the Bank of North Dakota Act required, with certain qualifications immaterial here, the deposit of public funds in such bank. On December 2, 1920, an initiated law (North Dakota Laws 1921, p. 255) went into effect, amending the Bank of North Dakota Act (chapter 147, Laws of 1919) by excluding from the enumeration of the funds required to be deposited in such bank, county funds, among others likewise excluded. On March 8, 1921, an emergency act of the legislature was approved prescribing regulations under which public funds should be deposited (chapter 56, Laws of 1921). The banks hereinbefore mentioned did not comply with the requirements of this emergency measure by furnishing bond or in any other manner. Between the date of the taking effect of this law and the expiration of Douglas' term of office in May, he deposited in the two banks named, $24,576.51. In addition to this, there were funds which had been deposited by him in these banks previous to March 8th, amounting to over $70,000. When Douglas' term of office expired difficulty was experienced in turning over the office to his successor, one Johnson, who refused to receive the evidence of indebtedness of these banks as cash. Both banks were closed on or about June 10th following.

The contentions on this appeal involve: (1) The liability of the defendants for moneys placed in the two banks in question on original deposit subsequent to the taking effect of the emergency law (March

8, 1921). (2) The liability of the defendants for funds which the treasurer kept on deposit in the same banks after the taking effect of this law which prescribed the qualifications for depositaries. (3) Whether or not the liability, if any, is qualified by the circumstances in connection with the transfer of the office from Douglas to Johnson on or about May 1st.

Considering these questions in the order they are stated: Chapter 56 of the Laws of 1921, in prescribing the qualifications for depositaries of public funds, lays down certain definite requirements, principal of which is the furnishing of a bond. It expressly makes all state and national banks complying with the provisions of the act legal depositaries, but it forbids the deposit of money therein until a bond is furnished in an amount at least equal to the largest deposit that may at any time be in the depositary. Upon the record before us, it is clear that the banks in question had not complied with the law, and that during the period of their noncompliance, the treasurer deposited $24,576.51. As to the amount so deposited, we deem it to be clear that the treasurer is liable personally.

The question as to the liability of the defendants for funds which the treasurer had previously deposited in these banks and which were not withdrawn and placed in a depositary qualified under the act which became effective on March 8th involves somewhat different considerations. The question is presented of the duty of the officer in circumstances created by the passage of the new law. In considering this question, it must be borne in mind that constructive notice of the passage of the emergency law was conveyed to the officer and to his bondsmen, and the question must be decided uninfluenced by the hardship, if any, that may result through the failure of the officer to have known in fact of the passage of the act.

The first section of chapter 56, Session Laws of 1921, reads as follows:

"All state and national banks in the state of North Dakota complying with the provisions of this act, and the Bank of North Dakota are hereby declared to be legal depositaries of the public funds of the various towns, townships, school districts, cities and villages and the various treasurers of the said corporations shall deposit all funds in their custody in such banks."

Section 2 provides that before any deposit shall be made in any depository, such depository shall furnish a bond, payable to the public corporation making the deposit, in an amount that shall at least equal the largest deposit that may at any time be in such depository; that the bond shall be subject to the approval of the governing body of the corporation or, upon its failure or refusal to approve, shall be presented to the judge of the district court. Upon approval of the bond, it is provided that the bank "shall be declared a depository of the funds of such corporation." Further provision is made to the effect that upon deposit, as provided in the act, the custodian and the sureties on his bonds shall be exempt from liability by reason of loss through failure or other act of the depository. It also contains a section rendering the custodian guilty of a misdemeanor if he should deposit public funds in any *state or national bank* in excess of the bond furnished. We are of the opinion that this act had the effect of making the Bank of North Dakota a general legal depositary from the date it took effect, and that until such time as other banks qualified by furnishing the bond required it was the only legal depositary of demand funds. This is clearly deducible, from the first section of the act, which declares that all state and national banks complying with the provisions of the act and the Bank of North Dakota are legal depositaries, and from the other provisions making it incumbent upon state and national banks to furnish bonds before deposits may be made therein. While § 2 is general in its requirement that the *depository* shall furnish bond, it is clear, in our opinion, from the language of Section 1 and from the penal provision of the act, that the Bank of North Dakota is not required to furnish bonds in order to qualify as a depositary. Section 1 further makes it the duty of the various treasurers to deposit *all funds in their custody* in depositary banks. This is a clear legislative direction to the treasurer to see that all funds are immediately given the protection which this act is designed to afford by being placed in depositaries furnishing bonds or in the Bank of North Dakota.

The condition of the legislation dealing with the subject consequent upon the passage of the initiated law was such that some doubt might well have existed as to whether there remained *any* legal requirements for depositaries of funds, other than those governing the Bank of North Dakota which continued to be the depositary of the state and of its

penal and industrial institutions. See State ex rel. Kopriva v. Larson, 48 N. D. 1144, 189 N. W. 626. This initiated law, it will be remembered, had removed the requirement of the deposit of county and local public funds in the Bank of North Dakota, but it did not provide affirmatively any requirement of deposit elsewhere, nor did it prescribe any qualifications for depositaries. Hence, the deduction that the emergency act was designed to supersede all other laws governing public depositaries, in so far as it dealt with the subject, is altogether reasonable and logical whether viewed from its intrinsic provisions or from the standpoint of its relation to other legislation. Whatever, therefore, might have been the status of such funds or the measure of the liability of treasurers depositing them in banks after the initiated law took effect, we deem it to be clear that the legislature, in chapter 56, Laws of 1921, directed their deposit in legal depositories under that act. This requirement is just as stringent, in our opinion, as applied to funds already in their custody, as it is with respect to funds which would subsequently come into their hands for deposit. From this it follows that the liability of the treasurer and his bondsmen is not limited to the funds placed on original deposit subsequent to the taking effect of the act, but it embraces as well funds in his custody which were not deposited in accordance with the act subsequent to its taking effect.

There is nothing in this record to show that the demand funds in the two banks in question when the initiated law took effect, amounting to some $70,000, could not have been promptly withdrawn and placed in a legal depositary had there been an attempt so to do. The banks were then open and continued to do business for more than three months thereafter. We cannot presume that the banks were insolvent on March 8th when the new depositary law took effect. See Schafer v. Olson, 24 N. D. 542, 43 L.R.A.(N.S.) 762, 139 N. W. 983, Ann. Cas. 1915C, 653.

The contention of the defendants to the effect that a complete settlement was had at the time of the transfer of the office from Douglas to Johnson in May finds little support in the record. The defendant Douglas admitted that at the time the office was transferred he took a receipt from his successor acknowledging "the receipt of $20,955.78 in assets by him considered good, and $55,058.35 in assets

not by him considered good until finally paid or liquidated," and which further recited that they were accepted by him subject to final payment or liquidation. He also testified on cross-examination that Mr. Johnson was not satisfied with the deposit in the two banks in question and that when he had said on his direct examination that there had been a full accounting all he meant was that he had told the county commissioners and the new treasurer that he had the balances in the two banks which subsequently failed.

Leaving wholly aside all question of the authority of the county commissioners to accept in settlement of the county treasurer's account something other than cash or a credit in a legal depository, we think the evidence clearly establishes that the bank balances in question were not received as cash by the incoming treasurer and that there was no settlement with the county commissioners such as would release the retiring treasurer or his bondsmen from a liability to account for funds which had not been deposited as the law required.

The judgment in favor of the plaintiff is modified as to amount, and it is ordered that the plaintiff have judgment against the defendants for $50,000 plus interest and costs.

BRONSON, Ch. J., and CHRISTIANSON, and NUESSLE, JJ., and COFFEY, Dist. J., concur.

Mr. Justice JOHNSON, being disqualified, did not participate, Honorable J. A. COFFEY, Judge of the Fourth Judicial District, sitting in his stead.

On petition for rehearing.

PER CURIAM. The defendant, State Bonding Fund, has petitioned for a rehearing. Among other things it is asserted that the defendant state bonding fund, if afforded an opportunity to do so, can produce certain additional evidence which will demonstrate its nonliability so far as concerns moneys on deposit on and prior to March 8th, 1921. This court cannot, of course, entertain a motion for leave to introduce additional evidence. Such application should be presented to and determined by the trial court. And although this court expresses no opinion upon the merits of the proposed application, a majority of

the court are of the opinion that the defendant State Bonding Fund should be permitted to present such application to the trial court. The judgment pronounced in the former opinion, therefore, will stand, but without prejudice to the right of the State Bonding Fund to make its said application to the district court.

BRONSON, Ch. J., and CHRISTIANSON, and NUESSLE, JJ., and COFFEY, Dist. J., concur.

L. C. PETTIBONE, Appellant, v. W. P. TUTTLE, Respondent.

(194 N. W. 701.)

Partnership — evidence held sufficient to sustain findings for defendant in action for dissolution of partnership and for an accounting.

1. In an action for dissolution of partnership and for an accounting, evidence examined and *held* sufficient to support findings of trial court.

Partnership — evidence held insufficient to establish partnership.

2. From an examination of the evidence the court is of the opinion that the evidence wholly fails to establish that a partnership existed between plaintiff and defendant as alleged in the complaint.

Opinion filed July 7, 1923.

Partnership, 30 Cyc. p. 414 n. 25; p. 737 n. 73.

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

Affirmed.

Newton, Dullam & Young, for appellant.

"But defendant insists and pleads as a defense, in his answer, that as the contract was for the purchase of an interest in lands, and was wholly oral, it cannot be enforced under the statute of frauds. The contract, to be truly stated, amounted to a parol agreement for the creation of a partnership, the objection of which was to acquire and sell certain lands. The part of the agreement obligating the parties to purchase the land was but an incident of the contract of partnership.

Note.—On effect of agreement to share profits to create a partnership, see note in 18 L.R.A.(N.S.) 963; 20 R. C. L. 825; 3 R. C. L. Supp. 1103.

It provided for the subject and manner of investment of the capital of the firm. It was simply an agreement that the firm would buy the lands. By this agreement neither party bought or sold lands. It was not an agreement for the purchase and sale of lands. It was nothing more than an agreement that the firm should buy lands of another which should be held as firm property. It was not, therefore, an agreement or contract under which an interest in or title to lands was attempted to be transferred. It simply provides what interest the parties shall have herein when the lands shall be acquired as provided by the contract. Surely, if two persons agree to enter into a partnership for the purchase and sale of dry goods, and therein specify the manner of the contribution of the capital of the firm and the goods to be purchased therewith, and the persons of whom they shall be purchased, the contract could not be regarded as creating or transferring distinction in principle between that case and this. We conclude that the contract in question is not within the contemplation of our statute of frauds, which provides that no evidence of a contract 'for the creation or transfer of any interest in lands, except leases for a term not exceeding one year,' is competent, 'unless it be in writing and signed by the party to be charged, or by his lawfully authorized agent. Code, § 3663." Pennybacker v. Leary, 65 Iowa, 220, 21 N. W. 575; Stearn v. Harris (Minn.) 41 N. W. 1036; Hodge v. Twitchell, 33 Minn. 389, 23 N. W. 547.

"A partnership may be formed by parol to deal in real estate and to improve and sell for joint profit a particular piece of land. When real estate is acquired in a partnership business so formed, and for partnership purposes, notwithstanding the provisions of the statute of frauds, it is partnership assets although the legal title be taken in the name of one of the partners. Fountain v. Menard, 53 Minn. 443, 445, 55 N. W. 601, 39 Am. St. Rep. 617; Stern v. Harris, 40 Minn. 209, 41 N. W. 1036; Newell v. Cochran, 41 Minn. 374, 43 N. W. 84. It is wholly immaterial that the title may be placed in the name of a third person by one partner to secure profit to himself at the expense of the other. Each owed to the other in their transactions the utmost good faith and openness of dealing. Neither had the right to secure, without consent of the other, any private advantage out of such transaction. Securing such advantage would be a fraud upon

the other party interested with him which equity would defeat by holding him a trustee for the others of the thing which he so secured to himself. There is no principle of equity jurisprudence better established or more rigorously enforced than this. The thin device, on the part of the partner sought to be charged of transferring title to a third person, not a bona fide purchaser, would not change the equitable relations and duties of the parties. Equity would hold the transfer to be a fraud upon his associates and would hold such third person to be a trustee of all for both partners as to the property conveyed to him. Gilfillan, A. J., in Hodge v. Twitchell, 33 Minn. 389, 23 N. W. 547." Stitt v. Ratportage Lumber Co. (Minn.) 107 N. W. 824; Davenport v. Buchanan, 6 S. D. 381, 61 N. W. 47; Flower v. Barnekoff (Or.) 11 L.R.A. 149; King v. Barnes, 109 N. Y. 285; Hackett v. Multnomah R. Co. 12 Or. 129; Coward v. Clanton (Cal.) 21 Pac. 359; Simpson v. Tenney, 41 Kan. 561, 21 Pac. 634; Jones v. Davies, 60 Kan. 309, 56 Pac. 484.

"An express agreement providing for a partnership as such is not necessary to create the relation. In law a partnership is often implied from the acts and interests of the parties, although the words 'partnership' or 'partner' may never have been used by them in connection with the business. It is likewise elementary that a partnership may exist as to a single transaction or enterprise." Kayser v. Mongham, 8 Colo. 232, 6 Pac. 803; Bates v. Babcock, 95 Cal. 479, 16 L.R.A. 745, 30 Pac. 605; Spreyer v. Des Jardins, 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Holmes v. McCray, 51 Ind. 358, 19 Am. Rep. 735; Newell v. Cochran, 41 Minn. 374, 43 N. W. 84; Treat v. Hills, 68 Wis. 344, 60 Am. Rep. 858.

"When parties agree to enter into an association for the purpose of buying or selling, and carrying on a joint business indefinitely, no stipulation for dividing profit and loss is necessary, as that is an incident to the prosecution of their joint business." Parsons, Partn. p. 57.

"If it were understood between the parties that there was to be a communion of profit it would be a partnership. 'A communion of profit implies a communion of loss; for every man who has a share of profits of a trade should also bear his share of the losses.' Golly. Partn. Sec.

18. And it is not necessary that there should be an express stipulation between partners to share the profit and loss, as that is an incident to the prosecution of their joint business. Id. Note. 3." Blumfield v. Buchanan (Or.) 8 Pac. 912.

Lawrence, Murphy & Nilles, for respondent.

"The definition of a partnership which seems to be most accurate and comprehensive is that of Chancellor Kent, as follows: 'A contract of two or more competent persons, to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions.'" 30 Cyc. 349.

Lowe v. Jensen, 22 N. D. 148; Yancey v. Boyce, 28 N. D. 187.

"It has also been declared essential to a partnership that the business with which it is concerned be conducted on the joint account of the partners." Cedarberg v. Guernsey, 12 S. D. 77, 80 N. W. 159.

"In order to constitute a partnership, there must be a joint ownership of the partnership funds, or a joint right to control them, and also an agreement to share the profits and losses." Omaha & G. Smelting & Ref. Co. v. Rucker, 6 Colo. App. 334, 40 Pac. 843.

"To constitute a partnership inter sese, there must be a joint ownership of the partnership funds." Robbin v. McKnight, 5 N. J. Eq. 642, 45 Am. Dec. 406.

"To constitute the partnership relation inter sese, the contract must extend beyond a common agreement to share in the profits. It must equally bind the parties to bear the burden of the losses." Goldsmith v. Eichold Bros. 92 Ala. 116, 33 Am. St. Rep. 97, 10 So. 80.

"A community of profits, an equality of sharing in net profits, unaccompanied by a community of risks, a mutuality in losses, does not make a partnership between business associates as respects themselves. Pulliam v. Schimpf, 100 Ala. 362, 14 So. 488." 30 Cyc. 349; Cudahy Packing Co. v. Hibou, 18 L.R.A.(N.S.) 975.

"Where a party is interested in the profits of an undertaking only as a means of compensation for service rendered, or for money advanced, he is not a partner." Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Eager v. Crawford, 76 N. Y. 97; Burnett v. Snyder, 76 N. Y. 344; Curry v. Gowler, 87 N. Y. 33, 41 Am. Rep. 343; Cas-

sidy v. Hallet, 97 N. Y. 158, 159; Davis v. Patrick, 122 U. S. 151, 7 Sup. Ct. 1102, 30 L. ed. 1090; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465.

"In this case, delivering the opinion of the court, Judge Snyder says: 'If the persons merely occupy the relation of principal and agent, employer, or employee or factor, no partnership can be predicated upon the fact that such agent, employee, or factor receives a part or share of the profits for his services or other benefits conferred . . . in every partnership. There must be a joint ownership of the partnership funds, or a joint right of control over them, and also an agreement to share the profits or losses arising therefrom. Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766. There is nothing to show any liability upon Clark for losses and expenses, which is deemed an important fact tending to show that the contract is not one of partnership." Clark v. Emery, 5 L.R.A.(N.S.) 512; Griggsby v. Day, 70 N. W. 881.

"A contract of employment between a master and his servant, or a principal and his agent, which provides for the payment of a part of the employer's profits to the servant or agent as a compensation merely for labor and services, does not create a partnership. It gives the employee none of the rights of a partner in the business and imposes upon him none of a partner's liabilities." Berthold v. Goldsmith, 24 How. 536, 16 L. ed. 762; Seymour v. Freer, 8 Wall, 223, 19 L. ed. 313; Beckwith v. Talbot, 95 U. S. 289, 24 L. ed. 496; Mehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 972, affirming 29 Fed. 276; Bigelow v. Elliot, 1 Cliff. 28, Fed. Cas. No. 1,388; Hazard v. Hazard, 1 Story, 371, Fed. Cas. No. 6,279; Oppenheimer v. Clemmons, 18 Fed. 886; Gentry v. Singleton, 63 C. C. A. 231, 128 Fed. 679; Re Pierson, 10 Nat. Bankr. Reg. 107.

"The rule is well settled that the trust must result at the time of the execution of the deed, and cannot be raised by matters subsequent thereto, and it is under this latter rule that the trust is restricted to the amount of the purchase money actually furnished by the person claiming the benefit of the purchase at the time of or before the execution of the conveyance as the trust must result at the very instant the deed is executed, or it cannot result at all." Wood, Lim. 2, p. 989.

Such a contract is within the inhibition of § 3 of chapter 32 of

the Compiled Laws of 1905 (Cobbey's Anno. Stat. 1903, § 5952) commonly called the "Statute of Frauds" and is void.

"In such a case no resulting trust arises in favor of one who contributes nothing to the payment of the purchase price." Norton v. Brink, 110 N. W. 669.

KNEESHAW, Dist. J.: This is an action brought by the plaintiff for an accounting of an alleged partnership and for the dissolution of the partnership. The complaint in the action alleges that there was an agreement of partnership and asks for the dissolution of the same and for an accounting of partnership property and a sale of the property acquired for partnership purposes. The action was tried on the theory that there was a partnership.

In the evidence it appears that plaintiff, some twenty years ago, was engaged in the real estate business at Dawson. Defendant came to Dawson and procured plaintiff's assistance in the handling of defendant's affairs. They became concerned in the handling of real estate, particularly railroad lands. Defendant proposed to plaintiff that in certain lands he would furnish the money and plaintiff would negotiate sales; that such proposition thus handled should be considered on a profit basis by dividing the profits equally between the parties. In accordance with this understanding, as plaintiff asserts, certain land in Kidder county was purchased by defendant, thereafter sold, and the profits equally divided between the partners; also certain land west of the Missouri river known as Black Butte township. Then defendant purchased some eighteen sections of land at $4.50 per acre. The purchase price was paid by defendant and title to the lands taken in the defendant's name. Concerning this land it is the plaintiff's contention that, pursuant to the arrangement, he was entitled to share in one fourth of the profits that should be derived in the handling of this real estate. It appears that this land was purchased in the years 1905 and 1906. It has never been sold. During the years that have since elapsed, the title has stood in defendant's name; he has paid the taxes and collected the rentals. It is the claim of the plaintiff that these lands should be sold and that he should be accorded the right, pursuant to the agreement, to participate in the profits to be derived upon such sale. It is clear upon the record that the lands as such,

during the years, were never treated as partnership real estate. The particular question involved is whether or not there was a partnership relation existing concerning profits that might be realized upon the sale of such lands.

The learned trial court, after hearing all the evidence in the case, made his findings of fact and conclusions of law and found as a fact that the plaintiff had failed to establish the material allegations of the complaint and that the evidence establishes the fact that no partnership existed between the plaintiff and defendant as set forth in the plaintiff's complaint and that plaintiff has wholly failed to sustain the cause of action set forth in the complaint, and as a conclusion of law found that the defendant is entitled to a dismissal of the action.

Judgment was duly entered on an order dismissing the action and plaintiff appeals to this court from such judgment.

The only question for consideration on this appeal is whether or not there is sufficient evidence to support the findings of the trial court. We are of the opinion that the findings are amply supported by the evidence.

We have examined the evidence and are fully satisfied and of the opinion that there is no evidence to show that a partnership existed between plaintiff and defendant as alleged in the complaint and that there was a total failure of proof to establish any such partnership and that, therefore, the court did not commit error in dismissing the action.

The judgment is therefore affirmed.

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

NUESSLE, J., being disqualified, did not participate, Honorable W. J. KNEESHAW, Judge of Second Judicial District, sitting in his stead.

STATE OF NORTH DAKOTA EX REL. H. A. KIRKELIE as Resident, Citizen and Taxpayer of Burke County, North Dakota, Appellant, v. C. J. KOPRIVA, County Auditor of Burke County, North Dakota, J. L. Finke, County Judge of Burke County, North Dakota, and O. B. Stitt, Clerk of the District Court of Burke County, North Dakota, Constituting the Redistricting Board of Burke County, North Dakota, Respondents.

(194 N. W. 704.)

Counties — petition to redistrict counties into commissioner districts need not contain definite proposal of changes.

1. A petition invoking the jurisdiction of the redistricting board, under § 3262 of the Compiled Laws of 1913, relating to redistricting of counties into commissioner districts, need not contain any definite proposal of changes.

Counties — word "congressman" in statute as to voters signing petition for redistricting into commissioner district construed to mean member of House of Representatives.

2. The word "congressmen" in § 3262, used in connection with the requirement of the number of voters who must sign a petition, is construed to mean a representative in the House of Representatives, and the number of votes cast for such office is held to be the basis for determining the sufficiency of a petition for redistricting.

Opinion filed July 11, 1923.

Counties, 15 C. J. § 42 p. 415 n. 33, 34.

Appeal from the District Court of Burke County, *Lowe*, J.

Affirmed.

Fisk, Murphy & Nash, for appellant.

There can be no doubt that the respondents in passing upon the petition acted in a quasi-judicial character. That this will not be tolerated. See; Cooley's Const. Lim. 7th ed. 592; Wash. Ins. Co. v. Price, Hopk. Ch. 1.; Oakley v. Aspinwall, 3 N. Y. 547; Stockwell v. Twp. Board, 22 Mich. 341; Vanderlip v. Derby (Neb.) 26 N. W. 707; Foster v. Frost, 41 N. W. 647; State v. Bradish, 95 Wis. 205, 70 N. W. 172; Rollins v. Connor, 74 N. H. 456, 60 Atl. 777; State v. Board, 19 Wash. 8, 52 Pac. 317; Powell v. Egan, 42 Neb. 482, 60 N. W. 932; Rosenberg v. Rohrer, 83 Neb. 469, 120 N. W. 159; Wilcox v. Supreme Council, 210 N. Y. 370, 104 N. E. 624.

"There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule that Lord Coke has laid it down that 'even an act of Parliament made against natural equity as to making a man a judge in his own case, is void in itself.' This maxim applies in all cases where judicial functions are to be exercised and excludes all who are interested, however remotely, from taking part in their exercise." Cooley, Const. Lim. 7th ed. 594.

"And the principle that no judge of any court can sit as such in any cause in which he is a party or in which he is interested applies to such tribunal as town boards, school boards, county boards, etc." Oakley v. Aspinwall, 3 N. Y. 549.

"A petition for a license to A. and B. consisting of the requisite number of signers, was signed by a member of the city council by whom the petition was to be heard and presented to the city clerk. Upon the discovery that the signature of the councilman would disqualify him from acting on the application, his name was erased, the petition withdrawn, and another was filed asking for a license for B. alone, and which was not signed by the councilman. Held, that signing the first petition disqualified the councilman, and that the erasure of his name and the withdrawal of the petition did not remove the disqualification." Rosenberg v. Rohrer, 120 N. W. 159.

E. R. Sinkler and *G. O. Brekke,* for respondents.

"The decision of the board of county commissioners on the sufficiency of a petition for the removal of a county seat is final in the absence of a showing of fraud sufficient to vitiate such petition." Miller v. Norton, 22 N. D. 196; State v. Langlie, 5 N. D. 594.

"The canvass by the board to determine the result of an election held upon an order of the supervisors by a two-thirds vote, at a meeting when all the towns were represented to decide the question of removing a county seat, is conclusive." Hipp v. Charlevoix, supra (Mich.) 29 N. W. 77.

"The board of county commissioners having found that a certain petition for the organization of a civil township containing the requisite number of legal voters and having acted thereon by taking the necessary steps to organize such township, held that the question as to

the sufficiency of such petition is not open to judicial investigation in mandamus proceedings to compel the calling of an election for school officers in such township." State v. Gang, 10 N. D. 331; State v. Supervisors, 23 Minn. 521; Currie v. Paulson, 45 N. W. 852.

"The record of a trial court imports absolute verity." State v. Hopewell, 53 N. W. 990.

"The record of a justice's judgment in his docket must control and it cannot be contradicted by his return to a writ of certiorari." Weaver v. Lammon (Mich.) 28 N. W. 905.

"The rule under consideration also protects from contradiction or impeachment by parol or extrinsic evidence the official records or documents prepared and kept by public officers in the performance of their duties as such." 17 Cyc. 581.

"Certiorari will not lie to review alleged errors not going to the jurisdiction of the inferior court." State v. Crawford, 24 N. D. 8.

"The rule is well established that in certiorari proceedings the case is to be determined upon the record as it appears from the return of the writ and that matters outside the record will not be considered to ascertain whether the action of the inferior board or tribunal is warranted by the facts or not." State v. Costello (S. D.) 153 N. W. 910.

"The provisions of our revised statutes on this subject profess to be merely declaratory of universal principles of law, which make no distinction between the case of interest and that of relationship, both operating equally to disqualify a judge. Hence the statute declares, that no judge of any court can sit as such in any case to which he is a party or in which he is interested, or in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties." Oakley v. Aspinwall, 3 N. Y. 551; People v. De La Guerra, 24 Cal. 73; Sigurney v. Silbey, 32 Am. Dec. 248; Horton v. Howard, 44 N. W. 1112; People v. Connor, 142 N. Y. 130; Abrams v. State, 20 S. W. 987; Case v. Hoffman, 44 L.R.A. 728.

"At common law, while it was recognized that a judge who was interested in an action, or of kin to either party, was disqualified from sitting in the cause, his judgment was generally considered to be erroneous, and not void, so that the objection might be waived by the

party either expressly or impliedly." Sampson v. People (Ill.) 59 N. E. 427; Duquoin Water Works Co. v. Parks (Ill.) 69 N. E. 587.

"Under statutes which specify the causes of disqualifications but do not forbid a disqualified judge to act, the disqualification of a judge is not generally regarded as jurisdictional, and it may be waived either expressly or impliedly by the parties." 5 A.L.R. 1589; Coletrain v. Templeton, 45 C. C. A. 338; Morrow v. Watts, 95 S. W. 988; Washington Fire Ins. Co. v. Hogan, 5 A.L.R. 1585; Eberville v. Ludvil Co. (Colo.) 64 Pac. 200; Nichols v. Berrick (Colo.) 62 Pac. 202; Kerr v. Burns (Colo.) 93 Pac. 1120; Stevens v. Hall, 69 Pac. 282; Goodrich v. Stangland (Ind.) 58 N. E. 148; Hargis v. Com. (Ky.) 123 S. W. 239; State v. Morgan (La.) 77 So. 588; Nimocks v. McGehee, 52 So. 626; State v. Donlan, 80 Pac. 244; State v. District Ct. 138 Pac. 1091; State v. District Ct. 148 Pac. 312; State v. Smith, 139 Pac. 60.

"A judge is not deprived of jurisdiction of a seat to compel a public officer to issue warrants for an extra statutory allowance, to another occupant of the same bench, the result of which will determine his own rights to a similar allowance, because of his interest, if there is no other judicial tribunal, to which the question can be presented." McCoy v. Hanvin, 153 N. W. 361.

"And where the Constitution makes the county court the sole judge of election contests, and the law makes no provisions for substituting another commissioner for one who is interested, such court is, by reason of the necessity of the case, bound to determine the election contest of one of the commissioners who may be interested in the case." Stafford v. County Ct. 51 S. E. 2.

BIRDZELL, J. This is an appeal from a judgment of dismissal in a certiorari proceeding which was brought to determine the validity of certain action of the redistricting board of Burke county. The facts are as follows: On September 27, 1922, there was filed in the office of the county auditor of Burke county a petition as follows:

"To the County Judge, County Auditor and Clerk of the District Court in and for Burke County, North Dakota:

"The undersigned representing more than twenty-five per cent of the legal voters of the county of Burke, as determined by the votes cast at the last preceding general election for congressman, and acting under

authority of Section 3262 of the 1913 Compiled Laws of North Dakota, hereby petition you as a board to change the boundaries of commissioners districts of the county of Burke so that the same shall be more reasonably equal in population."

This petition was signed by 795 names. Thereafter, on October 3, 1922, the county redistricting board met and adopted a resolution as follows:

"Whereas, a petition presented before this board representing more than 25 per cent of the legal voters of the county of Burke, as determined by the votes cast at the last preceding general election for congressman, and acting under authority of § 3262 of the 1913 Compiled Laws of North Dakota, and

"Whereas, said board is petitioned to change the boundaries of commissioners districts of the county of Burke so that the same shall be more reasonably equal in population, and

"Whereas, such petition was signed by 795 legal voters of said districts, which number is in excess of the 25 per cent of the total votes cast for congressman in said districts in the last general election, said total votes being 2,758;

"Therefore, be it resolved, that in compliance with said petition, said board redistrict said Burke county commissioners districts so that Richland township which is included in township 163, range 90, shall henceforth be included in the second commissioners district and removed from said first commissioners district, and that Dimond and Vanville townships be removed from the second commissioners district and included in the first commissioner's district, that as a result of said redistricting the first commissioners district, which had 1,282 votes in the general election in 1920 would be decreased to 1,165 votes. The second commissioners district which had 970 votes in the general election in 1920, would be increased to 1,087 votes and that the third commissioners district which had 1,131 votes in the general election of 1920 would remain unchanged."

Motion seconded by C. B. Stitt, clerk of court and carried, all members of the board voting aye.

C. J. Kopriva, County Auditor.
J. L. Finke, County Judge.
C. B. Stitt, Clerk of Court.

The statute under which the proceedings were had is §§ 3262 and 3263, Compiled Laws of 1913:

Sec. 3262. "The county judge, auditor and clerk of the district court of each county shall constitute a redistricting board with power to redistrict the commissioner districts in any county whenever 25 per cent of the legal voters of the county, as shall be determined by the votes cast at the last preceding general election for congressmen, shall petition said board to change the boundaries of the commissioner districts and file said petition with the county auditor. Within twenty days after the filing of said petition it shall be the duty of the county auditor to call a meeting of the redistricting board to consider such petition, and if it shall appear that the commissioner districts of such county are not reasonably equal in population or extent of territory they shall proceed at once to redistrict such county into commissioner districts."

Sec. 3263. "In redistricting any county it shall be the duty of the redistricting board to make the districts as regular and compact in form as practicable, and as equal in population as possible, as shall be determined by the vote cast at the last preceding general election, but no new district shall be so formed that any two of the then acting commissioners shall reside in the same district, and no county shall be redistricted oftener than once in five years."

Upon this appeal it is contended that the proceedings of the redistricting board are irregular and insufficient for the following reasons:

(1) That the petition is insufficient in that (a) it is indefinite and does not describe the new districts sought to be formed; (b) that there is not the required number of signers.

(2) That the board did not "consider" the petition as required by statute.

(3) That the board was without jurisdiction because it appeared that the districts, as then composed, were reasonably equal in population and extent of territory and were as regular and compact as practicable.

(4) That the action taken did not constitute a redistricting as required by § 3262.

These objections will be considered in the order stated. We are of the opinion that the statute does not require a petition for definite changes. It rather contemplates an exercise of discretion by the board when its jurisdiction is properly invoked. Favorable action will be

taken when it appears to the board that the commissioner districts are not as reasonably equal in population or extent of territory as they can be made. In exercising its discretion the statute seems to contemplate that the board is not to be controlled or restricted by definite proposals, but that action shall be taken to the end that the districts be as regular and compact in form as practicable and as equal in population as possible.

The contention that there are not sufficient signers is based upon the provision in the statute requiring the number to be determined by the votes cast at the last preceding general election for congressmen. If the number be reckoned by the vote cast for representative in Congress, it is sufficient, but, if reckoned by the vote cast for United States Senator, it is insufficient. It is contended that, there being no such office as congressman and the term being equally applicable to a United States Senator and to a Representative in the House of Representatives, the statutory requirement is not met unless the petition contain names of voters equal to 25 per cent of the highest number of votes cast for an office the incumbent of which is in fact a member of Congress. The conclusive answer to this contention is that the statute prescribing this measure for determining the sufficiency of a petition was passed in 1901 (See chap. 54, Session Laws of 1901). At that time the voters did not vote upon the election of a United States Senator. This is conclusive as to the legislative intention manifested in the use of the word "congressmen."

We think the objection that the board did not "consider" the petition within the meaning of the statute is wholly without merit in view of the recitals in the resolution. They reflect a consideration of the comparative vote in the respective districts, and the action taken tends apparently to equalize existing disparities. This likewise answers the third objection.

To the objection that the action taken constituted merely annexation rather than redistricting, it need only be said that, in our opinion, redistricting, under § 3262, may properly be accomplished in this way if, in the judgment of the redistricting board, such is the practicable and feasible method of bringing about the result contemplated by the statute. The extent and character of changes to effect the statutory

result are matters that clearly lie within the discretion of the board and do not go to its jurisdiction primarily.

A further argument is advanced to the effect that members of the board had signed as petitioners and by so doing disqualified themselves to sit in judgment on the petition. This question was not presented in the court below and consequently we are not required to consider it upon appeal.

It follows from what has been said that the judgment appealed from must be affirmed. It is so ordered.

BRONSON, Ch. J., and CHRISTIANSON, NUESSLE, and JOHNSON, JJ., concur.

BANK OF INKSTER, a Corporation, Respondent, v. AUGUST CHRISTENSON.

MARY CHRISTENSON, Appellant.

(194 N. W. 702.)

Husband and wife — wife of mortgagor held estopped to assert claim to property as against mortgagee.

In an action to foreclose certain chattel mortgages executed by one of the defendants, the other defendant, wife of the mortgagor, claimed to be the owner of some of the property mortgaged. The evidence is examined, and it is held to support the findings of the trial court that the wife of the mortgagor is estopped to assert her title as against the mortgagee.

Opinion filed July 11, 1923.

Husband and Wife, 30 C. J. § 486 p. 830 n. 74.

Appeal from the District Court of Grand Forks County, *Cooley*, J. Affirmed.

W. J. Mayer, for appellant.

It is generally held, however, that even where property is produced by the husband's efforts upon his wife's land, it belongs to the wife as against even her husband's creditors. Olson v. O'Connor, 9 N. D. 504, 84 N. W. 359.

"It is a well-settled rule of equity which has been adopted by the courts of law that where A has, *by his acts or representations or by his silence when he ought to speak out, intentionally or through culpable negligence, induced B to believe certain facts to exist,* and B has *rightfully acted on this believe so that he will be prejudiced if A is permitted to deny the existence of such facts,* A is conclusively estopped to interpose a denial thereof." 11 Enc. Law, 421.

"The primary ground of the doctrine is that it would be a fraud in a party to *assert* what his previous conduct has *denied,* when others have *acted on the faith of that denial.* The element of *fraud is essential,* either in the intention of the party estopped or in the effect of the evidence which he attempts to set up." 11 Enc. Law, 422.

"It is held that the facts necessary to work an estoppel must appear affirmatively." 11 Enc. Law, 424.

"To constitute an estoppel there must be a false representation or concealment of material facts, made with knowledge of such facts to one ignorant of the truth in regard thereto, with the intention that he shall act thereon, and action by him induced by such representation." Eickelberg v. Soper, 1 S. D. 568, 47 N. W. 953.

"To establish an estoppel in pais it must be shown that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe that his conduct would be influenced thereby, that such other party has acted upon or been influenced by such act, and that he will be prejudiced by allowing the truth of the admission to be disproved." Parliman v. Young, 2 Dak. 175, 4 N. W. 139.

"One is not estopped from claiming title to property by a prior admission of his want of title, where such admission was made without knowledge of the title, and without intent to deceive." Gjerstadengen v. Hartzell, 9 N. D. 268, 83 N. W. 230.

"In order to constitute an estoppel it is not sufficient to show that the language, acts, or conduct of one party might have misled the other to his prejudice; but it must affirmatively appear that the latter was in fact misled or induced thereby to do something that he would not otherwise have done." Sutton v. Consolidated Apen Min. Co. 15 S. D. 410, 89 N. W. 1020; Peabody v. Lloyds Bankers, 6 N. D. 27, 68 N. W. 92.

Strangers can neither be bound or take advantage by an estoppel. 11 Enc. Law, 432.

"The person claiming the estoppel must be without knowledge *and also destitute of any available means of acquiring such knowledge.*" 11 Enc. Law, p. 434.

McIntyre, Burtness & Robbins, for respondents.

"It is a well-established principle that where the true owner of property, for however short a time, holds out another, or, with knowledge of his own right, allows another to appear, as the owner or as having full power of disposition over the property, the same being in the latter's actual possession, and innocent third parties are thus led into dealing with such apparent owner, they shall be protected. Or where others are innocently induced to acquire rights in derogation of the secret or undisclosed claims of those who cause such action, the rights so acquired are secure whether contested in law or in equity. Such rights do not depend upon the actual title or right or authority of the party with whom they have directly dealt but are derived from conduct of the real owner which precludes him from disputing against them the existence of the title or right of power which he caused or allowed to appear to be vested in the party making the sale." Bigelow, Estoppel, 7th ed. 607.

"A party in possession of personal property is presumed to be the owner of it, and where such owner puts another in possession, and clothes him with the indicia of ownership, he loses his right thereto, as against creditors of that person." Hedbrun v. Ellsworth, 190 Ill. App. 388. Bodine v. Killem, 53 N. Y. 93; Boise Butcher Co. v. Anixdale, 144 Pac. 337; O'Connor v. Clark, 29 L.R.A. 607; Davis v. Bank, 25 L.R.A.(N.S.) 760.

"The general principle above stated applies to the conduct of a married woman in allowing the title to securities to stand in the name of her husband, or the apparent ownership of personal property or money to be in him." 10 R. C. L. 743.

BIRDZELL, J. This is an appeal from a judgment in an action to foreclose certain chattel mortgages securing a note of $5,000, dated April 14, 1920, due November 1, 1923, and executed by the defendant August Christenson alone. The facts as disclosed by the record are

substantially as follows: The defendant Mary Christenson was twice married. Her first husband died in 1910. Up to that time they had been living on a rented farm. The widow conducted a sale selling the personal property, except a cow and some heifers. Subsequently she moved to her own farm where she, together with her three children, continued to reside, renting the land for two years to a tenant. In the fall of 1912, she rented the land to the defendant August Christenson who continued to farm it as a tenant until 1916, the defendant Mary and her children residing thereon. In July, 1916, the defendants intermarried and August Christenson continued to carry on the farming operations until the fall of 1921. At the time of the marriage Christenson owed between $1,500 and $2,000, and, after conducting the farming operations for a period of approximately four years, or until April, 1920, he was owing $4,020.54, which indebtedness was largely represented by notes in the plaintiff bank and two other banks. To take up this outstanding indebtedness and to cover advances to be made during the then current year, the note in suit was executed. Concurrently therewith, August Christenson executed a chattel mortgage covering a large amount of farming equipment and live stock. The following month he executed another mortgage on an undivided two-thirds interest in the 1920 crop on certain rented land as security for the same indebtedness. In February, 1921, as additional security, he gave another mortgage on two horses and the 1921 crop, and in September of the same year, he executed a mortgage upon an automobile and some hogs. These mortgages contained the usual insecurity clause. August Christenson disposed of some of this mortgaged property and, in the late summer or fall of 1921, an attorney, acting for Mary Christenson, notified the plaintiff that she claimed some of the property covered by the mortgages. Also, August Christenson requested the plaintiff to come and take the property as he would no longer be responsible for it. Thereupon this action was instituted. The trial court gave the plaintiff a judgment against August Christenson of $4,100 and costs, and further adjudged the mortgages to be first liens upon the property described in them and decreed a foreclosure of the same. This judgment was entered the 27th of November, 1922. Thereafter, on the 12th of December, 1922, an order to show cause was issued, directing that the defendants show cause why the judgment should not be amend-

ed so as to provide that the mortgages therein described constituted valid liens upon the increase of all female animals described in the mortgages. This order was issued upon the affidavit of the plaintiff's attorney, which stated that, in drawing the findings, he had, through inadvertence and oversight, neglected to set forth this clause in the mortgages and similarly had neglected to incorporate in the judgment any provision covering such increase. Pursuant to this order the findings were amended and an amended judgment entered, extending the lien and the foreclosure to the increase of all female animals described in the mortgages. The order for the amended judgment was dated December 20, 1922, and directed the entry of a judgment nunc pro tunc as of November 27, 1922. Upon this appeal the appellant demands a trial de novo and also specifies certain errors for review.

The defendants answered separately in the court below, but were represented by the same attorney. The defendant Mary Christenson alone appeals. The principal contention is that the court erred in including in the judgment of foreclosure certain property of which she claimed to be the owner. This consisted of a single buggy, manure spreader, cream separator, some milk cows, steers, calves, hogs and crops. Both she and her husband testified to her ownership of this property, but they also testified to certain facts upon which the trial court based an estoppel to assert her title as against the plaintiffs in this action. Briefly stated, these facts are: After the marriage of the two defendants, the business was transacted in the name of August Christenson. The charge account at the store for family expenses was in his name. Property that was sold from the farm, whether property claimed now to have been owned by Mary Christenson or August Christenson, was sold by him, and when the proceeds were deposited the deposit was in his name. He had previously borrowed money or secured indebtedness on at least two occasions at other banks, mortgaging the property which is now claimed to have been the property of Mary Christenson. He asserted to the plaintiff bank that he was the owner of the property. There was a mortgage on the land of Mary Christenson, and August paid the interest,—part of the time borrowing money on his own note for such interest. The property was all listed for taxation in the name of August. August had sold hogs to the butcher and received the payment, which hogs are now claimed to

have been owned by Mary. August was doing all of the business. He made arrangements for the support of the family, paid interest on the farm mortgages and paid taxes as though he owned all of the property. In the testimony of August, he emphasizes throughout the idea that he was acting upon his wife's instructions at all times, but nevertheless he tacitly admits that the third parties with whom he dealt did not know of her asserted dominion over him and her property. We are satisfied from a careful perusal of the record that the testimony amply supports the finding of the trial court to the effect that the defendant Mary Christenson held the plaintiff out to the world as the owner of the property embraced in the mortgages and the conclusion that as to the plaintiff, dealing with him on the strength of his assumed ownership, she is estopped to set up her title.

Further contention is made that the trial court erred in amending the judgment after the term at which it was entered had gone by. There is no merit in this contention. It is firmly established in this jurisdiction that the power to vacate or modify judgments is not restricted to the term at which they are entered. In this state there are no terms of the district court in the common law sense of the word.

Section 7350, Comp. Laws 1913, provides "The district court is always open for the purpose of hearing and determining all actions, special proceedings, motions and applications of whatever kind or character, . . . " and § 7966, Comp. Laws 1913, provides "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." The trial court clearly had the power to entertain the motion of the respondent and to modify the findings and judgment. See Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Plano Mfg. Co. v. Doyle, 17 N. D. 386, 17 L.R.A.(N.S.) 606, 116 N. W. 529.

The judgment appealed from is affirmed.

BRONSON, Ch. J., and CHRISTIANSON, SVEINBJORN, JOHNSON, and NUESSLE, JJ., concur.

LENA FLATH, Respondent, v. BANKERS CASUALTY COMPANY, a Corporation, Appellant.

(194 N. W. 739.)

Insurance — burden on insurer to establish that injury was within exceptions of policy.

1. In an action against an insurance company to recover on an accident policy, the burden is upon the company of establishing that an injury to the insured, shown to be the result of an accident, is within an exception contained in the policy, where payment is resisted on the ground that there is no liability by reason of such exception.

Insurance — accident held within exceptions of policy exempting from liability injuries from violation of law.

2. In an action to recover on an accident insurance policy which provides "No indemnity shall be allowed for any loss . . . resulting directly or indirectly . . . while insured is violating any law or ordinance," evidence examined, and *held* that the accident, on account of which the recovery is claimed, was the direct result and consequence of a violation of the laws of the United States and within the exception exempting from liability.

Opinion filed July 16, 1923.

Accident Insurance, 1 C. J. § 288 p. 497 n. 28; § 334 p. 505 n. 54 New.

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

Action to recover on a policy of accident insurance.

Judgment for plaintiff.

Defendant appeals.

Reversed.

Young, Conmy & Young, for appellant.

Barnett & Richardson, for respondent.

Note.—Authorities holding that in order to defeat a recovery under policies of insurance avoiding or limiting liability where death or injury results from the insured's criminal action, or in consequence of any violation of law, or from any unlawful act on his part, there must be some causative connection between the insured's act and his death or injury, are collated in a note in 17 A.L.R. 1005, on when violation of law deemed proximate cause of death or injury so as to preclude recovery under policy of life or accident insurance.

See also 14 R. C. L. 1254; 3 R. C. L. Supp. 369; 4 R. C. L. Supp. 953; 5 R. C. L. Supp. 805.

NUESSLE, J. The defendant Bankers Casualty Company, a corporation, is engaged in the business of writing accident insurance. George A. Flath took out a policy in the company. In his application for the insurance which became and was a part of the policy, he stated that his occupation was that of proprietor of an auto-accessory business and his duties were "counter duties and salesman—supervising only." This policy was in force on July 8th, 1920. On the afternoon of that day Flath was injured in an automobile accident, and thereafter and on August 29th, 1920, he died as a result of the injuries so received.

At the time of the accident Flath and one Sydness were riding in an automobile on a public highway. Sydness was driving. The machine was running at a very high rate of speed; between 45 and 60 miles an hour. The accident occurred on a straight road which was in good condition. The automobile belonged to Flath. It was loaded with a large quantity of whisky and other intoxicating liquor, in all some three hundred thirty-six quarts in bottles. It was being driven at a high rate of speed so as to get into Fargo, something over one hundred miles distant, before morning.

Flath's policy provided, among other things:

"No indemnity shall be allowed for any loss . . . resulting directly or indirectly . . . while Insured is violating any law or ordinance; . . . nor from voluntary exposure to unnecessary danger . . ."

And also provided:

"This policy . . . contains the entire contract of insurance except as it may be modified by the company's classification of risks and premium rates in the event that the Insured is injured . . . after having changed his occupation to one classified by the company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limit so fixed by the Company for such more hazardous occupation."

The plaintiff is the beneficiary under the terms of the policy. Subsequent to the death of Flath, proper proofs of loss were made. The

defendant denied liability. Thereafter this action was brought to recover on the policy. The defendant answered setting up as defenses; first, that the insured was engaged in a violation of law at the time of the accident; second, that the accident was due to voluntary exposure to unnecessary danger; third, that the insured was injured after having changed his occupation to one classified as more hazardous than that stated in the policy, and fourth, that the insured was injured while doing an act or thing pertaining to an occupation more hazardous than that stated in the policy. No tender back of the premium paid or any part thereof was made by the defendant company until the time of the trial.

A jury was waived and the action was tried to the court. Findings of fact and conclusions of law were made in favor of the plaintiff and judgment was entered for the plaintiff and against the defendant company. This appeal is from that judgment.

It is the appellant's contention that at the time of the accident the insured was engaged in the transportation of intoxicating liquor contrary to the laws of the United States and that the automobile was then running at a rate of speed greatly in excess of that permitted by the laws of the state of North Dakota; that is, that the insured at the time of the accident was violating both the federal and the state laws; that as a consequence of such violations the hazard was increased; that thereby the insured voluntarily exposed himself to unnecessary danger; that there was a causal connection and relation between the acts constituting the violation of law and the accident and that, therefore, the defendant is not liable by reason of that provision of the policy first hereinbefore set out. Appellant further contends that under the terms of the second provision of the policy hereinbefore set out, it is not liable for the reason that the insured had changed his occupation from that in which he was engaged at the time the policy was written to one more hazardous and that the insured was injured while doing an act or thing pertaining to an occupation more hazardous than that stated in the policy.

The respondent's position is that while the facts are as hereinbefore stated, nevertheless there is no direct proof that the insured was engaged in violating the laws of the United States at the time of the accident; that the burden is on the defendant to affirmatively establish

defenses exonerating it from liability under the exceptions in the policy; that while the insured may have been riding in an automobile which was carrying a large quantity of intoxicating liquor, it is merely a matter of inference that he was transporting the liquor illegally or that there was any violation of law; that if there was a violation of the Federal laws by reason of the transportation of the liquor and of the state law by reason of the car running at a speed in excess of the statutory limit, nevertheless there is no proof that the accident was caused by either of these violations and that even though the insured was violating the law at the time of the accident resulting in his injury and death, unless it be established affirmatively that such violation was the cause of the accident that the defendant is liable.

It appears to us certain that the insured was violating the Federal statutes at the time the accident occurred in that he was engaged in transporting liquor contrary to law; that the car was being driven at a very high rate of speed in order to enable the insured to reach Fargo with his contraband cargo during the nighttime; that this was for the purpose of enabling him to evade the officers of the law. It is very certain that the transportation of liquor contrary to law is an extremely dangerous business. Surely, no reasonable man can believe that one engaged in such an enterprise is not much more subject to danger of accident than one whose business is that of selling automobile accessories and whose duties are those of a salesman and of supervising the business. Surely, everyone must agree that the accident in this particular case occurred solely and only because the insured and his companion were driving recklessly and taking every chance in order to avoid the possibility of apprehension on account of their unlawful undertaking. The car was very heavily loaded. Its speed was very great. When it turned turtle that happened which reasonably might have been expected.

The rule is, as the respondent contends, that in a case such as this the burden is upon the insurer of establishing affirmatively that an injury to the insured, shown to be the result of an accident, is within some exception contained in the policy. 1 C. J. 497; 14 R. C. L. 1437; note in 9 Ann. Cas. 921; Hess v. Preferred Masonic Mut. Acci. Asso. 40 L.R.A. 444 and note, 112 Mich. 196, 70 N. W. 460; Stevens v. Continental Casualty Co. 12 N. D. 463, 97 N. W. 862; Red Men's Frater-

nal Acci. Asso. v. Rippey, 50 L.R.A.(N.S.) 1006 and note, 181 Ind. 454, 103 N. E. 345. But here the defendant has successfully sustained the burden.

There is no question but that there is much authority to the effect that under provisions in policies similar to the one here in question, the mere fact that the accident occurred while the insured was engaged in a violation of law does not exonerate the insurer, but to avoid liability he must further establish that the violation of law was the cause of or had some causal connection with the accident. 14 R. C. L. 1254; 1 C. J. 457, 497; Townsend v. Commercial Travelers Mut. Acci. Asso. 231 N. Y. 148, 17 L.R.A. 1001, 131 N. E. 871; Supreme Lodge, K. P. v. Crenshaw, 129 Ga. 195, 13 L.R.A.(N.S.) 258, 121 Am. St. Rep. 216, 58 S. E. 628, 12 Ann. Cas. 307; Interstate Life Assur. Co. v. Dalton, 23 L.R.A.(N.S.) 722, 91 C. C. A. 210, 165 Fed. 176. It appears to us that it is not necessary to the decision of this case for us to enlarge upon that rule. It is at least most generous to the insured and there are well-considered cases laying down a much broader and less restricted rule. Duran v. Standard Life & Acci. Ins. Co. 63 Vt. 437, 13 L.R.A. 637, 25 Am. St. Rep. 773, 22 Atl. 530; Travellers' Ins. Co. v. Seaver, 19 Wall. 531, 22 L. ed. 155. It is sufficient for the purposes of this case to say that in our judgment this case comes within the narrower rule; that the accident was a direct consequence and result of the violation of the law and that therefore there was no liability on the part of the defendant company on account of the accident and injury. Thus holding, as we do, it is unnecessary for us to consider or discuss the other questions raised by the defendant's answer, and we therefore express no opinion as to the same. The respondent urges that this being a case properly triable to a jury and the court having made its findings as to the facts that the same rule applies with reference to the court's findings as to the verdict of a jury in so far as affects their weight and consideration on appeal. It is true that unless it appears that the findings are clearly against the preponderance of the testimony, they must stand. They are presumed to be correct. Richards v. Northern P. R. Co. 42 N. D. 472, 173 N. W. 778; Stevens v. National Elevator Co. 36 N. D. 9, 161 N. W. 558; State Bank v. Maier, 34 N. D. 259, 158 N. W. 346 and cases cited. In this case, however, there is no conflicting testimony, and the court made no specific findings as to whether the

insured was engaged in a violation of the law at the time of the accident or as to whether or not, if he was so engaged, such violation was the cause of the accident. In any event we believe that the only reasonable conclusion that can be arrived at from the record is that which we have heretofore expressed. Respondent further urges that under the authority of Yusko v. Middlewest F. Ins. Co. 39 N. D. 66, 166 N. W. 539, the defendant, not having tendered back the premium paid by the insured, is estopped to now deny liability. We think that the Yusko Case does not warrant this contention. There the property was destroyed, and there could be no further insurance against loss. There the defendant contended the policy was void but made no tender back of premiums paid. The defendant in this case denied liability on account of *this particular accident,* but so long as the insured lived he continued to be insured as against all risks covered by the policy. There was no attempt at any time to avoid the policy. If Flath desired to have the policy canceled, he should have made known his wish and demanded a return of the premium. There was no demand for payment on account of the policy until after the policy had expired. The insured died two days before that expiration. His estate might be entitled to a refund on account of those two days, but, even if so, we do not believe that under the circumstances and especially in view of the fact that at the time of the trial the defendant company tendered back a much greater sum than the premium for the two days would have amounted to, this can make the defendant liable.

The judgment must be reversed and the action dismissed with costs to the appellant.

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

PETER KASTNER, Respondent, v. A. C. ANDREWS, Doing Business as Andrews Grain Company, Appellant.

(194 N. W. 824.)

Sales — delivery of grain to warehouse held "bailment" and not sale.

Plaintiff, as holder and assignee of storage tickets representing grain stored by him and others with the G. U. Co-op. Elevator Company, a public warehouse, sued the defendant in conversion. Defendant was a grain commission merchant and had loaned money to the elevator company under a contract that it should be used in buying grain and in defraying incidental expenses, the borrower agreeing to ship to the defendant the grain purchased to be handled by the latter on commission with the privilege of applying the proceeds on the debt. The elevator company had shipped to the defendant grain required to redeem outstanding storage tickets, which grain the defendant sold, retaining the proceeds and crediting it on the elevator company's debt. It is *held:*

1. Under § 3114 of the Compiled Laws of North Dakota for 1913, the delivery of grain to a warehouse under contract whereby the latter agrees to deliver a like amount and grade to the holder of the receipts, is a bailment and not a sale.

Warehouseman — statutes held to contemplate continuous bailment of grain until redemption of receipts.

2. The above statute, considered in connection with § 3113 of the Compiled Laws of 1913 and with §§ 9, 10, 16, 23, 24 and 54 of the Uniform Warehouse Receipts Act, chapter 250, Session Laws of 1917, contemplates a continuous bailment until redemption of the receipts, notwithstanding the right of the warehouseman to mingle fungible goods with other goods and to substitute one mass for another, thus destroying the identity of the grain of a particular depositor.

Warehouseman — where amount of grain stored is less than required to satisfy outstanding receipts, warehouseman cannot confer good title upon purchaser.

3. Where the mass, which is owned in common by the holders of the outstanding warehouse receipts up to the aggregate of their receipts, is reduced below that which is required to satisfy outstanding receipts, the warehouseman cannot confer good title upon a purchaser.

Note.—For authorities discussing the question as to whether the storage of grain in bulk in warehouse shall be regarded as a bailment and not a sale, see note in 136 Am. St. Rep. 238; 27 R. C. L. 978; 3 R. C. L. Supp. 1543.

Warehouseman — holder of warehouse receipt not estopped to assert title as against purchaser in good faith from warehouseman.

4. The holder of a warehouse receipt or storage ticket is not estopped to assert his title as against a purchaser in good faith from a warehouseman.

Warehouseman — remedy of receipt holder upon surety bond of warehouseman not exclusive.

5. The remedy of a receipt holder upon the surety bond of a public warehouseman is not exclusive.

Opinion filed July 18, 1923.

Sales, 35 Cyc. p. 31 n. 29; Warehousemen, 40 Cyc. p. 406 n. 68, 71; p. 407 n. 79 New; p. 422 n. 93 New; p. 449 n. 14.

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

Affirmed.

H. A. Libby, for appellant.

Murphy & Toner, McLearn & Gilbertson and *Sullivan, Hanley, & Sullivan*, filed briefs in support of appellant's position.

"One who merely received from another, who has wrongfully sold the property of a third person, the proceeds of such sale is not guilty of conversion." 28 Am. & Eng. Enc. Law, 2d ed. p. 700 and cases there cited.

"A person having merely a limited interest in a chattel, may sell such interest without being guilty of a conversion." 28 Am. & Eng. Enc. Law, 2d ed. p. 700 and cases there cited; Leuthold v. Fairchild, 35 Minn. 99; Towne v. St. Anthony & D. Elev. Co. 8 N. D. 200, 77 N. W. 608; Citizens Nat. Bank v. Osborne-McMillan Elev. Co. 21 N. D. 335, and cases cited; Plano Mfg. Co. v. N. P. Elev. Co. 53 N. W. 302; Gillette v. Roberts, 57 N. Y. 28; Barrett v. Warren, 3 Hill, 348; Abernathy v. Wheeler, 92 Ky. 320; Parker v. Middleton, 24 Conn. 207; Valentine v. Duff, 34 N. E. 453; Bigelow, Leading Cases, Torts, p. 446; National Exchange Bank v. Wilder, 34 Minn. 142; Ferguson v. Talcott, 7 N. D. 183; Sanford v. Duluth & D. Elev. Co. 2 N. D. 6; Kellogg v. Olson, 34 Minn. 103, 24 N. W. 364; Caldwell v. Pray, 41 Mich. 307; Kohl v. Lynn, 34 Mich. 360; Jones, Chat. Mortg. ¶ 455.

Charles L. Crum, William Langer and *S. L. Nuchols*, for respondent.

A. G. Divet and *McIntyre, Burtness & Robbins*, as amici curiæ, filed briefs in support of respondent's position.

These "findings of fact," as we understand the rule in North Dakota, are entitled to the same weight in an action at law, as the verdict of a jury, and are to be so treated on appeal; and are not to be disturbed unless they are clearly against the preponderance of the evidence. Bank v. Webber (N. D.) 124 N. W. 952; Dowogiac Mfg. Co. v. Hellekson, 13 N. D. 257; Ruettell Ins. Co. v. Greenwich, 16 N. D. 546.

An agent can be guilty of conversion. The rule is definitely announced in the text in 28 Am. & Eng. Enc. Law. 2d ed. 688 in the following language: "An agent or servant who converts the property of a third person is liable in trover for such conversion and it is no defense that his acts were committed in pursuance of his employment and for the benefit of his employer or master; and this is true though the servant or agent acted under the bona fide belief that his master or principal was the owner of the property and in ignorance of the true owner's rights, since one who interferes with personal property, must at his peril see that he is protected by the authority of the true owner. Thus, where a broker or agent purchases goods from one having mere possession and without authority to sell and delivers such goods to his principal, he is liable for conversion. So, where an agent, such as an auctioneer, broker, factor, etc., sells property for one who has no title thereto, and transfers the possession thereof to a purchaser, he is liable for conversion. It has been held, however, that there is no liability for the conversion on the part of an agent who merely negotiates a sale for his principal without in any way interfering with the property, or who as agent merely collects the purchase money for goods wrongfully sold by his principal."

Under S. D. Rev. Code 1919, §§ 9751, 9753, 9754, 9758 and 9760, relative to grain warehouses, which recognize the inadequacy of warehouse facilities and the necessity of transferring grain to the terminal market and selling it, the holder of the storage ticket is not entitled to restoration of the identical grain stored and cannot demand it at the elevator where it was stored, and the warehouseman is only required to deliver an equal number of bushels of like grade, either at the warehouse or at the terminal market." Nicholson v. Poehler Co. 284 Fed. 992.

"Defendants, though commission merchants doing business as such,

in the matter of the sale of the wheat in question and the appropriation of the proceeds thereof to the payment of the Walbridge indebtedness, acted in their own interest and in their own behalf and not as mere agents for Walbridge, and are liable as for its conversion." Dolliff v. Robbins, 86 N. W. 772.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff in an action for the conversion of grain. The complaint alleges that between the 19th day of October, 1920, and the 1st of March, 1921, certain named persons, plaintiff among them, deposited grain for storage in the elevator of the Glen Ullin Co-operative Elevator Company at Glen Ullin, North Dakota, and that between the 17th day of March, 1921, and the 16th day of June, while the persons storing said grain were owners in common thereof, the defendant without the knowledge and consent of such persons and in violation of their rights did take and convert the same to his own use; that the original holders of the negotiable storage receipts, except the plaintiff, sold and assigned them for value to the plaintiff in this action; that the elevator company issuing the receipts is unable to honor them either by delivery of the grain or the payment of the value thereof; that at the time of the conversion of the grain the defendant knew that the same was stored with the elevator company as bailee and that the storage receipts were outstanding; and that the plaintiff had demanded the grain and redelivery was refused. The answer denies the conversion, puts the plaintiff upon proof as to the quantity of grain stored, for which he claims to hold storage receipts, and, in addition, alleges that the Glen Ullin Co-operative Elevator Company, during the time mentioned in the complaint, also received grain from the producers and shipped it in the usual course of the elevator business, and that from time to time it shipped to the defendant certain consignments to be handled and sold by him on the market; that the consignments were so received by the defendant and were sold for the use and benefit of the Glen Ullin Co-operative Elevator Company; that defendant had paid the elevator company for all the grain so shipped to him; that the defendant had no knowledge or notice that storage tickets were outstanding for any of the grain so handled by him. The case was tried in the district court of Burleigh county before Honorable H. L. Berry, district judge, without a jury, a jury having been waived.

The findings of fact are substantially in accordance with the allegations in the complaint, except that the court did not find that the plaintiff had demanded of the defendant the redelivery of the grain. It did find, however, that the plaintiff went to the defendant's office in Minneapolis and demanded a settlement of his claim on the storage receipts and that a demand for the grain would have been futile. It further appears from the evidence, although there are no findings covering the matter, that an agreement was entered into between the defendant and the Glen Ullin Co-operative Elevator Company, dated September 7, 1920, wherein it was recited that the elevator company was desirous of making arrangements with the defendant for the furnishing by the latter of funds from time to time needed in the business. It was agreed the defendant would loan and advance funds to the elevator company upon the understanding that they be used exclusively in buying grain and seed at the elevator and defraying the incidental expenses of conducting the business. The elevator company agreed on its part to ship to the defendant the grain and seed purchased to be handled for the former on commission, as such business is usually done, at Minneapolis, Minnesota,—it being understood that the defendant should make sales either in the form of options or as cash sales according to its best judgment. It was also agreed that the defendant should be entitled to deduct from the proceeds of sales any sum owing by the elevator company. It further appeared that the elevator company had given a warehouseman's bond in the sum of $5,000. As to a small portion of the grain in controversy, it appears that the elevator company had deposited it for storage in another warehouse in Glen Ullin and that the defendant had demanded and received the warehouse receipt issued therefor, later disposing of the grain and crediting the elevator company with the proceeds.

The principal, if not the sole, question to be determined upon this appeal is whether or not the defendant, in receiving and selling stored grain, applying the proceeds on its account with the elevator company and later refusing to honor the storage tickets issued by the latter, is guilty of conversion.

Obviously the first and primary matter to be considered in the solution of this question is the relationship between the elevator company first issuing the storage receipt and the holder of the receipt.

In the light of our statute and the former decisions of this court, this relationship is firmly established as being that of bailor and bailee. The statute, §§ 3113 and 3114, Comp. Laws 1913, in part reads:

Sec. 3113. "Each storage receipt issued in this state shall expressly provide that at the option of the holder of such receipt the kind, quality and quantity of grain for which such receipt was issued shall be, on his demand, delivered back to him, at any terminal point or at the same place where it was received upon the payment of a reasonable charge per bushel for receiving, handling, storage and insurance charges; and in case of terminal delivery the payment, in addition to the above, of the regular freight charges on the gross amount called for by the tickets being surrendered. . . . Nothing in this section shall be construed to require the delivery of the identical grain specified in the receipt so presented, but an equal amount of the same grade of grain or in lieu thereof a receipt issued by a bonded warehouse or elevator company doing business at terminal points, for an equal amount of grain of the same grade; provided, that grain placed in a special bin be excepted from the provisions of this section."

Sec. 3114. "Whenever any grain shall be delivered to any person, association, firm, or corporation doing a grain, warehouse, or grain elevator business in this state and the receipt issued therefor provides for the delivery of a like amount and grade to the holder thereof in return, such delivery shall be a bailment and not a sale of the grain so delivered, and in no case shall the grain so stored be liable to seizure upon process of any court in an action against such bailee, except actions by owners of such warehouse receipts to enforce the terms thereof, but such grain shall at all times in the event of the failure of insolvency of such bailee be first applied exclusively to the redemption of outstanding warehouse receipts for grain so stored with such bailee. And in such event grain on hand in any particular elevator or warehouse shall first be applied to the redemption and satisfaction of receipts issued by such warehouse." In Dammann v. Schibsby Implement Co. 30 N. D. 15, 151 N. W. 985, this court, following St. Anthony & D. Elevator Co. v. Dawson, 20 N. D. 18, 126 N. W. 1013, Ann. Cas. 1912B, 1337, said:

"From the very earliest time there had been a dispute as to whether a person who delivered grain to a public warehouseman and took

therefor a storage receipt had parted with his title to the grain. This dispute arose naturally from the difficulty of identifying the grain so stored. Some authorities held such a transaction to be a sale because, as they say, the identical grain cannot be returned. Other authorities held the deposit to be merely a bailment and the fact that the identical grain cannot be returned is immaterial in view of the fact that a like amount of the same kind and grade answers every requirement of the return.

"Those courts which held that the depositor had parted with his grain, of necessity held that no action could be maintained for its conversion. This for the very good reason that a man who has no wheat cannot maintain an action against somebody else for converting it. It might be said in passing that those decisions were made in the absence of statute upon the subject."

The court then, after referring to the statute quoted above, said (page 20):

"After the enactment of this statute the question was not an open one in North Dakota."

The only modification of this statute (if it be a modification) that has been called to our attention or that it is necessary to consider in this connection is the Uniform Warehouse Receipts Act, chapter 250 of the Session Laws of 1917. This act, in § 9, provides that a warehouseman is justified in delivering goods, subject to the three following sections, to (a) one who is lawfully entitled to the possession or his agent; (b) to one who is either himself entitled by the terms of a non-negotiable receipt or who has written authority from the person so entitled; (c) to one who is in possession of a negotiable receipt by the terms of which the goods are deliverable to him or to the bearer. It further provides, in § 10, that delivery is unauthorized where the warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession and that the warehouseman shall be liable as for conversion to all having a right of property or possession if he deliver the goods otherwise than as authorized in the preceding section. It is further enacted, in § 16, that no title or right to the possession of the goods on the part of the warehouseman, unless derived directly or indirectly from a transfer made by the depositor, shall excuse the

warehouseman from liability for refusing to deliver the goods according to the terms of the receipt.

Sections 23 and 24 provide:

Sec. 23. "If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole."

Sec. 24. "The warehouseman shall be severally liable to each depositor for the care and delivery of such mass to the same extent and under the same circumstances as if the goods had been kept separate."

Section 54 provides that any warehouseman who delivers goods out of his possession, knowing that a negotiable receipt is outstanding, without obtaining the possession of such receipt shall, with two exceptions immaterial here, be guilty of a crime.

This statute, as we view it, is in no way inconsistent with the pre-existing statutes heretofore referred to in so far as it touches upon the relation between the depositor and the warehouseman. It rather strengthens and carries out, by logical extension, the express declaration in § 3114, Comp. Laws 1913, that the delivery for storage shall be a bailment and not a sale.

It is argued, however, that the liability of the defendant is not necessarily determined by the consideration that the warehouseman is a bailee. Reliance is placed upon certain holdings of this court, to be hereafter referred to at some length, which, it is contended, recognize the right of the bailee to sell, or at least a power in him to confer a good title by estoppel. It is said that the bailment is made in the light of customs prevailing in the particular business, which customs carry by implication the right to dispose of stored grain and to pass title thereto. The first case relied upon in this connection is that of Marshall v. Andrews, 8 N. D. 364, 79 N. W. 851. In that case Justice Bartholomew, speaking for the court, said p. 368:

"It appears, then, that, while the statute recognizes the right of the bailee to at once ship the grain out of the warehouse, yet as between the bailor and bailee the title to that particular grain remains in the bailor."

A reading of the opinion will disclose that this was said in dis-

cussing the argument advanced by the appellant to the effect that a judgment for the plaintiff against the warehouseman could not stand because the action was in replevin and the verdict was a money verdict, containing no finding as to the ownership or right of possession of any particular wheat. The court, in answering this argument, adverted to the statute for the purpose of showing that the legislature intended to establish the relation of bailor and bailee notwithstanding that the identical grain delivered might not be reclaimed—the receipt being redeemable by grain of similar kind, quality, and quantity. It was the fact that the legislature had provided for such a redemption that led the court to remark, among other things, that "this section recognizes the usual and necessary custom of shipping grain out of the warehouses as the business may require." And further, that "the holder of the receipt cannot insist upon the delivery to him of the identical grain at the place of storage, but he can insist upon the delivery of the same quantity and the same kind and quality of grain." These observations also had a bearing on the defendant's contention that the burden was on the plaintiff to show that his wheat was not destroyed in the fire that destroyed the defendant's elevator. So, in the sense that the statute recognized the right of the warehouseman to substitute grain of like kind and quality for grain stored, it did recognize his right to ship the identical grain out of the warehouse, and this is clearly the sense in which the right of the bailee to do so was treated in that opinion. The opinion disproved the right of the plaintiff to recover specific grain, and hence negatived the contention that the action was in replevin. The court, in finally disposing of the case, held that the evidence was sufficient to establish conversion and that the judgment should be supported as for conversion. Neither the *right* of a warehouseman to *sell* grain required for the redemption of outstanding storage tickets, nor his power to confer a title by estoppel was involved in that case.

The case of State ex rel. Ertelt v. Daniels, 35 N. D. 5, 159 N. W. 17, is also cited in support of the contention that the warehouseman may pass good title to stored grain. The second paragraph in the syllabus reads:

"While, under § 3113, Comp. Laws 1913, the warehouseman may sell stored grain and upon a demand for the delivery of grain stored

substitute like grain therefor, yet the ticket holder need not make a demand in the alternative for the same grain or that of equal grade as a basis for conversion, where the ticket holder has demanded the return of his grain or payment of its value."

The action in that case was against the sureties on the warehouseman's bond and was for the benefit of the holders of storage tickets. The case was before the court on a demurrer to the complaint and it was contended that there was not a sufficient allegation of demand and refusal. The specific contention was that, in the light of § 3113, Comp. Laws 1913, to constitute a conversion, it is necessary that the demand shall have been in the alternative,—that is, either for the identical grain or for an equal amount of the same grade—and that a failure to deliver the identical grain would not constitute a conversion inasmuch as the warehouseman had the right to substitute grain of like quality. The holding was merely to the effect that the statute giving the right of substitution did not alter or enlarge the requirements as to demand; that it merely gave to the warehouseman the right to discharge his obligation of redelivery by redeeming in other grain of like quality. In the opinion the Marshall-Andrews Case, supra, was cited as holding that as between the bailor and bailee the title to the particular grain delivered remainded in the bailor. Likewise there was not involved in this case any question as to whether the warehouseman could confer upon a purchaser good title to grain stored which is necessary to redeem outstanding storage tickets.

The case of First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 280, 91 N. W. 436, is also cited by the appellant as holding that a warehouseman or bailee can confer good title to stored grain upon the purchaser. In that case error was predicated upon the refusal of the trial court to instruct the jury that the conversion, if any, took place at the time and place the wheat was shipped out of the elevator and upon the giving of the instruction that the conversion, if there was such, took place at a later time when the defendant refused to redeliver the wheat upon demand. The court, in speaking of the obligations of the warehouseman, said:

"Its obligations were fixed by the statute, and the fact that it may have mixed the grain with other grain, or that it may have shipped it out, if such was the fact, did not constitute a conversion. Under

the law it could fully comply with its obligations to the owner or person entitled to possession by delivering to such person an equal quantity of wheat of like grade; and only upon a demand by the person entitled to possession, and a refusal on its part, would it be liable for a conversion. Rev. Codes, §§ 1790–1792; Best v. Muir, 8 N. D. 44, 73 Am. St. Rep. 742, 77 N. W. 95; Marshall v. Andrews, 8 N. D. 364, 79 N. W. 851; Towne v. St. Anthony & D. Elevator Co. 8 N. D. 200, 77 N. W. 608. See also Sanford v. Duluth & D. Elevator Co. 2 N. D. 6, 48 N. W. 434."

It is apparent that the court was concerned only with the argument that a conversion takes place the moment stored grain is shipped from the warehouse, and it contents itself merely to point out that, notwithstanding such shipment, the obligations of the storage ticket could be fully met by the delivery of an equal quantity of like grade. The shipping out of the identical grain stored is no more a conversion than is the mixing of the grain with other grain, and the statute which permits substitution authorizes one to the same extent that it authorizes the other. Judicial recognition of this fact, as in the case of First Nat. Bank v. Minneapolis & N. Elevator Co. supra, is not a declaration that a warehouseman may by sale confer upon a purchaser good title to grain required to meet the obligations of outstanding warehouse receipts.

It is significant in this connection to note that the form of the receipt prescribed by the statute in force at the time of the decision in the above case, gave to the holder the option to demand the price or grain at the place where the grain had been received. Subsequently the legislature (see chap. 110, Sess. Laws 1905) provided that he should have the further option of demanding grain at any terminal point and that the obligation may be met by delivering an equal amount of the same grade of grain "or in lieu thereof a receipt issued by a bonded warehouse or elevator company doing business at terminal points, for an equal amount of grain of the same grade." This is a further statutory recognition of the right of substitution,—that which may be substituted being a bonded warehouse receipt. In this the legislature apparently contemplated the continuance of the bailment relation and, to some extent at least, negatived an intention that stored grain needed for redemption of outstanding receipts might be sold.

An additional indication that the legislature intended a continuous bailment and not one capable of being terminated by a sale is found in the provisions fixing the form of the storage receipt. Comp. Laws 1913, §§ 3113 and 3116. These clearly contemplate, and the receipts issued thereunder provide for, the payment of a storage charge which shall include the charges for receiving, elevating, insuring and delivering the grain, being governed by the period elapsing between the issuance of the receipt and its redemption. Such provisions are consistent only with the idea of a continuous bailment. Had it been contemplated that the bailee might rightfully sell and be subsequently accountable only for the value of the grain at the time demand were made upon him, it would seem that a receipt making appropriate provisions to that end would have been prescribed instead of one obligating the bailor to pay continuous storage and insurance charges. We are unable to find, either in the decisions referred to or in the statutes of this state, any recognition of a right on the part of the warehouseman to sell grain required for the redemption of outstanding warehouse receipts.

Our attention is also directed to decisions elsewhere embodying interpretations of the relation of depositor and depositee of grain under the North Dakota statutes and decisions. The principal cases under this head are Northern Trust Co. v. Consolidated Elevator Co. 142 Minn. 132, 4 A.L.R. 510, 171 N. W. 265, and Nicholson v. H. Poehler Co. (D. C.) 284 Fed. 992. In the former case it was said, on the authority of Marshall v. Andrews, 8 N. D. 364, 79 N. W. 851, that under the law of this state a public warehouseman does not become a wrongdoer by shipping stored grain to a terminal elevator, and it is remarked that the proprietor of such an elevator would have no cause to suspect that the warehouseman was wrongfully disposing of the grain shipped. These statements may both be justified, but it is submitted that they do not bear directly upon the question in hand. Clearly a public warehouseman does not become a wrongdoer solely by virtue of the act of shipping stored grain to a terminal elevator, since, by that act alone, he is doing nothing inconsistent with his obligation under outstanding storage receipts. He might take a terminal bonded warehouse receipt or he might have retained enough to satisfy the receipts. That case involved the right of a surety on a warehouseman's

bond to recover, through subrogation, against a purchaser of stored grain. The case was not considered on the basis of the right of a holder of an unredeemed storage ticket as such. While it decided nothing as to the rights of a ticket holder, it seems rather to have been assumed, for the purpose of the opinion, that though the bailor himself might recover, the surety on the defaulting warehouseman's bond, who claimed to be subrogated to the ticket holder's right, could not recover because of the superior equities of the one who had purchased without notice of any wrongful act of the defaulting warehouseman. These equities precluded a recovery by the surety and prevented it from taking advantage of the ticket holder's position. This is clearly reflected by the third and fourth paragraphs of the syllabus prepared by the court, which are as follows:

"The equities of one who buys grain in the open market, in good faith and for full value, from a warehouseman with whom it was stored, are superior to those of the surety on the bond of the latter, given for the protection of those storing grain with it, where such warehouseman has become insolvent and the surety has been required to pay the amount of the bond.

"Because of the superiority of such purchaser's equities, the surety does not become subrogated to rights which the true owners of the grain may have had, to follow it into the hands of the purchaser and to hold the latter as for a conversion thereof."

The case of Nicholson v. H. Poehler Co. arose in South Dakota and the court was primarily concerned with the law of that state. The opinion is a memorandum opinion of District Judge Elliott, and, though the facts are inadequately stated, it is apparent that the case is analogous to the Minnesota case above. Insofar as it purports to interpret the law of North Dakota, it appears to be by way of argument merely, and we are not impressed that the deductions are warranted.

It is conceded by counsel that in Minnesota a warehouseman can confer upon a purchaser no better title than he has and it is said that this is necessarily so in that state by reason of the statute which expressly prohibits the sale by a warehouseman of stored grain.

The Minnesota statute, § 2050 of the Revised Laws of Minnesota, 1905, forbids a warehouseman to sell or otherwise dispose of or deliver out of storage any stored grain without the express authority of the

owner and in return for the storage receipt, under penalty of fine or imprisonment or both; whereas, the North Dakota statute, § 3115, Comp. Laws 1913, provides that a warehouseman, who shall wilfully neglect or refuse, after proper demand, to deliver to the person making the demand the grain or the market value, shall be deemed guilty of larceny, and the Uniform Warehouse Receipts Act, § 54 of chapter 250, Laws of 1917, prohibits the delivery of stored goods out of the possession of the warehouseman without obtaining possession of the receipt, except in the case of perishable goods or upon foreclosure of a warehouseman's lien, or delivery under court order where the receipt is lost.

In commenting upon the Minnesota statute, in the case of Hall v. Pillsbury, 43 Minn. 33, at page 37, 7 L.R.A. 529, 19 Am. St. Rep. 209, 44 N. W. 673 at page 674 the Minnesota court said:

"If the warehouseman be also a dealer in grain, his right to dispose of, as his own, the grain in the warehouse, is limited to that which belongs to him, which he has purchased and put in, or, when deposited by others, which he has purchased from them, and to the excess above what is required to meet his outstanding receipts. The statute clearly enacts that he shall not sell or otherwise dispose of grain on deposit. Its purpose is to provide that the grain shall remain in the warehouse where deposited to meet the call of the owner. . . .

"Much argument has been expended to show the inconvenience to commerce in grain as in such cases the owner of the grain may, notwithstanding a wrongful sale by the warehouseman, follow the grain into the hands of the purchaser. As touching the matter of convenience, the argument has much force. It might tend greatly to facilitate traffic in grain if we had, in respect to it, such a rule as in England pertains to property sold in markets overt. But there is no such rule in this country. The general rule is that an owner of personal property cannot be deprived of his right to it through the unauthorized act of another. That rule applies as well to grain or other property on deposit for the purpose of storing as to property in any other situation."

In our opinion, the civil rights of the parties to a storage transaction are not dependent upon the force of penal statutes. The failure of the legislature to penalize (if it did so fail) the sale of stored grain by a warehouseman does not, in our opinion, give rise to an implication

that it might confer good title upon a purchaser. To so hold would in effect overturn the law of bailments as applied to such transactions.

The most, then, that can be said of our statutes, aside from the Warehouse Receipts Act, chapter 250, Laws of 1917, is that they do not penalize a sale by a warehouseman of stored grain, but they do penalize his wilful neglect or refusal to deliver the grain or pay the market value. They also recognize that a warehouseman may redeem by a terminal bonded warehouse receipt (§ 3113); and they are devoid of any expression modifying the property right of the holder of the warehouse receipt in the grain held by the warehouseman and which is necessary for the redemption of the receipt.

We regard these propositions as established: The holders of warehouse receipts are owners in common of the grain in the warehouse up to the quantity required to redeem the receipts. There is nothing in our statutes which can reasonably be construed as a recognition of an actual authority in the warehouseman to sell stored grain required for the redemption of outstanding receipts. This court has never construed our statutes as conveying any such authority and the decisions relied upon by the appellant merely recognize the legal fiction of separation and substitution in the case of fungible goods. They involve no question concerning a limitation upon the bailee's right to sell from the common mass. When the warehouseman ships grain out and substitutes for it other grain which he has purchased, the grain he places in the common mass passes to the holders of the receipts to the extent required for redemption. The holders of the receipts, then, must remain the owners until their title is lawfully divested. The right of the warehouseman to sell as his own, being necessarily limited to the quantity over that which is required to redeem outstanding receipts, it follows that where stored grain is shipped out and sold to the point where the warehouseman cannot redeem the outstanding receipts, property is sold which the vendor does not own. There remains, then, one further consideration: Is the receipt holder, who delivers grain for storage with the knowledge of the customs prevailing in the grain trade, estopped to assert his title as against a third party purchasing from the warehouseman?

The argument that the receipt holder is estopped is grounded on the proposition that, having stored his grain with the knowledge of a

prevailing custom, pursuant to which the warehouseman in the ordinary transaction of business will buy and sell and ship out to meet his sales, he vests an ostensible authority as broad as the custom. Following this argument, a deposit of grain carries with it an implied authorization to deal with it in a manner consistent with custom. If this results in a sale to an innocent third party and entails a loss, it is argued that the loss should fall upon the one who by the deposit made the transaction possible rather than upon the innocent purchaser who is justified in dealing with the warehouseman on the strength of his ostensible ownership. Preston v. Witherspoon, 109 Ind. 457, 58 Am. Rep. 417, 9 N. E. 585.

It may be true, as stated, that he who deposits his grain for storage does vest in the bailee indicia of ownership, but so does every bailor. This fact alone does not obviate the rule of caveat emptor, nor does it import the doctrines peculiar to markets overt. The purchaser likewise knows the character of the business transacted by the warehouseman and knows that in the ordinary conduct of such business he will both purchase grain and receive it for storage. This carries notice that his right to sell is limited to the excess above what is required to meet the outstanding storage receipts. Broadwell v. Howard, 77 Ill. 305; McBee v. Ceasar, 15 Or. 62, 13 Pac. 652. Hence, no reason is apparent for making an exception to the rule of caveat emptor. If such an exception should exist in this case to protect a purchaser of stored grain, likewise it should exist to protect a subsequent innocent purchaser of grain once owned by the warehouseman and which he had previously sold to a third party. Applying the exception contended for to successive sales by an elevator company, the result would be that the first purchaser who had paid full value and had obtained perfect title would be precluded from following his property into the hands of the second purchaser who had likewise bought it in good faith. But the law, as we understand it, has been established to the contrary for many years. Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334. Yet the first purchaser, who neglects to remove his grain, is as responsible for the apparent ownership as though he had removed it and then returned it for storage.

Much is said in the briefs of counsel concerning the effect upon the grain trade of a holding that will compel the purchasers of grain from

elevators to look beyond the seller for their title. The substance of the argument is that, as the business cannot be safely transacted if purchases at the terminals are made at the buyer's peril, grave obstacles will be thrown in the way of expeditious trading. Manifestly, this is an argument that might more appropriately be addressed to the legislature. We find that, in so far as the legislature has spoken upon the matter, it has inclined more strongly to the protection of the holders of warehouse receipts and that it has apparently concerned itself more with transactions dependent upon the security behind such receipts than with transactions consummated in the absence of such muniments of title. In these circumstances the argument of convenience cannot prevail.

Stress is also laid on the fact that public warehousemen are required to furnish bonds for the faithful performance of the obligations incident to the business and that the legislative purpose lying back of this requirement is protection to the owners of the stored property. It is argued from this that the liability on the bond is intended to be substituted for the right to follow the property into the hands of an innocent purchaser, in case of insolvency or inability to redeem the receipts. In view of the fact that the surety requirements are equally appropriate whether the holder of the receipt is to have the right to follow his property or whether he is not, no particular significance, in our opinion, attaches to these provisions. Insofar as they give a remedy to the holder of the receipts, the remedy does not purport to be exclusive and no reason is apparent for holding it to be such.

We are of the opinion that the sale to the defendant of the grain stored with the elevator conferred no title and that the plaintiff's grain was converted by the defendant. In support of these views, see McBee v. Ceasar, supra; Tobin v. Portland Mills Co. 41 Or. 269, 68 Pac. 743, 1108; Jackson v. Sevatson, 79 Minn. 275, 82 N. W. 634; Dolliff v. Robbins, 83 Minn. 498, 85 Am. St. Rep. 466, 86 N. W. 772; Young v. Miles, 20 Wis. 615, id. 23 Wis. 643. See also 6 Am. L. Rev. 450.

There are some additional questions discussed in the briefs, but they are of a minor character and do not call for discussion here. Suffice it to say that the plaintiff, as assignee, has a right to maintain the action, and the record shows, by the defendant's own testimony,

that, had a proper demand been made, delivery would have been refused. At any rate, it is questionable whether sufficient demand was not in fact made.

The order of this court is that the judgment be affirmed.

BRONSON, Ch. J., and CHRISTIANSON, J., and BURR and COOLEY, Dist., JJ., concur.

JOHNSON and NUESSLE, JJ., being disqualified, did not participate; Honorable A. G. BURR, Judge of the Second Judicial District, and Honorable CHAS. M. COOLEY, Judge of the First Judicial District, sitting in their stead.

THE STATE OF NORTH DAKOTA, Doing Business as the Home Building Association of North Dakota, Appellant, v. GEORGE E. WALLACE, Respondent.

(194 N. W. 710.)

Building and loan association — Home Builder's Act authorizes construction of homes for members of Home Buyers' League who have assumed prescribed contingent liability to state.

1. Section 6 of chapter 150 of the Session Laws of 1919, known as the Home Builders' Act, is construed and *held* to authorize the construction of homes for members of the Home Buyers' League, who have assumed the prescribed contingent liability to the state.

Building and loan associations — in application of limitation under Home Builders' Act, house and lot considered as real property and as entity.

2. The same section is further construed to place a limitation of $5,000 upon the price of a home to be built for such a member, and, in applying the limitation, the house and lot is considered as real property and as an entity.

Specific performance — alternative relief under invalid contract under Home Builders' Law granted under equitable principles.

3. Acting pursuant to a contract that was invalid by reason of the applicant not being a member of the Home Buyers' League and by reason of the price being in excess of that authorized by the statute, the state built a house for a purchaser, purporting to act under the authority of the Home Builders' Law, and the purchaser went into possession and made certain advancements and im-

provements. It is held the contract will not be specifically enforced, but in an action to enforce it, equitable considerations will be applied and an alternative judgment directed, giving the purchaser an option to obtain a return of advancements made with interest or to require the state to convey upon the payment or securing by him of the reasonable value of the property.

Opinion filed July 18, 1923.

Building and Loan Associations, 9 C. J. § 8 p. 924 n. 81 New.

Appeal from the District Court of Burleigh County, *Pugh*, J.
Reversed and remanded.

George F. Shafer, Attorney General, for appellant.

"The contract was too indefinite in its terms to authorize its specific performance. The appellant, on his part, contends that the excavation of the cellar and the moving of the building further over onto the lot was sufficient part performance to take the agreement out of the statute, and that plaintiff's default was assented to by the defendants, and that the agreement is sufficiently specific to be enforced by a court of equity. The rule applicable to the enforcement of parol agreements is that the agreement must be clear and definite as to all the terms of the same. Judge Storey, in his work on Equity Jurisprudence, states the rule as follows: 'But, in order to take a case out of the statute upon the ground of part performance of a parol contract, it is not only indispensable that the acts done should be clear and definite, and referable exclusively to the contract, but the contract should also be established by competent proofs to be clear, definite, and unequivocal in all its terms. It the terms are uncertain or ambiguous, or not made out by satisfactory proofs, a specific performance will not (as, indeed, upon principle it should not) be decreed. The reason would seem obvious enough, for a court of equity ought not to act on a conjecture; and one of the most important objects of the statute was to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts." Johnson v. Plotner (S. D.) 87 N. W. 926.

"The agreement is deficient, however, in a very important particular. Courts will not specifically enforce oral contracts to convey real estate, the material terms of which do not clearly appear, . . . will not make contracts for the parties. The agreement here was for the con-

veyance of land at the price of $1,153.50, with interest at the rate of 12 per cent per annum from August 26th, 1871, five hundred to be paid within one year, upon which the conveyance was to be made, and a mortgage to be given for the remainder of the purchase money. The parties agreed that credit should be given for the remainder, but the terms of such credit, whether it was to be for one, five, or ten years, do not appear. That was evidently left for future negotiations." Williams v. Stewart, 25 Minn. 516.

William Langer, for respondent.

An action for the recovery of money only, though tried by the court on stipulation, is not triable de novo on appeal. American Case & Register Co. v. Boyd, 22 N. D. 166.

The doctrine of estoppel requires of a party consistency of conduct, when inconsistency would work substantial injury to the other party. So where a person has acted or refrained from acting in a particular manner upon the request of another, the latter is estopped to take any position inconsistent with his own request or advice to the person so advised to act. 21 C. J. 1204; Siefert v. Lanz, 29 N. D. 139.

A county auditor is precluded from urging irregularities in sending two sets of election supplies and only one ballot box to a combined precinct in an election in which he is a candidate for re-election, where he was the person through whom such supplies and ballot boxes were sent by the board of county commissioners. Fuerts v. Semmler, 28 N. D. 411.

A person who as a petitioner has invoked the law to establish a drainage ditch cannot, after the establishment thereof, object to the unconstitutionality of the law. De Noma v. Murphy, 28 S. D. 372, 133 N. W. 703.

A contract, though unauthorized, but which involves no moral turpitude, and is not expressly forbidden by statute, will be enforced if justice requires it. 13 C. J. p. 504, § 447.

Statement.

BIRDZELL, J. This is an appeal from a judgment in favor of the defendant. The action was brought by the plaintiff to recover an unpaid balance which was claimed to be owing by the defendant on ac-

count of the construction of a house for the latter by the former. The defendant denies the contract alleged in the complaint and pleads another contract under which he claims that he is entitled to a contract for deed without the present payment of the money which plaintiff seeks to recover. A brief statement of the pleadings will best serve to convey an idea of the issues. The complaint alleges that the plaintiff is an agency of the state, organized under the provisions of chapter 150, Session Laws of 1919, as amended by chapter 39 of the Laws of the Special Session of 1919, engaged in the enterprise of providing homes for residents of the state; that on or about September 1, 1920, the defendant made application to the plaintiff association for the purchase and construction of a home under the provisions of the law; that it was agreed the plaintiff, upon completion of the house and upon receipt of the cash payment of twenty per cent of the total selling price, would convey the property to the defendant by deed or by contract for deed as provided in § 12 of the act; that the application was accepted and the dwelling house substantially completed on or about June 1, 1921, and possession delivered to the defendant, who has since retained possession; that the cost of the home, including the lot and equipment with various extras and alterations ordered by the defendant and furnished at his instance, was $11,720.45, which sum the defendant agreed to pay plaintiff, and that the home was of the reasonable value of $11,720.45; that no part of the above sum has been paid by the defendant, except certain instalments amounting to $2,900; that defendant has neglected to pay the balance or to make settlement in the manner provided by law; that there remained owing the sum of $8,820.45 with interest from November 1, 1921 at the legal rate; that the plaintiff was willing and able to convey the property to the defendant or execute a contract for deed upon receipt of the balance alleged to be due the plaintiff or upon the execution of a settlement. The prayer for judgment is for the recovery of the balance.

The answer takes issue with the allegations respecting the cost of the home and the contract to pay the cost, and it affirmatively alleges a contract to construct the dwelling at a cost of not to exceed $5,300; that thereafter certain extras were furnished by the plaintiff at an agreed price of $520. It alleges the payment of instalments differing in time of payment but not in amount from those alleged in the complaint;

that, on account of these payments, there is no money due the plaintiff from the defendant under the agreement. It further alleges a breach of contract by the plaintiff in the failure to furnish certain electric fixtures. The prayer for judgment is that the plaintiff's action be dismissed and that defendant be credited with $99.95 with interest on account of the failure to furnish electric fixtures and that plaintiff be required to execute a written contract for deed obligating it to convey the property to the defendant at the agreed price of $5,820 and that defendant receive credit on the contract for $2,900.

The trial court found that the plaintiff association had accepted the application of the defendant; that the defendant bought the lot described in the complaint and had the deed run directly to the state, doing business as the Home Building Association; that there existed an oral agreement between the plaintiff, through its manager, Robert Blakemore, and superintendent of construction, James Baker, that the plaintiff would build a home for the defendant according to certain plans and specifications at the agreed price of $5,300; that no written contract had ever been made; that, in reliance on the oral contract, the lot was conveyed to the plaintiff at a valuation of $900; that extras had been furnished at an agreed price of $520; that the home was completed on June 1, 1921 and that plaintiff took possession at that time; that the plaintiff had paid on the contract $2,900 in instalments at certain times specified in the findings; that the plaintiff had failed to furnish electric light fixtures; that the same had been furnished by the defendant requiring the expenditure of $99.95. Upon these findings the defendant was given a judgment that the plaintiff execute a contract for deed to be signed by proper officers, obligating it to convey the property to the defendant upon the payment of $5,820, on which there was credited $2,999.95, the balance to draw interest at 5 per cent, principal and interest to be paid at the rate of $28.65 per month. Upon full payment the plaintiff is required to execute a warranty deed.

The specifications of error upon this appeal challenge principally the findings of fact with reference to the existence of an oral contract and attack the holding that the oral contract, if it did exist, was a valid and lawful contract and that the defendant was entitled to specific performance of the same.

When the appeal was first presented to this court it was found, upon

examining the record, that evidence was lacking as to the reasonable value of the home at the time possession was taken by the defendant, the reasonable rental value, the value of improvements made subsequent to the assumption of possession and as to whether or not the defendant was a member of a Home Buyers' League, and, if so, the extent of obligation due the association from the league. The case was remanded to the district court for the taking of additional evidence on these matters and for the making of appropriate findings, conclusions, order for judgment and judgment in the light of the further testimony. After the taking of the additional evidence, modified findings and conclusions were filed, under which the judgment was modified to the extent of requiring the defendant to pay, in all, $6,220 instead of $5,820 as originally decreed, but no findings are made on the evidence touching the matters referred to in the order of remand.

Decision.

Upon a consideration of the testimony in the record, this court is not disposed to disturb the finding of the district court that there was an oral contract, but we are of the opinion that a proper judgment in this case is not dependent upon the existence or nonexistence of the contract alleged and proved by the defendant. Had this court been of the opinion that a proper judgment could be entered on the record made, there would have been no necessity to remand the case for the additional evidence indicated in the order. The additional brief for the respondent, filed on the return of the amplified record, is devoted largely to an argument which seeks to demonstrate that this court was without authority to require the additional evidence. It is said that the action is for the recovery of money only and is consequently triable by a jury; that the plaintiff, having sued on a contract to recover a definite sum, and the defendant, having relied on a different contract to pay a specific sum, the plaintiff is precluded from recovering any sum other than that which the jury found to be owing; that neither the reasonable value, nor the reasonable rental value, nor the reasonable value of improvements, nor the question as to whether the defendant is a member of a home buyers' league, were within the issues framed by the pleadings. These contentions, for the most part, depend for soundness

upon the consideration as to whether this is in reality a civil action, seeking equitable relief or an ordinary action for compensatory damages to be assessed in a money judgment. The relief sought by the plaintiff is clearly equitable in its nature. The attempt is to recover the purchase price and not damages for breach of a contract to purchase. It is elementary that the right of the vendor to specific performance is reciprocal with that of the purchaser and that the remedy of specific performance is mutual. While the complaint in this action clearly characterizes the action as being a vendor's action for specific performance, the relief sought by the defendant likewise invokes chancery powers. He asks for specific performance in the shape of the execution of a conveyance or, more accurately, of a contract to convey. So, even if the issues tendered by the complaint were triable to a jury, under well-established practice the equitable issue submitted by the defendant must first be disposed of by the court. Cotton v. Butterfield, 14 N. D. 465, 105 N. W. 236. Furthermore, the judgment obtained by the defendant below granted equitable relief, and it is this judgment that we are asked to review. If the findings of fact do not warrant the legal conclusions reflected in the judgment, and if these conclusions are assigned as error, as they obviously are, this court cannot affirm the judgment, but must reverse it. Then, if equitable considerations are not to be applied, as respondent urges they should not be, the argument defeats its own ends because the reversal of the judgment would leave the title to the property in the plaintiff and also a substantial portion of the purchase price.

Being of the opinion that the present action is one properly triable to the court without a jury, we pass to a consideration of the specifications of error. Specifications 8 and 9 particularly challenge the holding of the trial court that the oral contract, specified and described in the findings of fact, was a valid and lawful contract and that the defendant was, as a matter of law, entitled to a decree of specific performance thereof against the plaintiff. We deem these specifications to be well founded for reasons which may be briefly stated. The law governing relations of the parties, it is agreed, is chapter 150 of the Session Laws of 1919.

Section 6 of chapter 150 authorizes the funds available to the industrial commission through the sale of bonds, appropriations, deposits

received by the Association, or from payments made by purchasers, to be used under proper regulations in building or purchasing homes for members of the "Home Buyers' League, as such Leagues are hereinafter defined." It further provides "No home shall be built, or purchased and sold, at a price to exceed five thousand dollars, except in case of a farm home, in which case the selling price shall not exceed ten thousand dollars."

Section 8 provides that any person may open a home buying account with the association by applying in person, by mail or through a Home Buyers' League, trade union, woman's club or any other recognized industrial, social or civic body. And § 10 says that ten or more depositors in the association may form themselves into a local body to be known as a Home Buyers' League and that no person shall become a member of a Home Buyers' League without the written consent of all the other members.

Section 11 provides for the election of a secretary-treasurer, by each Home Buyers' League, who shall be its executive officer.

Section 12 provides that whenever a member of a Home Buyers' League shall have deposited a sum equal to 20 per cent of the total selling price of a home or farm home, the association shall, upon his application, purchase or build such home or farm home or convey it to him upon a cash payment of 20 per cent, etc., and § 13 makes each member of every Home Buyers' League jointly and severally liable for all contracts, debts and obligations due the association from his league, to the extent of 15 per cent of the price at which his home was sold to him.

From these portions of the act, we are of the opinion that two propositions are clear; first, that, to use the language of the legislature, "No home shall be built, or purchased and sold, at a price to exceed $5,000, except in case of a farm home, in which the selling price shall not exceed $10,000," and that the homes are to be built for members of home buyers' leagues only, who in turn are under a contingent liability over to the state to the extent of 15 per cent of the price at which their respective homes were sold to them. Whether these requirements, or any of them, are reasonable or unreasonable, workable or unworkable, are manifestly not questions for judicial consideration. They are the positive expressions of the legislature whose judgment must be taken as

final in such matters. It stands admitted on the record in this case that the contract price of the home in the case at bar was $5,300, but it is argued that, inasmuch as the defendant purchased the lot and put the title thereto in the state, $900, or the purchase price of the lot, must be subtracted from the contract price. We find no warrant in the statute for such a procedure. The statute deals with a home and obviously the "home" is not nebulous but immovable with a foundation in real estate which classifies it in law as real property. The law contemplates that the Industrial Commission shall acquire suitable tracts and that the tract and house shall be conveyed together as an entity. The home clearly includes both. If, for purposes of the limitation, the lot be considered as owned by the purchaser, the association had no authority whatever to contract to construct a house upon it. There is no evidence that the legislature intended to impose one restriction as to those who did not own lots and another as to those who did or who could acquire them. Rather it appears the intention was to assist those of modest means to acquire modest homes. The act does not create a loaning system but outlines a home building scheme.

It further stands admitted on the record that the defendant is not a member of a Home Buyers' League and thus there is denied to the state the degree of liability which the legislature saw fit to impose upon members of such leagues who would purchase homes. One who seeks the benefit of a statute of this character, must likewise assume the burdens imposed for public protection. Whether these obligations be real or fanciful is not a matter with which we are concerned. The requirement is one which we cannot characterize as negligible.

On the other hand, the plaintiff cannot recover of the defendant the cost to it of the building erected for him. On the argument such a right was disclaimed.

The situation then, in which this case rests, is this: The plaintiff has title to a lot by the voluntary conveyance of the defendant, upon which it has, with his consent, erected a house under a verbal contract according to which neither the state nor the defendant were bound. The defendant is in possession of that house; he has advanced certain moneys to the state; he has made certain improvements upon the property and paid taxes; he is not entitled to a conveyance of the house upon the

payment of any remainder due or to be paid according to the terms of the contract for the reason that he dealt with public officers with the knowledge of the limitations upon their authority and in disregard thereof. From the very fact that these limitations are prescribed and from the fact that their evident purpose was public protection, the contract must be annulled. On the other hand, the state is in no position to charge to the defendant any share of the costs that might be due to maladministration, if there be such costs. We cannot assume that the defendant is responsible for such conditions, if they exist, or did exist, to any greater extent than any one of his fellow citizens. This being the situation, the defendant should not lose and cannot equitably, in our opinion, be required to lose the moneys he has advanced in this enterprise. Hence, the defendant's money and the value of the property which he turned over to the state and which the state has subsequently improved, should be returned to him with interest at the rate fixed pursuant to § 9 of chapter 150 of the Session Laws of 1919, subject to a deduction for a reasonable rental of the property during the time it has been in his possession. In estimating the amount of his advances, there must be taken into consideration the value of the improvements (not necessarily their cost to him) which he in good faith has placed upon the property and the taxes he has paid. This, in our judgment, measures the obligation of the state. On the other hand, if the defendant is desirous of securing title to the property, which in good faith he has attempted to acquire, we think provision should be made in the judgment to this end and that the provision should be that the property be conveyed to him upon an undertaking, supported by security satisfactory to the state, that he will pay the reasonable value thereof, such reasonable value to be determined as of the time he entered into possession, and that the decree should make reasonable provision for deferred payments at the option of the defendant.

The judgment appealed from is reversed and the case is remanded to the district court with directions to enter a decree not inconsistent with the conclusions herein expressed,—the reasonable values, reasonable rentals and the value of improvements to be found in accordance with the evidence herein taken and upon which no findings have as yet been made.

BRONSON, Ch. J., and CHRISTIANSON and NUESSLE, JJ., and COOLEY, Dist. J., concur.

JOHNSON, J., being disqualified did not participate; Honorable CHAS. M. COOLEY, Judge of the First Judicial District, sitting in his stead.

THE MINNEAPOLIS THRESHING MACHINE COMPANY, a Corporation, Appellant, v. JOSEPH HUNCOVSKY, Respondent.

(194 N. W. 830.)

Appeal and error — foreclosure suit with advice or a verdict not in action "tried without a jury" authorizing new trial on appeal.

1. Following Emery v. First Nat. Bank, 32 N. D. 575, and prior decisions, it is *held* that an action to foreclose a mortgage in which a jury is called to find a part or all of the facts is not "an action tried . . . without a jury," within the meaning of § 7846, Comp. Laws 1913, as amended by chapter 8, Laws 1919, and is therefore not governed by that statute as to the manner of review upon appeal.

Appeal and error — failure to present issue of breach of warranty held reversible error.

2. For reasons stated in the opinion, it is *held* that the failure to determine a material issue presented by the pleadings and evidence is error which requires reversal of the judgment.

Opinion filed July 19, 1923.

Appeal and Error, 4 C. J. § 2647 p. 726 n. 17; § 3011 p. 1027 n. 90.

From a judgment of the District Court of Morton County, *Lembke*, J.

Plaintiff appeals.

Reversed and remanded for a new trial.

Lawrence, Murphy & Nilles, for appellant.

"It is well settled that a person who signs an instrument without reading it, when he has the opportunity to read it and can read, cannot avoid the effect of his signature merely because he was not informed

of its contents." 12 R. C. L. p. 386; Standard Mfg. Co. v. Slot, 121 Wis. 14, 98 N. W. 923, 105 Am. St. Rep. 1016; Pratt v. Metzgar (Ark.) 95 S. W. 451; Quimby v. Shearer, 56 Minn. 534, 58 N. W. 155; Sanborn v. Sanborn, 104 Mich. 180, 62 N. W. 371.

We concede that it is the general rule that trial courts are vested with a proper judicial discretion regarding the allowance or refusal of amendments of pleadings and their rulings will not be disturbed unless an abuse of such discretion is shown. Flamer v. Johnson, 36 N. D. 214; Beachamp v. Retail Merchants Asso. 28 N. D. 483.

"Pleadings are for the purpose of advising the parties to an action what the opposite party relies on, that he may be ready to meet it in evidence on trial." Parliman v. Young, 2 Dak. 175, 4 N. W. 143; Marshall v. Haney, 9 Gill. 258; Hong Sling v. Scottish Union & Nat. Ins. Co. 7 Utah, 441, 27 Pac. 171; Blum v. Bruggemann, 58 App. Div. 377, 68 N. Y. Supp. 1066.

"Pleadings are presumed to be statements in legal form of those facts constituting the charge or defense of the party, by means of which issues between the parties to be tried are defined, and are necessary to inform the court what issues are raised and which are proper." Cook v. Merritt, 15 Colo. 212, 25 Pac. 177.

"Pleadings are the allegations made by the parties to a civil or criminal case, for the purpose of definitely presenting the issues to be tried, and to determine between them." Tucker v. United States, 151 U. S. 164, 38 L. ed. 112, 14 Sup. Ct. Rep. 299, 301.

"Under the civil law there was on a sale for a fair price an implied warranty of title and that the goods sold were sound, but under the common law there is a clear distinction between the responsibility of the seller as to title and as to quality; the former he warranted, the latter, if the purchaser had opportunity to examine, he did not." 2 Kent, 487; 1 Bouvier's Law Dict. p. 438; Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 987; James v. Bocarg, 49 Ark. 289; Hight v. Bacon, 126 Mass. 12, 30 Am. Rep. 640.

Norton & Kelsch, for respondent.

That where in the trial of an equitable notion a jury is called and certain issues are submitted to and are tried by a jury, the procedure governing trials by jury in civil cases and the practice applicable thereto in appeals therefrom to the supreme court, applies to and must con-

trol the procedure on appeal in the case at bar, and that the rights of the appellant in the supreme court must be determined thereby. Peckham v. Van Bergen, 8 N. D. 597.

"We are confronted by the fact that this is an equity case in which a jury was called to determine issues of fact. In such cases as has been shown the ordinary rules of evidence are applicable and this court does not sit to try these de novo." Peckham v. Van Bergen, 8 N. D. 597.

"It is true in an equitable action that the case is in fact tried by the court, for the court ultimately finds the facts, approving or rejecting the jury's findings, but even so it is not a case tried without a jury when a jury is called. It must be held, therefore, that an equity action in which a jury finds part or all of the facts is not an action tried without a jury, within the meaning of § 5630, and is therefore not governed by that section, either as to the manner of trial in the district court or as to the review in this court upon appeal." Spencer v. Bisecker, 15 N. D. 143.

"If the motion for judgment notwithstanding the verdict be denied, the supreme court on appeal from the judgment may order judgment to be entered when it appears from the testimony that a verdict should have been so directed." Norton v. Wright, 43 N. D. 116; 2 Hill's Dig. p. 87; First State Bank v. Kelly, 30 N. D. 84; Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958; Marquardt v. Rubner, 77 Minn. 442, 70 N. W. 617.

The appellant asserting error has the burden of proving it and must present a record affirmatively showing such error. Erickson v. Wiper, 33 N. D. 195; Jenson v. Clauson, 34 N. D. 637–643; State v. Glass, 29 N. D. 620; Ruber v. Seizler, 37 N. D. 556; Hohler v. Amodt, 31 N. D. 23; International Harvester Co. v. Thomas (N. D.) 176 N. W. 523.

"The rule is well settled that an objection upon one ground does not go to other grounds not stated, and is a waiver of all grounds of objection not specified." Petrie v. Weyman, 35 N. D. 149.

CHRISTIANSON, J. This is an action to foreclose a chattel mortgage securing the payment of a note in the sum of $750, executed and delivered by the defendant to the plaintiff. The complaint is in the usual

form. The defendant in his answer asserted that the note in question was executed and delivered in payment of a certain tractor and plows; that the tractor was sold under an express warranty that the same "was in sound and good working condition and that the work done thereby would be just as good as a new tractor;" that such representations and warranties were false and untrue; that upon discovery of their falsity and upon plaintiff's failure to comply with its representations and express warranties, the defendant canceled, rescinded and terminated said contract in all things. The defendant interposed a reply denying the matters set forth in the answer and averring that the machinery in question "was sold by the plaintiff to the defendant under and by virtue of the terms of a certain written order and contract containing all the terms and agreements of said sale, and that it was expressly understood and agreed that said machinery was sold without any warranty whatsoever; . . . that the defendant prior to said sale fully examined said property prior to the delivery thereof and knew its quality and character and accepted the same without any warranty whatsoever and agreed that said property was sold without any warranty, statutory, express or implied, and that the said defendant by an instrument in writing released the plaintiff from any claim for breach of warranty or any other claim whatsoever."

When the case was called for trial in the district court the defendant asked that a jury be empanelled and the issues of fraud and breach of warranty submitted to the jury for an advisory verdict. The request of the defendant was granted over the objection of plaintiff's counsel. After the trial had commenced, in fact, after plaintiff had rested, and during the introduction of evidence by the defendant, defendant applied for leave to amend the answer. The application was granted and the answer amended so as to completely eliminate the theory of rescission and to claim damages for breach of warranty.

Plaintiff's counsel opposed the application to amend the answer on the grounds that the proposed amendments set up an entire new defense and counterclaim; that the plaintiff had prepared to try the issues framed by the original pleadings and was surprised by the proposed amended answer and unprepared to refute the new matter in the amended answer; that in order to properly try the question of breach of warranty it would be necessary for the plaintiff to have the testi-

mony of expert witnesses and of persons who could testify as regards the particular tractor in question, including the former owner from whom the plaintiff had secured the same; that in the event the objection was overruled and the application for leave to amend granted, the plaintiff be granted a continuance so as to enable it to secure the necessary witnesses and evidence.

The jury returned a verdict in favor of the defendant awarding damages in the sum of $863.40. Thereafter the trial court made findings in favor of the defendant and ordered judgment in accordance with the verdict. Judgment was entered accordingly and the plaintiff has appealed.

On this appeal plaintiff asks for a trial de novo. He, also, specifies certain rulings of the trial court as error, and presents specifications of alleged insufficiency of the evidence to sustain the verdict of the jury and the findings of the court.

This court cannot try the case anew. It is well settled that the statute permitting equity cases to be tried anew in this court applies only in cases tried in the district court without a jury, and has no application to equity cases wherein a jury is called to pass upon all the issues, or some issue, of fact. Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759; Spencer v. Beiseker, 15 N. D. 140, 107 N. W. 189; Merritt v. Adams County Land & Invest. Co. 29 N. D. 496, 151 N. W. 11; Emery v. First Nat. Bank, 32 N. D. 575, 156 N. W. 105.

Plaintiff asserts that the trial court erred in permitting the defendant to amend his answer as hereinabove referred to. The allowance of amendments is a matter resting in the sound judicial discretion of the trial court and its rulings in regard thereto will not be disturbed except where it clearly appears that the judicial discretion has been abused. Leach v. Nelson, 48 N. D. 1046, 189 N. W. 251. The discretion so vested, however, is not arbitrary and is to be exercised in furtherance of justice. See Comp. Laws 1913, § 7482; 31 Cyc. 362, 391.

While in this case we find it unnecessary to determine whether the permission to amend the answer constituted an abuse of discretion and is such error as to require a new trial, we deem it proper to say that the allowance of amendments under the conditions here disclosed is not to be commended. This action was commenced in November 1920.

Defendant's answer was interposed in December 1920, and the reply served in January 1921. The case was not brought on for trial until March 20th, 1922, or more than fourteen months after the reply had been interposed. No showing whatever was made by the defendant in support of the application for leave to file the amended answer. It would seem that under the circumstances the application for leave to amend the answer should not have been allowed without granting plaintiff a continuance for a reasonable length of time. 31 Cyc. 391; 9 Cyc. 122.

In order to consider the other errors assigned on this appeal, we deem it necessary to refer to the evidence adduced upon the trial. The evidence shows that some time in June, 1919, one Tibesar, an agent of the plaintiff company, and the defendant entered into certain negotiations with the result that thereafter and on or about July 17, 1919, a written order prepared by plaintiff's said agent was signed by the defendant. By the terms of such order defendant ordered from plaintiff and agreed to purchase from it a certain tractor and a set of plows. The order recited that the machinery described therein was second-hand and not of a kind manufactured by the plaintiff. It also stated the purchase price thereof to be $750; and that defendant agreed to execute and deliver a note in that sum payable November 1, 1920. The undisputed evidence, however, is to the effect that such note was not the only consideration to be paid by the defendant for the tractor and plows. It is undisputed that the defendant also agreed to deliver, and actually did deliver, to the plaintiff's agent, Tibesar, a certain Avery truck and set of plows. The order makes no reference whatever to such truck and plows, and is wholly silent on the question of warranties. Certain provisions in the written order to the effect that the machinery therein ordered is not warranted at all were stricken out. The order provides that the tractor and plows are to be shipped "as soon as repaired." It appears, however, that for certain reasons the outfit was not shipped at all during the summer or fall of 1919. During the following winter, and on or about January 1920, further negotiations were had and the note and mortgage in suit were executed at that time, although they are dated July 19, 1919. On or about April 24th, 1920, the defendant was in Bismarck and at that time had further negotiations with plaintiff's agent, Tibesar. At this time the defendant signed a written in-

strument wherein he stated that he had fully examined the property prior to the delivery thereof; that he knew its quality and character and accepted the same in the condition it then was without any warranties whatsoever. This instrument further stated that this property had been sold and delivered to him on that date.

The tractor and plows were shipped and arrived at Fort Rice on or about April 25th, 1920. The evidence adduced by the defendant tends to show that the tractor did not work; that the defendant expended certain sums in payment of freight charges and in repairing the tractor; that thereafter and on or about May 4th, and again on June 8th, 1920, the defendant served written notice of rescission, stating that the contract was rescinded for the reason that the tractor failed to comply with the representations and warranties of the plaintiff; and the defendant asked for a return of the truck and plows which he had delivered to plaintiff's agent and also for a return of the note and mortgage in suit. The evidence also shows that during a certain conversation thereafter had plaintiff's agent did offer to take the tractor back and to return to the defendant the truck and plows and the note and mortgage in suit, but defendant claims that this offer was not unconditional —that plaintiff's agent attached thereto the condition that the defendant pay all the freight charges.

In the instructions to the jury no attempt was made to state the specific issues submitted further than to give a general charge on the questions of fraud and breach of warranty. No instruction was given and no finding made by the jury, nor is there any finding by the court in this case, with respect to the written instrument signed by plaintiff on April 24th, 1920. The case was tried on the theory that plaintiff was guilty of fraud and misrepresentation in obtaining defendant's signature to the order signed and dated July 19, 1919; that consequently that order was not binding on the defendant and that the defendant might prove the contract as it actually existed. So far as can be gathered from the instructions to the jury and the findings of the trial court, that was the theory on which the case was tried and determined.

In our opinion the issue of fraud so tried and deemed a controlling one, does not, in fact, exist in this action. The evidence in this case shows without contradiction that the defendant speaks, reads and writes the English language perfectly. There is not the slightest evidence to

indicate that he did not have every opportunity to read the order which he signed. He had a copy of the order in his possession from July 17th, 1919, until January 1920, before he signed and delivered the note and mortgage involved in this action. In the circumstances here shown the defendant is clearly bound by the instrument which he signed. 12 R. C. L. 386; Standard Mfg. Co. v. Slot, 121 Wis. 14, 105 Am. St. Rep. 1016, 98 N. W. 923; Alexander v. Ferguson, 73 N. J. L. 479, 63 Atl. 998.

It does not necessarily follow, however, that the defendant is precluded from introducing evidence of the warranties which he claims were made, for it is well settled that the general rule prescribed by § 5889, Comp. Laws 1913, that " '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,' does not preclude proof of the existence of any separate oral stipulation or agreement as to any matter on which the written contract is silent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them." Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93. See also 3 Horwitz's Jones, Ev. pp. 174, 175, § 439; Williston, Sales, § 215; Boynton Furnace Co. v. Clark, 42 Minn. 335, 44 N. W. 121; Krueger v. Dulas, ante, 542, 191 N. W. 1014. We believe that this rule is applicable as regards the alleged warranties here. It seems clear that the parties did not intend the written order of July 17, 1919, to be a final and complete statement of the whole transaction between them. Both parties found it necessary to resort to parol evidence in order to establish the actual agreement between the parties. Printed provisions to the effect that the machinery was not warranted at all were stricken out before the order was signed. In other words, under the circumstances of the case, the alleged agreement as to warranty covers a matter not inconsistent with the terms of the written document,—a matter which the parties did not intend the written document to cover at all.

In this case, however, the rights of the parties do not rest upon and are not controlled by the written order alone. According to the evidence adduced by both sides the original written order was supple-

mented, if not superseded, by subsequent negotiations and agreements. The written order clearly contemplated that the machinery therein described should be delivered to the defendant within a short time. It is undisputed, however, that such machinery was not delivered until more than nine months after the order was executed. It is also undisputed that interim the execution of the order and the delivery of the machinery other and further negotiations were had between plaintiff's agent, Tibesar, and the defendant. During one of such conversations the question of rescission was discussed and some proposition made by the plaintiff with respect thereto,—although the parties differ as to the exact terms of the proposition made. During the last negotiation had prior to the shipment of the machinery, namely, the one had on April 24th, 1920, the defendant executed and delivered a certain written instrument, the terms of which have already been stated. It would seem, therefore, that the rights of the parties in this case are not necessarily controlled by the original written order, but by the actual agreement between the parties as eventually consummated. Guild v. More, 32 N. D. 432, 455, 456, 155 N. W. 44. The contention advanced by the plaintiff that it is not bound by the acts of its agent, Tibesar, as regards these subsequent transactions, is, in our opinion, untenable in the circumstances of this case. See Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575, 132 N. W. 137; Comptograph Co. v. Citizens Bank, 32 N. D. 59, 70, 155 N. W. 680; Boynton Furnace Co. v. Clark, supra. Testimony was adduced on the part of the plaintiff to the effect that during the negotiations had on April 24th, 1920,—and prior to the execution of the instrument signed by defendant on that day,—plaintiff's agent, Tibesar, stated to the defendant that he (defendant) would have to take the tractor as it then stood, and without any warranty whatever, or that he (Tibesar) would return the truck and plows to the defendant and surrender to him the note and mortgage in suit; that defendant agreed to take the tractor and plows without warranty and in the condition in which they then were and executed the instrument referred to in evidence of such agreement. If an agreement such as plaintiff claims was made between the parties on April 24th, 1920, then manifestly the defendant is not entitled to prevail in this case. The defendant on the other hand denies that he at any time agreed to accept the machinery without warranty. He asserts that in every con-

versation had with plaintiff's agent, Tibesar, he (Tibesar) made the same representations and warranties, and that he (defendant) agreed to purchase the machinery in reliance thereon. He asserts that such representations and warranties were made by plaintiff's agent, Tibesar, in the conversations had prior to the signing of the order on July 17th, 1919; also, at the time of the execution of the note and mortgage in January 1920, and again during the negotiations had on April 24th, 1920. The defendant further claims that he had no opportunity whatever to read the instrument which he signed on April 24th, 1920; that plaintiff's agent Tibesar, presented it to him for execution as he (defendant) was boarding the train; that he had no time or opportunity to read it at all and that he signed it in reliance on the representations of plaintiff's agent as to its purpose and contents.

It will be noted that there is a direct conflict in the evidence as regards the instrument executed April 24th, 1920. In its reply the plaintiff pleaded such instrument as a defense to the alleged breach of warranty. As has been indicated, however, the issue so presented was neither submitted to the jury nor determined by the trial judge. In other words, we have a situation where a material issue raised by the pleadings and presented by the evidence is left wholly undetermined. The plaintiff was entitled to have this issue determined, and the failure of the trial court to do so is error which requires a reversal of the judgment and a new trial. Spencer v. Beiseker, 15 N. D. 140, 107 N. W. 189.

There seems to have been more or less confusion upon the trial as regards the basis for computation of damages, and in view of a new trial we deem it proper to make some observations in regard thereto. One who is defrauded by a false statement which induces him to enter into a contract, "on discovery of the fraud, . . . is given the option of rescinding or affirming the transaction. In case of rescission, he is required to act promptly on discovery of the fraud. In such case, the contract ceases to exist for any purpose, and the parties stand in the same position as though it had never been made, and hence, it is necessary that they be placed in the same position in which they were before the transaction took place. Therefore the party defrauded, in such case, is entitled to recover back whatever consideration he parted with, but he must, also, return or offer to return to the other party whatever

he received. In case of affirmance, he retains what he received, and is entitled to be compensated for the damages he sustained by reason of the false representation. That is, the wrongdoer will be compelled to pay damages equal to the difference in value between what he gave and what he represented he would give." Guild v. More, 32 N. D. 432, 454, 155 N. W. 44.

The judgment appealed from is reversed, and a new trial ordered.

BRONSON, Ch. J., and BIRDZELL, NUESSLE and JOHNSON, JJ., concur.

OLE TORGERSON, Appellant, v. MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Respondent.

(194 N. W. 741.)

Pleading — demurrer admits truth of all well pleaded facts; demurrer does not necessarily admit inferences or conclusions from pleaded facts; facts presumed or reasonably or necessarily inferred from those alleged admitted by demurrer; legal conclusions or inferences of fact not presumed or necessarily inferred from facts alleged not admitted by demurrer.

1. The demurrer admits the truth of all well pleaded facts, but not necessarily the inferences or conclusions drawn therefrom, though alleged in the complaint; facts presumed or reasonably or necessarily inferred from those alleged are also admitted. Legal conclusions or inferences of fact, which are not presumed or which may not be reasonably or necessarily inferred from the facts alleged, are not admitted by the demurrer.

Note.—The rule that it is the duty of a master to exercise ordinary care to provide a reasonably safe place for his servants is held not to be applicable to cases in which the work which the servants are employed to do is of such a nature that its progress is constantly changing the conditions as regards an increase or diminution of safety, as will be seen by an examination of the authorities collated in notes in 19 L.R.A.(N.S) 340; 28 L.R.A.(N.S.) 1267; 18 R. C. L. 595; 3 R. C. L. Supp. 828.

Master and servant — railroad held not negligent as to section hand unloading doors in car.

2. Where plaintiff, a section hand, of three years' experience as a section hand, was directed to unload grain doors piled in three piles in a box car, and where, after removing the central pile, one of the others toppled over, injuring plaintiff, it is *held*, for reasons stated in the opinion, that such facts, appearing upon the face of the complaint, do not constitute actionable negligence on the part of the defendant, based upon (a) failure to furnish a reasonably safe place in which to work, or (b) to instruct and warn servant as to the method of work, or of the danger that a pile might fall when the one in the middle was removed.

Master and servant — rule requiring master to furnish safe place inapplicable to changing conditions.

3. Where it appears, on the face of the complaint, that the risk or danger, if any, arises by reason of the actual prosecution of the work, because of change in conditions, and the manner in which the work is from time to time prosecuted, the rule that the master must furnish the servant a reasonably safe place to work has no application.

Master and servant — duty to warn servant stated.

4. The duty to warn exists only when the master possesses knowledge of risks or dangers, or should, in the exercise of ordinary care for the servant's safety, have such knowledge, not within the knowledge of the servant or discernible by the latter, in the exercise of ordinary care. There is no liability for failure to anticipate danger to a servant or to warn him thereof, unless the master's knowledge of the danger or opportunity to have knowledge thereof, having in mind the master's primary duty to make inquiry, is superior to that of the servant.

Master and servant — no duty to warn servant as to operation of natural laws.

5. It is not the duty of the master to warn or instruct a servant of ordinary intelligence and experience, with his faculties of observation unimpaired, as to the operation of natural laws.

Master and servant — risk known by one of ordinary prudence, assumed.

6. The allegation that plaintiff did not "know or appreciate the danger to himself in the sudden shifting of the doors" is not necessarily sufficient to make a case for the jury. If a person of ordinary prudence, of the age and experience of the plaintiff, in the same or a similar situation, would have known and appreciated the danger and risk, the servant will be deemed, as a matter of law, to have assumed the risk.

Master and servant — complaint showing ordinary risk demurrable.

7. When the complaint, upon its face, fails to show actionable negligence on the part of the defendant, and affirmatively shows that the risk was an

ordinary one, and was therefore assumed by the plaintiff, a demurrer thereto should be sustained.

Opinion filed June 28, 1923. Rehearing denied July 23, 1923.

Master and Servant, 26 Cyc. p. 1101 n. 31; p. 1114 n. 86; p. 1166 n. 97; p. 1167 n. 1; p. 1168 n. 8; p. 1171 n. 26; p. 1196 n. 99; p. 1393 n. 78; p. 1397 n. 89; Pleading, 31 Cyc. p. 333 n. 76; p. 335 n. 77, 78, 79, 80; p. 336 n. 83.

Appeal from an order of the District Court of Ramsey County, *Buttz*, J.

Affirmed.

L. R. Nostdal (*Knauf & Knauf*, on briefs), for appellant.

"If a master employs a servant to do work in a dangerous place or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity may fail to appreciate the danger, it is a breach of duty on the part of the master to expose a servant of such character, even with his *consent*, to such dangers, unless he first gives him such instructions or caution as will enable him to apprehend them, and do his work safely with proper care on his part." Hughes v. Chicago, M. & St. P. R. Co. (Wis.) 48 N. W. 259; Wyldes v. Patterson, 24 N. D. 218.

"A superior is bound to know whatever may endanger the person or life of an employee in the discharge of the duties of his employment and is bound specially to warn him of the nature of the danger unless such employee well knew of the existence of the hazard or risk and willingly exposed himself to it." Stucke v. Orleans R. Co. 50 La. Ann. 188; 123 N. Y. 280; 16 Am. Neg. Cases, p. 790; Kepler v. Schwenk, 151 Pa. 505, 25 Atl. 130; Brennan v. Gordon, 118 N. Y. 489.

"A workman, when ordered from one part of the work to another, cannot be allowed to stop, examine and experiment for himself, in order to ascertain if the place assigned to him is a safe one; and therefore, in obeying the order, while he assumes obvious and ordinary risks, he has a right to rely upon a faithful discharge of the master's duty to use ordinary care to warn and protect him against unusual dangers." Carlson v. N. W. Tel. Exch. Co. 63 Minn. 433.

The question of assumption of risk is an affirmative defense and the

question of whether the servant knew of and appreciated the danger and therefore assumed the risk is a question for the jury. Jacobson v. Hobart Iron Co. (Minn.) 114 N. W. 951; Armour v. Golkouska (Ill.) 66 N. E. 1037; note in 28 L.R.A.(N.S.) 1128.

The doctrine of assumption of risk has no application where the master is negligent. The negligence of the master in the case at bar is alleged and admitted by the demurrer. George v. St. Louis & S. F. R. Co. (Mo.) 125 S. W. 196.

The question of contributory negligence must be raised by answer and the burden of proving contributory negligence is upon the defendant. Oswerson v. Grafton, 5 N. D. 281.

"If persons engaged in dangerous occupations are not informed of the accompanying dangers, by the promoters thereof or by the employers thereon and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will be chargeable for the injuries sustained." Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464.

"A workman must know the dangers of his employment by actual experience in the employment or by the instructions of his employer before he can be held to have assumed them." Rummel v. Dilworth, 131 Pa. 509.

"A master who withholds from his servant such information as is necessary to enable him to provide for his own safety does so at his own peril." Hammond Co. v. Johnson, 38 Neb. 244.

Flynn, Traynor & Traynor and *John E. Palmer,* for respondent.

"The peril was as obvious as the certainty that a crooked pile of child's blocks will fall when it becomes sufficiently top-heavy, or when it is struck . . . Under the circumstances of this case it is clear that notwithstanding the master's order, the servant assumed the risks of his employment, created by his own work, present to his sight, obvious at a glance and as familiar as any experience in life." Hagglund v. St. Hilaire Lumber Co. (Minn.) 106 N. W. 91.

If the specific facts do not support the legal conclusion pleaded, the specific facts control, and the pleading is bad. Carlson v. Board, 67 Minn. 436, 80 N. W. 3; Casey v. McIntyre, 45 Minn. 526, 48 N. W. 402; Moon v. Allen, 82 Minn. 89, 84 N. W. 654; Dana v. Porter, 14 Minn. 355; State v. Ring, 29 Minn. 78, 11 N. W. 228.

"The general rule of law declaring the duty of the master in regard

to furnishing a servant a safe place to work, is usually applied to a permanent place, or to one which is quasi permanent. It does not apply to such places as are constantly shifted and being transformed as a direct result of the servant's labor, and where the work in its progress necessarily changes the character for safety of the place in which it is performed, as it progresses." Hagglund v. Lumber Co. 97 Minn. 94, 106 N. W. 91; Hostager v. Paper Co. 110 Minn. 408, 125 N. W. 902. See also L. & N. v. Dunn (Ga.) 94 S. E. 661; Tomczek v. Johnson, 110 Minn. 320, 125 N. W. 268.

There can be no question but what the question of assumption of risk can be raised on demurrer. Kommerstad v. G. N. 120 Minn. 376, 139 N. W. 713; Judd v. So. R. Co. (Ky.) 188 S. W. 880.

An employee also assumes all risks of conditions as he finds them, even though such conditions may be due to the master's negligence or the negligence of fellow servants. Hermann v. Clark, 89 Minn. 132, 94 N. W. 436; Manore v. Kilgore, 107 Minn. 347, 120 N. W. 340; Boyer v. Eastern R. Co. 87 Minn. 367, 92 N. W. 326.

And if the danger and risk is as apparent to servant as to the master, the master is not liable. Smith v. Tromanhauser, 63 Minn. 98, 65 N. W. 144; Reid v. N. W. Fuel Co. 116 Minn. 96, 133 N. W. 161; Galland v. G. N. 101 Minn. 540, 111 N. W. 1133; G. C. & S. F. v. Drennan (Tex.) 204 S. W. 691; Pruitt v. Norfolk & W. (Ky.) 221 S. W. 552; G. C. & S. F. v. Clement (Tex.) 220 S. W. 407; A. C. L. v. Kennedy (Ga.) 92 S. E. 973; Anderson v. Fred Johnson Co. 116 Minn. 56, 133 N. W. 85.

"It was a danger that did not require the teaching of the event. Therefore, it was a present risk and therefore it was assumed." McAdoo v. Anzellotti, 271 Fed. 268; Hagglund v. St. Hilaire Lbr. Co. 97 Minn. 94, 106 N. W. 91.

"The duty of the master does not extend to dangers and risks that are apparent and obvious, or that *might be discovered by the exercise of reasonable care and prudence.*" Dixon v. Union Iron Works, 90 Minn. 492, 97 N. W. 375.

"The danger was inherent in the nature of the work and was perfectly apparent. There was no hidden or unknown danger; nothing broke and nothing gave way." Davison v. Ressler, 128 Minn. 204, 150 N. W. 802.

"A complaint in an action to recover damages for negligence must state the act of negligence complained of, and the plaintiff must recover, if at all, upon the particular act of negligence stated in the complaint." Hall v. Northern Pacific R. Co. 16 N. D. 60.

JOHNSON, J. This is an appeal from an order of the district court of Ramsey county, sustaining a demurrer to the complaint.

The plaintiff alleges that for about three years prior to the date of the injury described, he was employed by the defendant as a section hand; that he was fifty years of age; that on or about the 29th day of July, 1921, he was ordered by the foreman of the defendant to unload a box car containing grain doors; "that the said foreman did not inspect the interior of said car or instruct the plaintiff as to the manner in which plaintiff was to proceed with the unloading of said car; that said car was fully loaded with certain grain doors and in the following manner: a pile in the center of the car and two piles on each side thereof; that plaintiff had no previous experience in unloading cars like the car he was ordered to unload; that he did not know and appreciate the danger to himself in the sudden shifting or sliding of the piles of doors during the process of unloading; that he had no reason to anticipate that the piles of doors in either end of the car might, on the removal of the central pile, slide and topple over on him; that an inspection of the place where he was ordered to work would not reveal the imminent danger he would be exposed to; that defendant, thru its section foreman, failed to discharge the duty that it owed to plaintiff, its servant, to inspect said premises where plaintiff was ordered to work and to warn plaintiff, prior to his entering the car, of the existing danger of said grain doors suddenly shifting, sliding or toppling over upon him when the central pile had been removed and he started to work on the next pile."

Then follow allegations to the effect that the plaintiff proceeded to unload the car and, when he had removed the central pile of doors, a pile next thereto shifted its position and toppled over on plaintiff and injured him before he could escape. The plaintiff then continues: "That the proximate cause of plaintiff's said injuries suffered by him, as aforesaid, was the failure of the defendant to provide a reasonably safe place in which he was to work and to warn plaintiff before he en-

tered on said work of the existing danger to him while so performing said work hereinbefore referred to; that the existing danger to plaintiff, while performing the work he was so ordered to do, was known, or in the exercise of due care should have been known to the defendant and was not known to the plaintiff and could not have been seen and thereby anticipated by plaintiff upon inspection of the inside of said car before or during the progress of the work he was set to do by the defendant." Plaintiff then alleges in general terms that the injuries were occasioned by the negligence of the defendant "as aforesaid" and were not caused by any "contributory negligence on the part of this plaintiff."

The trial court sustained a demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

Section 7458, Comp. Laws 1913, provides that "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties."

It is elementary that the complaint must allege facts which show actionable negligence on the part of the master and that the injuries complained of were the proximate result of such negligence. It is also elementary that if the pleading clearly shows on its face that there was no negligence on the part of the defendant, and that the risk was an ordinary risk which the plaintiff assumed as a matter of law, the demurrer was properly sustained. Kommerstad v. Great Northern R. Co. 120 Minn. 376, 139 N. W. 713.

A demurrer admits the truth of all well-pleaded facts, but not necessarily the inferences or conclusions drawn therefrom, though alleged in the complaint; facts presumed or reasonably or necessarily inferred from those alleged are also admitted. 31 Cyc. 335, 336. Legal conclusions or inferences of fact which are not presumed or which may not be reasonably or necessarily inferred from the facts alleged, are not admitted by the demurrer.

It will be noticed from the portions of the complaint heretofore set out that the proximate cause of the plaintiff's injury is alleged to be: First, the negligent failure on the part of the defendant to furnish a reasonably safe place in which to work, and secondly, a negligent fail-

ure on the defendant's part to instruct plaintiff how to proceed to unload the doors and to warn plaintiff of the danger that the remaining pile or piles of doors might shift and topple over upon plaintiff, when the central pile was removed. We shall discuss these propositions in the order stated.

Plaintiff alleges "that an inspection of the place where he was ordered to work would not reveal the imminent danger he had been exposed to." Taking this allegation as true, "the imminent danger" to plaintiff must have resulted from the prosecution of the work he was engaged to do—the manner of the removal of the grain doors from the car. The premises, including the car and the piles of doors, were not, in themselves, dangerous, or unsafe; the danger or risk came into existence only, if at all, after the work of unloading commenced and by reason of the actual prosecution of the work, of changing conditions and of the manner in which the work was done. We think that the rule that the master must furnish the servant a reasonably safe place to work has no application in this case. Gulf, C. & S. F. R. Co. v. Drennan, — Tex. Civ. App. —, 204 S. W. 691; Riley v. Neptune, 181 Ind. 228, 103 N. E. 406, 7 N. C. C. A. 352; Hostager v. Northwest Paper Co. 110 Minn. 408, 125 N. W. 902.

Did the defendant owe a duty to the plaintiff to instruct him how to proceed to unload the doors and to warn him of the risk and danger that the pile of doors on either side of the central pile might topple over when the latter was removed? It seems to be fundamental that the duty to warn exists only when the master possesses knowledge of risks or dangers, or should, in the exercise of ordinary care for the servant's safety, have such knowledge, not within the knowledge of the servant, or discernible by the latter in the exercise of ordinary care. In order to hold that the complaint in this case states facts constituting actionable negligence on the part of the master for not anticipating danger to the plaintiff, we would be required to hold that the defendant should, in the exercise of ordinary care, have anticipated that the plaintiff would remove the central pile first, leaving the other piles untouched, and that one or both of the other piles would fall on plaintiff. We do not understand that to be the law. The master was not, under the facts alleged, required to assume or anticipate that the servant would ignore natural laws, adopt a method of work manifestly

dangerous, or one which a person of his age and experience, in the exercise of ordinary care, must have known to be dangerous under the circumstances. There can be no liability for failure to anticipate danger to a servant and to warn him thereof, unless the master's knowledge of the danger, or opportunity to have knowledge thereof, having in mind the master's primary duty to make inquiry, is superior to that of the servant. Ahern v. Amoskeag Mfg. Co. 75 N. H. 99, 21 L.R.A.(N.S.) 89, 71 Atl. 213. The master here had no reason to anticipate that the servant would remove the central pile and leave one pile on each side standing with consequent danger to himself from the falling of one or both of them. San Antonio Sewer Pipe Co. v. Noll, 37 Tex. Civ. App. 269, 83 S. W. 900. It would seem reasonable to suggest that, if it cannot be held negligent on the part of the plaintiff to unload the doors in such a way as to leave a pile or piles standing in such a position as to be manifestly dangerous to himself, it cannot be deemed negligence on the part of the defendant to fail to anticipate that he would do this very thing and to omit to warn plaintiff against unloading the doors in this particular way. Such risk as there was lay entirely in the method of work adopted by plaintiff. Dunbar v. Hollingsworth & W. Co. 109 Me. 461, 84 Atl. 992; Ness v. Great Northern R. Co. 25 N. D. 572, 582, 142 N. W. 165. Whatever danger inhered in the method adopted was clearly discernible to a man of ordinary intelligence and experience. Labatt, Mast. & S. § 1249.

In the case at bar, the allegations that the plaintiff had no experience in "unloading cars like the one he was ordered to unload" and that the existence of danger to the plaintiff was unknown to him, are not sufficient, when the nature of the work is considered, to require specific instruction as to the method of work or warning of the danger that one pile might fall when another and adjoining one was removed. When the work is simple and the danger is observable to an ordinarily prudent and careful person, there is no duty to warn. Boyer v. Eastern R. Co. 87 Minn. 367, 92 N. W. 326, 12 Am. Neg. Rep. 496. The work of unloading these grain doors was not complicated or difficult. It called for no particular system or rules of procedure; the most inexperienced and unskilled workman, using his eyes and his intelligence, could unload such doors without any instructions or rules to guide him. There was no latent danger inherent in the work or in the

piles of doors which any ordinary man could not see and appreciate. To have warned plaintiff that one pile of doors might tumble down if the support of another pile were withdrawn, would have been but to call his attention to the operation of a natural law,—the law of gravitation, presumed to be known to him (Riley v. Neptune, supra), under conditions so obviously commonplace that the average boy would have scorned the warning as alike a reflection upon his intelligence and upon his capacity for ordinary observation. (Props v. Washington Pulley & Mfg. Co. 61 Wash. 8, 45 L.R.A.(N.S.) 658, 111 Pac. 888; Bollington v. Louisville & N. R. Co. 125 Ky. 186, 8 L.R.A.(N.S.) 1045, 100 S. W. 850). We are constrained to hold that, in the exercise of common observation, any man of ordinary intelligence would understand the situation entirely and appreciate the risk to his person involved in removing the central pile of doors from the car while leaving a pile on each side standing. No warning could have made the danger plainer; the probability that the doors might fall could not be better known or understood by the employer than by the employee; it was obvious to any person having knowledge of elementary natural laws, presumed a common possession of the mass of mankind. It seems clear, therefore, that the master was not negligent in failing to warn the servant. Johanson v. Webster Mfg. Co. 139 Wis. 181, 120 N. W. 832.

There is no allegation that the doors were negligently piled in the car; or that they were piled in an unusual manner, or that plaintiff never unloaded grain doors before and did not know the proper manner of unloading them. There is no allegation in the complaint from which it can be inferred that the defendant knew or should have known that plaintiff would first remove the central pile, leaving the others a standing menace to himself, or that it was at fault in permitting the risk to exist that one pile of doors might fall when another was removed, or that such risk resulted from any negligent act or omission on its part. There is no allegation that defendant knew that plaintiff had no experience in unloading grain doors. In other words, the risk that the doors might slide or topple down, under the circumstances, was an ordinary risk, understood by plaintiff, incidental to the employment and the method of unloading adopted by plaintiff and was, therefore, assumed by him. Labatt, Mast. & S. §§ 1166, 1167. The

risk having been ordinary and such as to be observable and appreciated by a person in the use of ordinary observation and of ordinary intelligence, the presumption being that plaintiff was in the possession of ordinary and unimpaired faculties of observation, there was no duty to warn or instruct the servant. Labatt, Mast. & S. §§ 1144, 1145.

The allegation that plaintiff did not "know or appreciate the danger to himself in the sudden shifting of the doors," is not necessarily sufficient to make a case for the jury. Plaintiff may, as a matter of law, nevertheless have assumed the risk. "A servant assumes all the ordinary risks which are incidental to his employment; . . . the inability to maintain an action is a peremptory conclusion of law, if it is apparent that the injury resulted from a risk of this description, unless the plaintiff can adduce evidence which fairly tends to show that the injured person, by reason of his want of experience or his tender years, was not changeable with that comprehension of the risk, which, in the absence of such evidence, he is presumed to possess." Labatt, Mast. & S. § 1167. The facts alleged in the complaint support, but certainly do not negative, the presumption of which the author speaks. If a person of ordinary prudence, of the age and experience of the plaintiff, in the same or a similar situation, would have known and appreciated the danger and risk, he will be deemed, as a matter of law, to have assumed the risk. Brownwood Oil Mill Co. v. Stubblefield, 53 Tex. Civ. App. 165, 115 S. W. 626; Labatt, Mast. & S. § 1307. From the averments in the complaint, it seems clear that plaintiff himself was guilty of negligence, or that, in any event, he assumed the risk that the method adopted might result in injury to himself. Reasonable minds could draw no other conclusions from the facts alleged. Unsted v. Colgate Farmers Elevator Co. 18 N. D. 309, 122 N. W. 390; Hagglund v. St. Hilaire Lumber Co. 97 Minn. 94, 106 N. W. 91.

Inasmuch as the facts alleged in the complaint fail to show negligence on the part of the defendant or any want of ordinary care, and that the risk was an ordinary risk and, therefore, assumed by the servant, the order of the trial court, sustaining the demurrer, was right and it is *affirmed,* with leave to file and serve an amended complaint within thirty days from date of remittitur.

BIRDZELL, CHRISTIANSON, and NUESSLE, JJ., concur.

BRONSON, Ch. J. (specially concurring). I concur in an affirmance. The complaint through its general allegations and in pleading conclusions of law, fails to allege with certainty and definiteness facts sufficent to constitute a cause of action for negligence against the master.

JOHN VALLELY, as Receiver of the State Bank of Milton, Appellant, v. THOMAS DEVANEY, Adelard Benoit, Geo. N. Marcotte, M. L. Sullivan, J. D. Beauchamp, Northern Livestock Company, Respondents.

(194 N. W. 903.)

Bills and notes — makers and indorsers of notes given bank held estopped to defend on ground that they were accommodation paper.

1. Where notes are given to a bank at the solicitation of its president to enable it to carry, in a form satisfactory to the bank examiner, an indebtedness owing by a corporation in which the president and the makers and indorsers of the notes are personally interested, and, where the bank subsequently fails and the receiver sues on the notes, the makers and indorsers are estopped to defend on the ground that the notes were given for the accommodation of the bank.

Bills and notes — makers and indorsers of note held estopped to assert defense that officer of bank had secret fraudulent intentions.

2. Where the undisputed evidence shows that the notes were given pursuant to the arrangement stated above with the understanding between the president of the bank and the makers and indorsers of the notes that the latter were not to be held personally liable and that the notes were not to be paid by them, the defendants are estopped, as against the receiver, to assert in defense that

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Note.—On power of bank president to bind bank by agreement that liability of party to commercial paper shall not be enforced, see notes in 28 L.R.A.(N.S.) 501; 3 R. C. L. 442; 4 R. C. L. Supp. 186.

On power of bank president to assure maker of note that his obligation will not be enforced, see notes in 1 A.L.R. 703; 9 A.L.R. 1146.

On validity of obligation given bank as affected by concealment of illegal transactions, see notes in 26 L.R.A.(N.S.) 993; 34 L.R.A.(N.S.) 105; L.R.A.1916A, 1218.

the president of the bank entertained a secret fraudulent intention to hold them personally liable to the bank.

Opinion filed July 23, 1923.

Bills and Notes, 8 C. J. § 1007 p. 722 n. 30, p. 723 n. 31.

Appeal from the District Court of Cavalier County, *Butz*, J.

Reversed and remanded.

McIntyre, Burtness & Robbins and *G. Grimson*, for appellant.

"Since a fraud must relate to facts then existing or which have previously existed, the general rule that fraud cannot be predicated on statements promissory in their nature and relating to future acts, nor upon the mere failure to perform a promise or an agreement to do something at a future time, or to make good subsequent conditions which have been assured. Nor, it is held, is such nonperformance alone even evidence of fraud." 12 R. C. L. 254.

False pretense is a misrepresentation as to an existing fact or past event, and not a mere broken promise to do something in the future. Spriggs v. Craig, 36 N. D. 160.

The accommodated party is he to whom the credit of the accommodation party is loaned, and is not necessarily the payee, since the inquiry always is as to whom did the maker of the paper loan his credit as a matter of fact. And the fact that one derives some incidental benefit from the paper will not make it accommodation paper as to him. 8 C. J. 254.

Where a check was given by a third person to a bank without consideration at the solicitation of the cashier, and immediately passed to the credit of a depositor's overdue account to make the account whole, the check was given for the accommodation of the depositor, and not for the accommodation of the bank. The bank could sue thereon. Neal v. Wilson (Mass.) 100 N. E. 544; First Nat. Bank v. Davidson, 188 N. W. 194; Metzger v. Seigall, 145 Pac. 72.

The maker of a note cannot defend an action thereon by showing an oral agreement made at the time of its execution that he should not be held liable, for the reason that this would violate the rule forbidding the contradiction of the terms of a written instrument by parol evidence. German-American State Bank v. Watson, 163 Pac. 637; Neal v. Wilson, 100 N. E. 544.

A corporation is not charged with notice of facts because of knowledge on the part of an officer or agent, where the officer or agent is dealing with the corporation in his own interest, or where for any other reason his interest is adverse to that of the corporation, so that communication of the knowledge by him cannot be presumed. Woodworth Co. v. Carroll (Minn.) 112 N. W. 1054; Brookhouse v. Union Pub. Co. 73 N. H. 368, 6 Ann. Cas. 675.

Price & Pierce and *Thomas Devaney,* for respondents.

Whether or not the debt has been novated is a question of fact and depends upon the intention of the parties to the particular transaction claimed to be a novation. If the terms of the agreement are equivocal or uncertain, then it becomes a question of fact for the jury under suitable instruction. 29 Cyc. 1140.

The representation as to where the defendant was to place a culvert across the creek running through the plaintiff's land, and how the culvert was to be constructed with reference to its use by them, and that the road was to be built on a line running through the village of Rockford, and that its depot was to be located and built at a designated place, if taken as mere promises or assurances that the defendant would do these things, they would be insufficient, for fraud cannot be predicated of a mere promise, though it be afterwards unfulfilled. But if the agent in making those representations intended to create in the plaintiff's mind the belief that it was, as a fact, the then intention of the defendant to do the things mentioned, and the representations might be understood and were understood by plaintiffs as asserting that fact, then a charge of fraud can be based upon the representations. Albitz v. Minneapolis R. Co. 42 N. W. 394.

Accommodation paper is a bill or note to which the acceptor, drawer, maker or indorser, has put his name without consideration for the purpose of accommodating by a loan of his credit some other person who is to provide for the bill or note when it falls due. It represents and is a loan of credit to the party accommodated. 8 C. J. 252.

"The defendants executed the note for Blethen's accommodation with the intention and understanding that he should procure it to be discounted at the payee bank for his own personal benefit." Rae v. McDonald, 71 N. W. 11.

Evidence that a note was executed to a bank by one of its officers to take the place on the books, of a note of a debtor, after the comp-

troller of the currency had objected thereto; that the bank officers agreed that the note should create no liability against the defendant; that the debtor's note was also retained by the bank, and a mortgage taken thereafter to secure the same,—shows that defendant's note was without consideration. Bank v. Felt, 69 N. W. 1057; Central Bank & T. Co. v. Ford, 152 S. W. 700.

The defense that a promissory note was made as an accommodation to the payee is inseparably connected with the absence or want of consideration and evidence that it was so executed does not vary or contradict the written contract within the rule excluding parol evidence but tends only to establish the fact always open to inquiry between the parties that the note was without consideration. National Bank v. Bowens, 124 N. W. 241; Peoria Mfg. Co. v. Huff, 63 N. W. 121.

It thus appears that the defendant executed his first note, subsequently renewing it from time to time, and ultimately by the note in suit, for the purpose of having it take the place of the Naylor note. Pauley v. O'Brien, 69 Fed. 460; Rankin v. City Bank, 208 U. S. 541, 52 L. ed. 610.

BIRDZELL, J. This is an appeal from a judgment for the defendants and from an order denying a motion for judgment notwithstanding the verdict or in the alternative for a new trial in three consolidated actions upon as many promissory notes. By stipulation two additional actions, each on separate notes, abide the result of these cases. The facts are as follows: In 1918, one W. L. Dodson purchased a large herd of cattle at some distant point and took them to Cavalier county. In connection with the purchase he had given his note to the St. Paul Cattle Loan Company of South St. Paul for $28,000. This note was indorsed by B. Prom and was secured by a chattel mortgage on the cattle. From this herd some cattle were afterwards sold to the defendant Benoit, some to the defendant Beauchamp and some to the defendant Marcotte, all farmers living in the vicinity of Milton. In the summer of 1919, Benoit, Beauchamp, and Marcotte, together with the other defendants in this action, Devaney and Sullivan, organized a corporation under the laws of this state, which was known as the Northern Live Stock Company. When this company was organized the directors were Sullivan, Devaney, Marcotte, Beauchamp, Sheehan, and

Prom. Benoit was made president, Devaney, secretary, and Sheehan, treasurer. During the remainder of the year 1919, meetings were held and negotiations conducted with a view to the acquisition by the company of a large herd of live stock and of considerable land for ranch purposes. These negotiations were practically completed in December and soon after the first of the year, January 12th, a meeting was held at which they were finally completed. The details of the arrangement are not clear in the record and are perhaps immaterial. But it does appear that the various interested individuals named above turned their herds in to the company, each taking what is termed a lien note in settlement. The manner in which the corporation stock was distributed does not appear, except it does appear that Prom obtained $5,000 of stock on account of the purchase of the Dodson herd. There seems to have been an understanding reached, prior to the meeting of January 12, 1920, that no mortgage should appear as being given by the live stock company, so that the company might obtain the advantage of a better credit rating. Hence the so-called lien notes. It was apparently recognized at the January meeting that cattle were being turned in to the company upon which there were mortgages. The testimony is conflicting as to the discussion of the mortgages at this meeting, but the defendants all agree it was understood that the individuals, except Dodson, who turned their herds in, were to pay off their mortgages or secure releases. They further claim that at the time of this meeting they did not know of the South St. Paul Cattle Loan Company mortgage on the Dodson herd. They testify also that, while the subject of mortgages was under discussion and while each of the other owners stated the amount of the mortgage against his herd, Dodson and Prom remained silent, thus giving the impression that the Dodson herd was clear. It appears that the defendants in this action, other than Sullivan, did later clear up the mortgages on their herds. Early in July, 1920, Prom requested Benoit, the president of the live stock company, to accompany him to St. Paul. While they were there they went to the Stock Yards National Bank for the purpose of securing an extension of the $28,000 loan. Prom gave his note for $26,000 and secured Benoit's indorsement. He returned with this note to Milton and stated to the remaining members of the board of directors of the live stock company that the loan would be extended if they would indorse

this note; that otherwise it would be foreclosed and that, inasmuch as the mortgage covered so large a percentage of the cattle taken over, this would practically put the live stock company out of business. Upon these representations the note was indorsed by the remaining directors. They claim, however, to have derived from this transaction an understanding that Prom was to pay this debt personally. Soon after this, Benoit, as president of the company, shipped some three carloads of cattle to St. Paul and applied the proceeds on the cattle company loan. Up to this time expenses were being incurred in the care of the cattle which had been met by the State Bank of Milton in the following manner: Upon a note of the Northern Live Stock Company, dated December 1, 1919, due April 1, 1920, indorsed by Sullivan, Marcotte, Beauchamp, and Benoit, the bank advanced $1,000; upon a note of the Northern Live Stock Company, dated January 10, 1920 and due the 1st of May, the bank had advanced $693.22; upon a note of Benoit, dated January 12, 1920, and indorsed by Sullivan, Marcotte, and Devaney, and which was payable on or before the 12th of May, the bank advanced the amount of the note, $1,462; and upon the company note, dated January 31st and due the 15th of June, guaranteed by Devaney, Sullivan, Marcotte, Benoit, and Beauchamp, $1,000; total $4,155.22.

There was more than $5,000 paid out for the company on the checks of Benoit, over and above the funds derived from the notes, which was carried as an overdraft, so that by August 1, 1920 there was due the bank on account of notes, overdraft and interest, $10,133.84. Prom was president and managing officer of the bank. On or about August 1st, Prom met with the other directors of the Northern Live Stock Company at the office of Devaney in Langdon and proposed to them that they execute notes representing the amount that had been thus advanced for the benefit of the cattle company. It seems that previous to the meeting he had prepared notes for execution. At that meeting, notes were given by the various makers, dated August 1, 1920, in amounts as follows: Devaney, $2,000; Beauchamp, $2,000; Benoit, $3,000; Northern Live Stock Company, $2,500; Northern Live Stock Company, $633.84. Each of the individual notes was indorsed by the remaining four members of the board of directors, except Prom, and the company notes were indorsed by all except Prom. The failure of

Prom to execute or indorse the notes, according to the explanation given at the time, was due to the fact that they were to be held by the bank and he could not, as an officer of the bank, appear to be liable. These are the notes upon which the present actions were brought.

The testimony is to the effect that at the time the notes were executed, it was stated by Prom, in substance, that he desired the notes so that he might carry the live stock company loan in a manner that would be unobjectionable to the bank examiner and that, if these notes would be executed, the company debt would be in such shape that the bank could carry it; that upon being asked whether or not the individuals were to be liable, he had stated, in substance, that they would not be liable; that the entire obligation would be met from the assets of the live stock company; that he spoke of a prospective sale which a real estate broker was negotiating under a listing contract of some weeks standing and that the proceeds of this sale would more than liquidate the company obligations, and that these obligations would be the first to be satisfied out of the proceeds. The notes, aggregating $4,155.22, which were past due, were turned over to the secretary of the live stock company, marked "renewed" across the face. The secretary states, however, that the meeting had adjourned before the notes were delivered to him and that they were included among some papers handed him by Prom with an explanation that they were memoranda to show what the new notes were given for; that he did not examine the papers and did not know that the old notes were included until after this suit was brought.

The sale referred to did not materialize, and later that fall the company, lacking both the means and feed to care for the cattle longer, shipped them to South St. Paul where they were sold. The proceeds of the cattle, with the exception of those derived from the Sullivan herd, amounted to some nine thousand dollars and were applied on the St. Paul Cattle Loan Company mortgage. The proceeds of the Sullivan cattle were apparently applied on a prior mortgage which he had not removed or satisfied according to the agreement. The State Bank of Milton failed on December 3d and is insolvent. This action is brought by the receiver to collect these notes as assets of the bank. If the notes be considered as assets of the bank, it is nevertheless insolvent.

The principal contention upon this appeal is that the trial court

erred in not granting plaintiff's motion for judgment notwithstanding the verdict. It is contended that the facts, as shown by the record and as stated above, constitute no defense to a liability on the notes. On the other hand, it is contended by the defendant that the facts stated show the notes to have been executed for the accommodation of the bank, and, furthermore, that their execution was induced by fraud.

The fraud which it is claimed vitiated the original transaction was the concealment of the mortgage on the Dodson herd at the time they were turned in to the company in the meeting when everybody, except Dodson and Prom, disclosed the mortgages on their respective herds. It is urged that this fraud was operative during practically the whole time the expenses for the care of the cattle, which were advanced by the bank, were being incurred. While the notes in suit were given at a time subsequent to the discovery of this fraud, if fraud existed, it is said that they were given in circumstances that justified the defendants in treating the St. Paul Cattle Loan Company obligation as the personal debt of Prom, the maker of the renewal note. It is also claimed that their execution was directly induced by the promise of Prom that the defendants would not be held personally liable, a promise which he did not intend should be performed, for, as he testified, his very object in getting the notes was to obtain their personal liability for the advances to the live stock company. Are the rights of the bank, suing through the receiver, affected by the matters of defense which must be taken as established? We shall consider these defenses under two heads; first, accommodation to the bank, and, second, fraud.

It is elementary that the plaintiff is not entitled to a judgment notwithstanding the verdict is justifiable on the most favorable construction of the evidence. So, for the purpose of discussing this assignment of error in the light of the defenses asserted, we shall consider that the evidence establishes the following conclusions of fact: When the Dodson herd was turned in to the company there was fraudulent concealment by Prom and Dodson of the St. Paul Cattle Loan Company mortgage; that the fact remained concealed until about July 1st or some six months later; that substantially all of the advancements that were made by the bank and which are represented by the notes in suit were made during this time (some were made, indisputably, however, before the January meeting); that the note given in renewal of the debt to the

St. Paul Cattle Loan Company is the personal note of Prom and was given as such with the understanding that the mortgage security on the Dodson herd, then owned by the live stock company, should continue as a lien; that a month later when the notes in suit were given they were given to enable the bank to carry the live stock company obligations in a form satisfactory to the bank examiner; and that the individuals who gave them were induced to do so relying upon the promise made by Prom that they would not be held personally liable but that the notes would be discharged by the assets of the company, which promise was fraudulent in that Prom did not intend it to be performed, but intended to hold the defendants personally liable. Certainly, no view of the facts more favorable to the defendants is warranted by this record. The question, then, is "do these facts constitute a defense to the notes in the hands of the payee bank, at the suit of the receiver, the bank being insolvent. Whether the notes be considered as given in payment of the live stock company's obligation to the bank, or whether they be considered as having been given so that the obligation might still be carried by the bank, in which event they must be regarded as collateral security, is immaterial. In either event the bank is a holder for value. Comp. Laws, 1913, §§ 6910 and 6912; N. I. Law, §§ 25 and 27.

The clear and unmistakable meaning of the undisputed evidence descriptive of the transaction at the time the notes in suit were taken is that they were given to be turned over to the bank so that the bank could carry, in satisfactory form, the obligations which had been incurred by the live stock company, amounting to over $10,000, in the brief period of its existence. This is the testimony of the defendants themselves, and they practically agree as well that the necessity for giving the notes was that the bank could not carry this obligation in the shape it then stood, represented as it was by overdue notes and an overdraft, and that, unless the obligation were evidenced in some different manner, it would not be satisfactory to the bank examiner. As an obligation of the live stock company it was likewise in excess of the legal limit. If it be assumed that this understanding, together with the express promise that Prom is said to have given, that they would not he held personally liable, coexisted and further assuming that the effect of the whole transaction was to make the notes an accommodation

to the bank instead of the live stock company (and this is the most favorable view for the defendants), the defendants are liable under what we consider to be the sound rule of law adhered to by the overwhelming weight of authority. Where a note or other obligation is given to a bank with the avowed object of its appearing as assets for purposes of public examination, those who purport to be liable upon the obligation are estopped, as against creditors who would be prejudicially affected by the truth, to assert a secret understanding that they were not to be held liable. Where the action is brought by the receiver of an insolvent bank with which such an arrangement is claimed to exist, the other assets not being sufficient to satisfy the claims of creditors, the rule is applicable with all its force. Pauly v. O'Brien (C. C.) 69 Fed. 460; Lyons v. Benney, 230 Pa. 117, 34 L.R.A.(N.S.) 105, 79 Atl. 250; Harrington v. Connor, 51 Neb. 214, 70 N. W. 911; Murphy v. Gumaer, 16 Colo. App. 183, 70 Pac. 800; Arthur v. Brown, 91 S. C. 516, 74 S. E. 652; Neal v. Wilson, 213 Mass. 336, 100 N. E. 544; Skagit State Bank v. Moody, 86 Wash. 286, L.R.A.1916A, 1215, 150 Pac. 425.

Banks are institutions subject to public regulation to the end that they may make proper loans and freely contract debts with depositors and others to achieve the ends of legitimate business. Careful examinations by public authority are required periodically in order that those who deal with banks may not be misled by appearances. To sanction any arrangement, therefore, whereby the real assets and securities of a bank are to be regarded as less than or different from the apparent assets and securities would tend to defeat the entire purpose of the regulatory measures. Those who participate in a transaction the object of which is to give to the assets of a bank a favorable appearance, for purposes of examination, but less favorable for purposes of liability or enforcement, are participating in a transaction which is fraudulent as to the public and as to the creditors, including depositors, in whose behalf regulation is primarily imposed. First Nat. Bank v. Davidson, 48 N. D. 944, 188 N. W. 194.

On the question of fraud, we think little need be said. It will be observed, from the statement of facts, that the fraud relied upon to defeat liability on the notes in question consists in the statement that the defendants were not to be personally held, a promise which was

fraudulent in that it was not intended to be kept. There seems to be some further contention that there was fraud in representing that the obligation of the live stock company to the bank would be met from the assets of the company when, as a matter of fact, Prom intended to apply the assets toward the payment of a mortgage securing the note upon which he was personally liable. This amounts substantially to the same thing and it all resolves to the primary fraud committed on these defendants in taking from them notes under a promise that they were not to be held personally liable, a promise which for one reason or another was not intended to be kept. Manifestly, if the defendants are estopped, under the rule of law heretofore previously applied, from asserting the accommodation character of the instruments, and, if the prime reason for that estoppel is that to permit them to show the true transaction would be to work a fraud on creditors, it must be obvious that the same reason precludes the assertion by them of the fraud of Prom, which, if allowed to be established, would have exactly the same effect. From the standpoint of creditors the promise upon which the defendants rely is fraudulent. If they cannot show, as against the receiver, that the note was for the accommodation of the bank, they should not be permitted to show that Prom entertained a dishonest intention (dishonest toward them) of holding them to the exact legal consequences of their act while stating to them that he did not do so. In other words, if the legal consequence of their act in giving a note for the accommodation of the bank is liability at the suit of the receiver, no different consequence can be attached by reason of the existence of a secret intention on the part of the officer of the bank that they were to be held to such a liability. So, we think the defense of fraud fails for the same reason that the defense of accommodation fails. The defendants cannot assert a collateral fraud of the character attributed to Prom when to do so would involve the perpetration of a fraud upon creditors in which they (the defendants) participated. This would permit them to take advantage of their own wrong.

It should be obvious that we decide nothing with respect to the liability of parties upon notes given to a bank for its accommodation where sued by the bank itself. It follows, from what has been said, that the facts, proven by the undisputed evidence in the case and by the testimony of the defendants themselves, do not establish any defense to

liability on the notes in suit, and it was error for the trial court to deny the motion for judgment non obstante.

It may not be improper to make a further observation touching the original consideration for the notes in suit which further substantiates the estoppel against the defendants. They stood in the bank in lieu of obligations previously incurred on behalf of the live stock company, some prior and some subsequent to the transaction of January 12th, which is the first transaction claimed to have been tainted by any fraud. The live stock company received benefits coextensive with the advancements made by the bank. There can be no question on the record before us but what the bank was not chargeable with any fraudulent concealment practiced by Prom in his own interest. Compton v. Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147, nor that Prom, while purporting to act for the bank in connection with his personal interests, could not bind the bank by a verbal promise that those who executed the notes to the bank would not be personally bound thereby. Bank of United States v. Dunn, 6 Pet. 51, 8 L. ed. 316; Neal v. Wilson, 213 Mass. 336, 100 N. E. 544; State Bank v. Forsyth, 41 Mont. 249, 28 L.R.A.(N.S.) 501, 108 Pac. 914; First Nat. Bank v. Lowther-Kaufman Oil & Coal Co. 66 W. Va. 505, 28 L.R.A.(N.S.) 511, 66 S. E. 713. While Prom's fraud, if it existed, would have warranted the live stock company in rescinding the contract, it would have made the contract only voidable, not void. If, therefore, while the live stock company continued to act under the contract, it incurred obligations to the bank, manifestly it could not defend against such obligations on the ground of another's fraud. The bank gained no advantage by that fraud. In fact the security it held for the moneys advanced to the company was impaired by the failure of Prom to personally remove the mortgage lien on the cattle. These defendants placed reliance in Prom's representation that there was no lien, and, after its discovery, that he would remove it, and they knew that he was dealing with them in the live stock company on his own account. Therefore, as between the bank and the defendants, it is more equitable to charge the latter than to visit the consequences of such fraud, if any, upon the bank. This consideration is an additional basis for the estoppel in favor of the receiver.

Judgment reversed and cause remanded with directions to enter judgment for the plaintiff.

BRONSON, Ch. J., and CHRISTIANSON, NUESSLE, and JOHNSON, JJ., concur.

JAMES HRABEK, Respondent, v. JOSEPH PATOCKA, Appellant.

(194 N. W. 691.)

Appeal and error — objections to instructions referring to four separate paragraphs on four different subjects held too general for assignment of error thereupon.

In an action for assault and battery where defendant inflicted upon plaintiff a serious injury with a club, it is *held*, for reasons stated in the opinion:

1. Where written instructions were submitted to counsel before the close of the case, an objection, which was made to four distinct and separate paragraphs thereof upon four different subjects and which wholly failed to specifically direct the attention of the trial court to an error, now asserted upon appeal, in one of such paragraphs of the instructions, although otherwise specifically it directed the court's attention to another paragraph thereof, is too general for the assignment of error thereupon.

Appeal and error — rejection of testimony and offers of proof concerning anterior provocative acts of plaintiff to disprove or minimize malice, held not prejudicial.

2. That the rejection if testimony and offers of proof concerning anterior provocative acts of plaintiff, made to disprove or minimize malice was, under the circumstances, not prejudicial.

Opinion filed June 23, 1923. Rehearing denied July 24, 1923.

Appeal and Error, 3 C. J. § 752 p. 846 n. 76; 4 C. J. § 2986 p. 1004 n. 63; Trial, 38 Cyc. p. 179 6 n. 49.

Note.—While the authorities do not appear to be in accord as respects compensatory damages, it seems to be well settled that acts or words of provocation may be shown in mitigation of exemplary or punitive damages, provided they are of recent occurrence, and connected with the assault, as will be seen by an examination of the cases collated in a note in 16 A.L.R. 816.

In District Court, Walsh County, *Burr*, J.
Civil action for assault and battery.
Plaintiff received verdict for $8,307.
Defendant has appealed from the judgment.
Affirmed.
H. C. DePuy, for appellant.
T. I. Dahl and *Nevin & Greenberg*, for respondent.

Statement.

BRONSON, Ch. J. This is an action for assault and battery. In the complaint defendant demanded damages aggregating $25,750. Defendant interposed a general denial. The jury returned a verdict for $7,307, actual damages, and $1,000, exemplary damages. Defendant has appealed from the judgment.

The facts are: Defendant, aged 45, a farmer, resided at Pisek, North Dakota, for many years. Plaintiff, aged 45, married, came to Pisek in 1919. There he was a cobbler. The plaintiff served in the United States army during the World War and was in France. Both the plaintiff and the defendant gave their testimony in the Czecho-Slovakia language through an interpreter. Defendant, called as a witness by the plaintiff under the statute, testified: On April 14th, 1922, he was putting his horses in his barn; he saw plaintiff more than a block away; plaintiff was carrying a pail of milk and a sack of salt; defendant ran out of his yard toward plaintiff; out of a woodpile of willow he picked up, as he ran, a stick about 6½ feet long and the size of a fork handle; he yelled at plaintiff when he was about 20 feet from him; he called that he wanted to see plaintiff about why he wanted to smash defendant's head; they met on the sidewalk near the crossing adjacent to defendant's home; plaintiff made no answer; he set the salt and the milk on the ground, raised his hands and walked toward defendant; he hit plaintiff on the head with the stick, twice; the second blow knocked plaintiff down. Otherwise he testified that he ran, picked up the wood, and when he came toward plaintiff, plaintiff turned toward him and he hit; he left plaintiff lying on the ground, went back to the barn and then went to the telephone office to inform a party to take a look at plaintiff because he had hit him; defendant was nervous and

did not feel good; the way plaintiff was approaching him he might take the stick away from him so defendant hit him. Otherwise, the defendant did not testify in his defense excepting that he was called for purposes of making certain offers of proof.

Plaintiff testified: On April 14th, 1922, plaintiff was repairing shoes and in the evening went after milk; in his course he followed the sidewalks because it was muddy; he went by defendant's house; he got some milk and also bought some salt; he started home on the sidewalk passing by defendant's house; he did not see nor talk with defendant; he went by defendant's house but does not remember how far he got beyond; he does not know what happened to him and his next remembrance is when he talked to his wife some time afterwards at home.

A young lady testified that she saw defendant strike plaintiff with a stick; plaintiff fell to the ground; defendant ran away; later she saw defendant going up town; she screamed and called for help; then she called a doctor at Park River; she saw one blow struck; the place was on the crosswalk near defendant's house.

Another lady testified that she saw defendant running with something like a stick in his hand to the place where plaintiff was; she saw him hit plaintiff twice; he struck plaintiff, who then fell down; then he struck him once more; she saw a pail fall out of the plaintiff's hand.

The wife of defendant testified that on this day of the assault her husband had a nervous spell; that the night before he did not sleep; in the afternoon he went out to work around the barn; toward evening she saw her husband running by the window with a stick; there was an iron fence around defendant's house; this willow woodpile was outside the fence; she saw plaintiff lying on the ground; she took a wet towel and a wash dish; then she went over to plaintiff and laid the towel on his head; her husband came back about three quarters of an hour later.

The doctor, who had plaintiff under his care from the day of the assault until December 7th, 1922, testified: There were two lacerations in plaintiff's head; when he saw plaintiff he was unconscious and remained so for about three or four days; on the 5th day plaintiff became semi-conscious and remained so for about two weeks; a fracture of the skull was sustained; one ear-drum was broken; concussion of the brain occurred; the seventh and eighth cranial nerves were injured; as a result plaintiff sustained the loss of hearing in one ear; he has facial

paralysis on the left side; these conditions affect plaintiff's balance so that he walks with difficulty; he staggers at times and is dizzy; his opinion is that plaintiff never will make a full recovery; these conditions further have affected his left leg and his entire left side.

Another doctor called in consultation testified to the same effect. He also gave some testimony to the effect that the plaintiff might die within a year from a brain abscess; that plaintiff has a ruptured drum of the ear and is deaf on the left side; that the left side of his face is paralyzed and there is an impediment in his walk due to the paralysis which condition is permanent. There was also testimony to the effect that plaintiff was previously a healthy man. That during the war he performed the services of a soldier in active training and, three years previously, he had passed an examination for life insurance.

During the course of the trial the wife of defendant was asked whether she knew of any trouble between plaintiff and defendant; of any disagreement or dispute between them over wages; whether she had heard of any threats made by plaintiff against her husband which she had told her husband immediately prior to the time of the assault. Defendant also offered to prove that plaintiff was a quarrelsome man and that his general reputation was such; that plaintiff told defendant shortly before the time of the assault that he, plaintiff, was a man of violent temper and unable to control himself when in anger; that on two occasions shortly before the alleged assault plaintiff swore at defendant and made threats and gestures towards him; that some two weeks previous to the assault plaintiff made statements in the presence of others concerning troubles over money matters with defendant and that if settlement was not made in a friendly way it would be settled with fists; that such statement was communicated to defendant; that on the day just prior to the time of the assault plaintiff walked past defendant's residence and made angry grimaces towards the residence of defendant and at the same time carried his hands in his pockets in the manner one would carry them if he had hold of a pistol inside of his pocket; that defendant, shortly before the time of the assault, had been informed that plaintiff was of such a vindictive disposition that he would be liable to burn defendant's buildings or other property and that defendant believed this to be probable; that such things preyed upon the mind of defendant and caused him to have great fear of bodily

injury at plaintiff's hands; that defendant is a man of natural, peaceable temperament and of good general reputation. The above questions and offers were rejected by the trial court upon the ground that under the testimony by defendant himself he was in no danger from acts of plaintiff at the time of the assault since he sought out and ran after plaintiff with a club, and, further, that at the time plaintiff was rightfully upon the street without any showing of misconduct then by plaintiff; that otherwise he had received testimony for purposes of showing defendant's mental condition and attitude. This testimony was offered to disprove malice, in mitigation of damages, and to show that the acts mentioned so preyed upon defendant's mind as to cause him to have great fear of bodily injury at plaintiff's hands. Defendant contends that the trial court erred in rejecting such proffered evidence and offers.

The instructions of the trial court were reduced to writing and submitted to counsel before the close of the case. In the instructions the trial court charged the jury to the effect that the jury might take into consideration the plaintiff's normal expectancy of twenty-three years to aid them in calculating how much would compensate him for permanent injuries and that they might multiply his annual loss by this expectancy of twenty-three years. Defendant filed a general written objection to four separate and distinct paragraphs of the instructions covering four different subjects, one of which included the instruction above stated. In this objection defendant specifically pointed out his objection to one of such instructions but failed in any manner to call the attention of the trial court specifically to any error in the instruction above stated. Defendant now contends that the trial court erred in such instruction for the reason that the same did not require the jury to ascertain the present worth of plaintiff's annual loss during the period of his expectancy of life.

Decision.

The record discloses the commission of a wanton and wilful assault. While plaintiff was peacefully performing a domestic task, and wending his way homeward at the conclusion of a day's work, defendant, observing him pass without his yard, seized a stick and ran after him; at the time plaintiff was proceeding upon a public sidewalk and high-

way which ran past defendant's home. Defendant, about a block away while at his barn some little distance remote from the sidewalk where plaintiff was walking, left his work and deliberately, so far as the record discloses, seized a club from a woodpile in front of his yard and started to apprehend plaintiff. He caught up with the plaintiff at a place where plaintiff was past defendant's home and was walking away therefrom. The deliberate and wanton character of the assault is admitted by defendant himself. Through his own testimony he offers no acts, threats or conduct on the part of the plaintiff occurring at any time prior to the assault on this day that in any manner justified or mitigated the deliberate act of assault committed by him. The plaintiff has been seriously injured. Under the circumstances as disclosed by this record the verdict of the jury is moderate. In no manner is it claimed by defendant that this verdict is excessive.

The instruction above mentioned was erroneous because it did not prescribe the ascertainment of the present worth of an annual loss for 23 years. It is evident that this instruction which left out of consideration the element of interest in ascertaining present worth was merely a lapsus linguæ, in dictation, which would have been promptly corrected if the court's attention had been directed thereto. The objection made by defendant was entirely too general, referring as it did to four distinct and separate paragraphs of the instructions upon four different subjects. Pease v. McGill, 17 N. D. 166, 115 N. W. 260; 38 Cyc. 1796. We are clearly of the opinion that defendant is not now in a position to predicate error thereupon. Furthermore, it is not apparent that such instruction was prejudicial in view of the expenses, the suffering and loss sustained by plaintiff considered in connection with the amount of the verdict for actual damages rendered.

The consideration of the various offers of proof and of evidence presents a more serious question. The acts and conduct of the plaintiff, so connected with the time and the performance of an alleged assault as to induce a presumption that they were provocative of defendant's passion and excitement continuing and existing at the time of the assault, are often properly admissible to disprove or minimize malice. 5 C. J. 676, 678, note in 16 A.L.R. 816. Their admissibility is somewhat determinable through their close connection with the facts and circumstances of the alleged assault. They may not be received mere-

ly for the purpose of proving grounds for malice and of justifying the malice that consequently resulted. Their admissibility must be considered in connection with the particular facts of the case. In this case, some of the offers made are very general with reference to the time of, and concerning their connection with, the assault. The trial court indicated that he had permitted introduction of testimony to show the mental attitude or condition of plaintiff's mind. From the record it must be noted that the defendant in his testimony or otherwise does not show a single circumstance of any act or conduct that could be construed as a threat or as a menace to defendant or his property at the time of this assault. In no manner does he seek to explain by his testimony his deliberate act of seizing a club and running after the plaintiff over a block away. For instance, the offer made to prove that plaintiff went by defendant's home and made angry grimaces at his residence in no manner contained the element of proof that this act, if true, was seen by or communicated to the defendant or that he was provoked thereby. No overt act of plaintiff at the time of this assault is shown which in any manner served to establish that defendant was placed in a position of fear or in such mental condition or excitement that could not have been controlled in the absence of malice. See Cummins v. Crawford, 88 Ill. 312, 30 Am. Rep. 558, 561; State v. Lehman, 44 N. D. 572, 583, 175 N. W. 736. The proof offered concerning plaintiff's disposition and character would afford a reason for avoiding, not for soliciting an assault, in the absence of malice. The outstanding feature upon this record was that this assault was solicited by the defendant. Plaintiff testified that he did not even see the defendant at the time of the assault. In view of the fact that defendant in his own behalf offered no testimony to show overt acts or menacing conduct by plaintiff at the time of the assault and of his own mental condition aroused to action through a series of provocative acts as enumerated in the offered testimony, we are of the opinion that the rejection of this proffered testimony may not be considered prejudicial error. The verdict for exemplary damages was $1,000. It might readily have been for a much larger amount considering the deliberate character of the assault. Upon the entire record we are satisfied that the learned trial court accorded to defendant a fair trial. The judgment is affirmed with costs.

CHRISTIANSON, BIRDZELL, NUESSLE, and JOHNSON, JJ., concur.

BRONSON, Ch. J. (upon petition for rehearing). Defendant, in his petition, complains that the court has misunderstood the record and has erroneously treated *objections* to instructions as *exceptions*. At the time when the charge was given to the jury, the record shows a statement by the trial court as follows: "Let the record show that the proposed charge to the jury was submitted to respective counsel on both sides and that they were required to take exceptions thereto in writing and that the only exceptions taken are those that were filed by the court with the clerk.

Sec. 7621, Comp. Laws 1913, provides that all instructions to the jury, whether given in writing or orally, shall be deemed excepted to unless the court, before giving them, asks for exceptions to be noted, in which case all proceedings connected with the taking of exceptions shall be in the absence of the jury and a reasonably sufficient time shall be allowed counsel to take such exceptions. This law was enacted in 1913 and is known as the "Practice Act."

Sec. 7620, Comp. Laws 1913, which was in force many years before the Practice Act was adopted, provides that the court may, in its discretion, submit written instructions to counsel for examination and require such counsel, after a reasonable examination, to designate such parts thereof as he may deem objectionable and each counsel must thereupon designate such parts of such instructions as he may deem improper and thereafter only such parts so designated shall be excepted to by the counsel designating the same. The defendant asserts that the court did not ask for exceptions; that he did submit the instructions and ask for examination thereof; that, pursuant thereto, defendant filed written objections in accordance with said § 7620; that at no time did the trial court mention exceptions excepting at the time when he made the record notation above stated. The objections that defendant made to the instructions are designated objections; but, the record is clear, pursuant to the record statement made by the court, that counsel were required to take exceptions thereto in writing and that the only exceptions taken were those that were filed by the court with the clerk. These included such objections to instructions and also instructions refused.

Defendant cites and relies upon Paulsen v. Modern Woodmen, 21 N. D. 235, 130 N. W. 231. This case was decided in 1911 before the 1913 Practice Act was adopted. Then, exceptions might be taken to instructions within twenty days after their filing. Rev. Codes 1905, § 7022. Now, no exceptions are required unless the court so requests. Comp. Laws 1913, § 7621. We must take the record as it is. If the trial court failed to settle the record in accordance with the facts, defendant had an appropriate and ample remedy by application to this court. Comp. Laws 1913, § 7657; Blood v. Howard, 31 N. D. 602, 154 N. W. 524. The petition for rehearing is denied.

BIRDZELL, JOHNSON, NUESSLE, and CHRISTIANSON, JJ., concur.

THE STATE OF NORTH DAKOTA EX REL. GEO. F. SHAFER, Attorney General, and H. F. Horner, State's Attorney of Cass County, Relators, v. THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR RANSOM COUNTY, and the Hon. Geo. M. McKenna, Judge thereof, Respondents.

(194 N. W. 745.)

Courts — supervisory power of supreme court over inferior courts not affected because district court was acting within its jurisdiction.

1. The power of the supreme court, under § 86 of the Constitution, to exercise superintending control over inferior courts is not affected by the fact that the district court was acting within its jurisdiction.

Indictment and information — statutory provisions held to provide exclusive procedure governing motions to dismiss indictments.

2. Sections 10,731, 10,732, 10,733 and 10,734, Comp. Laws 1913, are held to provide an exclusive procedure governing motions to dismiss indictments, and when indictments are erroneously dismissed upon motion, the further proceedings must be as contemplated in the statute.

Opinion filed July 25, 1923.

Courts, 15 C. J. § 535, p. 1104 n. 79; Indictments and Informations, 31 C. J. § 366 p. 796 n. 15.

Application for Supervisory Writ.

Writ denied.

Geo. F. Shafer, Attorney General, *H. F. Horner,* State's Attorney of Cass County, and *Geo. A. Bangs,* Special Assistant Attorney General, for relators.

Burke & Burdick, Barnett & Richardson, Wolfe & Schneller, and *Pierce, Tenneson, Cupler & Stambaugh,* and *W. S. Lauder,* for respondent.

BIRDZELL, J. The attorney general has presented to this court an application for the issuance of a supervisory writ directed to the district court of the third judicial district and to the Honorable Geo. M. McKenna, judge, which shall require the respondent to vacate certain orders setting aside certain indictments. After service of notice of the motion for the issuance of the writ, a hearing was had. Upon the hearing the defendant objected to the jurisdiction of this court and argued orally in support of the objections filed. This court subsequently ordered additional arguments on the following questions: 1. "Were the orders of the trial court erroneous?" 2. "If erroneous, has this court the power to rectify the error and reinstate the prosecutions, in view of the fact that the defendants were discharged and bail exonerated?" The respondent has certified to the transcript of the proceedings below, which, including the original records and indictments, constitutes his return.

From the verified application, the transcript of proceedings certified by the respondent as a part of the return and from the exhibits, the following facts appear: On May 2, 1922, a grand jury was convened in Cass County and from that time until the 18th of May regular sessions were held and certain investigations conducted. Among the matters investigated was the criminal responsibility, if any, of various individuals for the failure of the Scandinavian American Bank of Fargo. The sessions were attended by the state's attorney of Cass county, by the attorney general, a regular assistant attorney general and a special assistant attorney general. During the sessions some forty-three witnesses appeared before the grand jury, and on the 16th and 17th days of May, thirty-five indictments were voted and returned against twelve defendants. The indictments involved in this proceeding charge cer-

tain crimes against the defendants in connection with the operation of the Scandinavian American Bank, and upon each is indorsed the names of witnesses examined, the number varying for the different indictments from ten to twenty-one. Subsequently, the place of trial of the actions was changed from Cass county to Ransom county, and on March 6, 1923, motions to quash the indictments were heard before the respondent herein. Numerous grounds in support of the motion were urged, among them the following: That the attorney general and his assistant were permitted to be present during the proceedings of the grand jury in violation of § 10,666 of the Laws of 1913; that the special assistant was permitted to be present; that the special assistant was not duly qualified as a special assistant, not having received his appointment and qualified under it; that the evidence of a large number of witnesses covered a variety of crimes and the evidence was received while the grand jury was investigating under the general head of Scandinavian American Bank cases; that such evidence was received en masse against all the defendants; that the grand jury did not vote indictments against any defendants until the evidence had all been received; that the names of all the witnesses examined before the grand jury were not indorsed upon each one of the indictments; that the names of fourteen witnesses do not appear on any of the indictments returned in the Scandinavian American Bank cases; that, according to the minutes of the grand jury the attorney general was sworn as a witness in connection with the purported refusal of one defendant, F. W. Cathro, to appear as a witness before the grand jury and his name does not appear as a witness upon any indictment; and upon other grounds not necessary to mention here. The respondent at the hearing of the motion took certain evidence with reference to the grand jury proceedings and thereafter granted the defendants' motion to quash. The order entered in each instance sets aside the indictment and does not direct any further proceedings nor hold the defendants subject to further proceedings, as the court is authorized to do under §§ 10,732 and 10,733, Comp. Laws 1913.

At the outset of this controversy, the respondent herein objects to the issuance of any supervisory writ which will require further proceedings in the criminal cases in which orders setting aside the indictments were made on the ground that this court has jurisdiction neither

of the subject matter, nor of the person of the respondent, and that, irrespective of the power of the court to assume jurisdiction, a proper case for the exercise thereof is not made upon the face of the motion and of the application.

The application is one which is clearly addressed to the superintending jurisdiction of this court as the same is expressed in § 86 of the Constitution. The section reads:

"The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state and *shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.*"

The two branches of jurisdiction conferred by this section, as well as that of the original jurisdiction conferred in the following section, have heretofore been sufficiently discussed and outlined in the adjudications of this court that there is no occasion now to attempt restatement of the principles that control generally in determining jurisdictional questions. State ex rel. Goodwin v. Nelson County, 1 N. D. 88, 8 L.R.A. 283, 36 Am. St. Rep. 609, 45 N. W. 33; State ex rel. Moore v. Archibald, 5 N. D. 359, 66 N. W. 234; State ex rel. Lemke v. District Ct. ante, 27, 186 N. W. 381.

In the last case cited this court, in an exhaustive opinion by Mr. Justice Christianson, reviewed the various decisions in this state and in Wisconsin, South Dakota and Montana, whose constitutions are quite similar in this respect to our own, and came to the conclusion that, by Section 86 of the constitution, this court is vested with a general superintending control over inferior courts, which not only enables it but requires it, in proper cases, to control the course of litigation so as to prevent miscarriage of justice, especially in cases where there is no appeal or where the remedy by way of appeal is inadequate. The power expressed in the constitution is unlimited, save as its exercise may be regulated and limited by statute. The only statute that has been passed in the whole period the constitution has been in force, which bears directly upon the jurisdiction of superintending control (chapter 118 of the Laws of 1891, § 7339, Comp. Laws 1913), in no way limits or restricts the power. On the contrary it seems to place the entire responsibility for the proper exercise of superintending jurisdic-

tion in the court, for it says, § 7339: "And in its superintending control over inferior courts it may issue such original and remedial writs as are necessary for the proper exercise of such jurisdiction." It is for the court, then, to determine when a proper case is presented for the exercise of its superintending control.

Is the power of the court in any way affected by the fact that the district court was acting within its jurisdiction? We are clearly of the opinion that it is not. In the case of State ex rel. Lemke v. District Ct. ante, 27, 186 N. W. 381, it was not suggested that the district court did not have jurisdiction to grant the restraining order which this court, in the exercise of its superintending control, set aside, nor does it appear that the action of this court was in any way influenced by the consideration as to whether or not the district court had jurisdiction to do what it did. And in Wisconsin, where the precedents under a constitution like ours are more numerous than elsewhere, it is held that the power of superintending control is not restrained or suspended by the fact that the court whose actions are to be reviewed has acted within its jurisdiction and has exercised judicial power. See State ex rel. Umbreit v. Helms, 136 Wis. 432–439, 118 N. W. 158. Indeed, it is difficult to comprehend the existence of an efficient power of superintending control if the power must always stop short of an interference when it is ascertained that the inferior tribunal was acting within the scope of its jurisdiction. How would it be possible, with the powers so limited, to "restrain excesses," "quicken neglects" and "prevent miscarriages of justice" if all of them may be practised with impunity within the range of the tribunal's jurisdiction?

Closely allied to the foregoing contention is the further proposition advanced on behalf of the respondent that the power of superintending control cannot be exercised by the court for the reason that there is nothing before the lower court which can be acted upon. The indictments have been dismissed, the defendants discharged and their bail exonerated. It is said that by reason of this fact the criminal cases are no longer pending before the district court; that the court itself has nothing before it to which it could address judicial action; and that this court cannot require any action to be taken that is not otherwise within the scope of the powers of that court. This argument when analyzed amounts to this: that an inferior court of general jurisdiction

can, by its own erroneous action, defeat the constitutional powers of this court. This is a reductio ad absurdum. It should require no argument to refute it. The truth is that the three branches of the jurisdiction of this court, namely, appellate, superintending control and original, were each granted in the Constitution with a view to the efficient exercise thereof by the court, and there were granted along with the powers the means and instrumentalities through which they might become effective. It may as well be argued that an inferior court acting erroneously might defeat the exercise of the appellate power of this court. The logical and complete answer to the proposition advanced is that the power of superintending control attaches where the error of the trial court begins, and when it is exercised it directs the trial court to go back to the point where the error was committed and to proceed henceforth in accordance with the law and within its jurisdiction. It may be that certain acts would be prerequisite to further proceedings, such for instance, in a criminal case, as a rearrest of the defendant, but that is not an insuperable objection to the further proceedings. So long as a defendant has not been placed in legal jeopardy his substantial rights are not invaded if he is brought to trial upon a legal presentment or information. He has no vested right grounded upon preliminary error. It might as well be argued that he could not be made to respond to a second indictment for the same offense.

This identical argument has likewise been answered in Wisconsin in the case of State ex rel. Fourth Nat. Bank v. Johnson, 103 Wis. 591, at p. 624, 51 L.R.A. 33, 79 N. W. 1081. In answering the argument that mandamus would not be employed to correct erroneous action, the court said: "This difficulty, also, is more apparent than real. While it is true that the legitimate function of the writ of mandamus is to compel action by the inferior court, rather than to reverse action already taken, it would be gross absurdity to hold that, after refusal to perform the duty within its jurisdiction, the inferior court could nullify the constitutional grant of superintending power by the entry of any order or orders. This court holds its power under no such uncertain terms. Those powers are not dependent upon the speed with which the trial court enters orders. If it becomes necessary, in the due discharge of its power of superintending control, that orders of the inferior court be vacated, this court will not hesitate to compel the vacation of such

rder by the inferior court by so framing its writs of mandamus. With the superintending control and the attendant writs this court took all the power necessary to make that control and those writs effective, and its arm is not nerveless because no writ may be found in the form books so framed as to meet the emergency. The writ may be framed to meet the exigencies of the case, and the court will discharge the duties of the trust reposed with it by the people, though it becomes necessary to modify and enlarge the terms of the ancient writ."

People ex rel. Robinson v. Swift, 59 Mich. 529, 26 N. W. 694, presents a situation parallel with the case at bar. The trial court had sustained the motion to quash an indictment and discharged the defendant from custody. Thereafter the Supreme Court entertained an application to review the action. It held that the action of the lower court was not final in the sense that it was beyond review and required the court to proceed with the prosecution under the indictments that had previously been set aside.

We are clearly of the opinion that the jurisdiction of this court under its superintending control power is not defeated by an erroneous order of the trial court discharging the defendants and permitting them to go hence without bail.

The question for our serious concern upon this application is, in view of the statutes of this state governing criminal procedure, is a case resented in which this court should exercise its superintending control? Let it be understood at the outset that no method of appeal has been provided whereby the state may secure a review of the action of the district court in a proceeding other than that which is now before us, and here we would emphasize also the fact that there is nothing to prevent a subsequent prosecution, unless it be, in some instances, the statute of limitations,—and we cannot readily determine upon this application in what instances the statute may be successfully invoked. We have in this state statutory provisions governing the procedure upon motion to quash indictments that are clear and explicit in their statement of consequences to follow the ruling of the district court and the effect is so clear as to have been necessarily within the contemplation of the legislative mind. These statutes originated some fifty years ago, apparently in a proposed codification of the law governing criminal procedure. We find them in force with substantial uniformity in

New York, California, Montana, North Dakota, South Dakota, Washington and Idaho. In some of these states, as for example California and South Dakota, provision is made for an appeal by the state from an order setting aside an indictment or information.

The statutory provisions as found in our Code are as follows:

"Sec. 10,731. If the motion is denied, the defendant must immediately answer the information or indictment, either by demurring or pleading thereto.

"Sec. 10,732. If the motion is granted the court must order that the defendant, if in custody, be discharged therefrom, or, if admitted to bail, that the bail be exonerated, or, if he has deposited money instead of bail, that the same be refunded to him, unless the court directs that another or an amended information be filed or that the case be submitted to the same or another grand jury; or, if the case is such that an information might have been filed against the defendant had a grand jury not been called at the time, or the defendant at any time waives a preliminary examination, in writing, the court may direct an information to be filed for the offense charged in the indictment set aside.

"Sec. 10,733. If the court directs that another or an amended information be filed or that the case be resubmitted to the same or another grand jury, the defendant, if already in custody, must so remain, unless he is admitted to bail; or, if already admitted to bail, or money has been deposited instead therefor, the bail or money is to be answerable for the appearance of the defendant to answer a new information or indictment, and unless another or an amended information or an information in the place of the indictment set aside, as provided in the last section, is filed within ten days from the date of the order, or the filing of the defendant's waiver of a preliminary examination, or a new indictment is found at the same or next term of the district court, as the case may be, the defendant must be discharged and his bail exonerated or money refunded as provided in the preceding section.

"Sec. 10,734. An order setting aside an information or indictment, as provided in this article is no bar to a future prosecution for the same offense."

It will be noticed that, following a favorable ruling of the district court upon the motion, the statutes do not contemplate any further proceedings upon the indictment and, by referring to § 10,993, it will be

seen that the state has no appeal from the order setting it aside. The sections quoted, together with the section on appeals, are to be found in the Code as early as 1877. See Revised Codes of Dakota for 1877, §§ 259 to 262 inclusive, and § 476, Code of Criminal Procedure.

On behalf the state it is argued that these statutes in themselves create a situation justifying the exercise of superintending control where a district court has erroneously dismissed indictments, as a result of which the state will be put to a large burden of expense in calling another grand jury or in proceeding through preliminary hearing and informations, and where, in some instances, new prosecutions may be barred by the statute of limitations. And on behalf the respondent the contention is made in substance that these statutes comprise exclusive regulations of criminal procedure. That as the consequence of an erroneous ruling of the trial court must necessarily have been within the contemplation of the legislature, the statutes must be deemed exclusive insofar as they speak upon the subject matter.

This court does not hesitate to confess a degree of embarrassment in the determination of the questions presented upon these arguments. On the one hand we are clear that the Constitution vests a superintending control generally over the actions of the district courts. On the other hand, we are confronted with the consideration that the legislature, to which must be conceded a large measure of responsibility and an extensive range of power in the regulation of criminal as well as civil procedure, has prescribed certain rules with a view, no doubt, to the accomplishment of the ends of criminal justice. Obviously, this court should not be deterred in the exercise of its jurisdiction unless it is of the opinion that in so doing it may defeat objects which the legislature had in view in prescribing a definite procedure to govern in such cases. No other consideration could properly, in our judgment, operate to deter the exercise of an undoubted power. When confronted with a situation of this character our rule of action should be that which was expressed by Chief Justice Marshall in Cohen v. Virginia, 6 Wheat. 264–404, 5 L. ed. 257–291, where he said:

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by be-

cause it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."

Approaching, then, the consideration of the question with a view to determining whether or not, under the constitution and the statutes of this state, we should exercise the power of superintending control under the present application, let us first note carefully the language of the constitution. It says that this court "shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." We have previously pointed out that no limitations have been imposed and that on the contrary the legislature has declared that this court might issue such writs as are necessary for the proper exercise of its jurisdiction. Whether or not, under a Constitution such as ours, this court must in all circumstances when applications are made appealing to its power of superintending control, exercise an independent judgment entirely apart from the judgment which has been expressed by the legislature, may well be open to serious question. In Wisconsin, Michigan and perhaps some other states, the grant of the complete superintending power is independent of legislative regulation or limitation. The language is "the supreme court shall have a general superintending control over all inferior courts." That this broad grant is directly responsible for the assumption by the Wisconsin court of a high degree of responsibility in the exercise of the power, is made apparent from the language employed by Justice Winslow in the case of State ex rel. Fourth Nat. Bank v. Johnson, 103 Wis. 591, at p. 626 (51 L.R.A. 33), 79 N. W. 1081, where, he said:

"Even admitting that issues of fact were raised by the answer, we cannot admit that the legislature has any power to deprive this court of any part of its constitutional jurisdiction to fully hear and try such questions. By the Constitution this court was given power to exercise fully and completely the jurisdiction of superintending control over all inferior courts. This power carries with it not only the writs necessary to its exercise, but the right to hear and determine the cause when

the writ has brought it before the court. No part of that power can be taken away by a statute. This court will always pay all due deference to the legislative will, and upon mere questions of practice or orderly proceeding will heed and conform to the statute; but when the statute invades or attempts to take away any of the constitutional powers of the court the court would be untrue to itself, and to the people, from whom it holds its commission, if it permitted the statute to control. As said in Klein v. Valerius, 87 Wis. 54, 22 L.R.A. 609, 57 N. W. 1112: 'It must be remembered that this court as well as the legislature gets its judicial power and jurisdiction directly from the constitution' . . . but the statute cannot be considered as obligatory upon the court, especially in a case like the present, where the questions at issue arise upon the record alone, and where the course presented by the statute would amount to a denial of relief. Such a holding would amount to a practical abdication of constitutional powers, or rather, perhaps, to a submission to legislative invasion of constitutional powers."

Since the legislature has not in any manner attempted to limit the powers of this court with respect to superintending control, it may well be inferred that the power is one to be exercised whenever, in the judgment of the court, a situation calling for its exercise exists; but, nevertheless, we are of the opinion that action by a district court, under the express provisions of a statute which is attended by no consequences other than such as are likewise within the purview of the statute, presents a different situation to the reviewing court, where its supervising power is invoked, than is presented where the action of the inferior tribunal is based merely on its common law or inherent powers. In the latter situation (see People v. Glen, 173 N. Y. 395–400, 66 N. E. 112), the court is guided by a common law that is largely the creation of the courts; in the former it is but an instrument in carrying out a legislative plan, intended, doubtless, to be an improvement upon the common law. If its action as a common-law tribunal is out of accord with accepted law, it may properly be subject to supervision. But where it seeks merely to carry out the mandates of a statute and where its action either way is attended by consequences especially provided in the act, manifestly a different situation is presented to the supervising authority.

In the respect indicated above, the cases relied upon by the relator, principally People ex rel. Robinson v. Swift, 59 Mich. 529, 26 N. W. 694; State ex rel. McGovern v. Williams, 136 Wis. 1, 20 L.R.A.(N.S.) 941, 116 N. W. 225, and State ex rel. Umbreit v. Helms, 136 Wis. 432, 118 N. W. 158, are not parallel with the situation before us, however persuasive they may be as authorities on the question of power. It may be noted, too, that, closely following the decision of the last cases cited from Wisconsin, the legislature amended the appeal statute by providing for an appellate review of the orders of the circuit courts quashing indictments before jeopardy has attached. See chap. 324, Wis. Laws for 1909 and chap. 187, Wis. Session Laws of 1911.

Reference to our statutes will disclose that the action of the district court in ruling on the motion might be equally erroneous even though he had expressly provided that the defendants be held subject to further prosecution and though the bail had not been exonerated. Proceedings on the original indictments are equally at an end. It might be equally erroneous though, following such order, the matter had been submitted to a second grand jury and no indictment returned. The defendant not having yet been in jeopardy, it might be urged, with logic as persuasive as that employed here, that this court should exercise its superintending control to prevent a guilty defendant from escaping prosecution under the original indictment erroneously set aside. From our consideration of the statute, we are convinced that the legislature intended to provide an exclusive means for conducting the prosecution of a defendant where an indictment was quashed by the district court acting within its jurisdiction, and being of this opinion, we think the responsibility for error should be held to lie where the legislature placed it. If in particular cases it may result in the escape, on technical grounds, of persons who should be punished for public offenses, it may well be observed that this is only one of numerous instances where the legislature, acting within its unquestioned sphere, enables technicality to defeat justice. An instance of this, gathered from some of the cognate provisions of the law in question, will suffice for an illustration. Suppose that a crime has remained hidden from the view of the prosecutor until shortly before the expiration of the statute of limitations. The prosecutor conducts an investigation before a grand jury resulting in an indictment. Through oversight the grand jury neglects

to indorse upon the indictment the name of one of the witnesses examined before it and when the accused is arraigned, after the bar of the statute has attached he moves to set aside the indictment on the ground that the name of a witness examined before the grand jury and all the time known by him to be one of his accusers has been omitted from the indictment, clearly such an error affects no substantial right. A great jurist has said that it seems almost an absurdity to set aside an indictment on any such ground (Mitchell, J., in State v. Hawks, 56 Minn. 129, 57 N. W. 455–458); yet the legislature has seen fit to make it the mandatory duty (Comp. Laws 1913, § 10,728) of the court in these circumstances to dismiss the indictment. It would not be argued by anyone that a miscarriage of justice directly resulting from legislative technicality could properly be prevented by the exercise of superintending control by a court. Where a statute indicates the procedure to be followed upon the granting or setting aside of an indictment upon motion, as clearly as does the statute in question, and, where it is apparent on the face of the law that the legislature contemplated, in the event of a ruling adverse to the state, nothing but proceedings upon a subsequent information or indictment, and, where, the subject-matter is as appropriately one for legislative regulation, we are of the opinion that the statute must be held to be exclusive. From this it follows that the writ should not issue in this case.

We have given to the questions presented upon this application that careful and painstaking consideration which in our judgment is merited by their importance. The matters that have been urged upon us in this connection reach not only to the very foundation of the power of this court, but, as will be seen from the foregoing, lead at least to the borderline of the field of conflicting powers of the co-ordinate branches of the government. It must be obvious that questions of such delicacy would not be considered by this court if, in our judgment, occasion did not exist for so doing. The occasion in this instance, of course, can be none other than our opinion that, in major part at least, the action of the trial court was erroneous. The conclusion at which we have arrived with respect to interference makes our views on the merits of the action taken below of minor importance—especially in view of the infrequency of grand jury proceedings in this state; but, as our serious consideration of the delicate questions above discussed must necessarily be

taken as an implied holding adverse to the action of the lower court, we deem it a duty to state briefly only our adverse viewpoint.

The district court, in disposing of the motion, filed an extended memorandum opinion in which he discussed, somewhat elaborately, various grounds of the motion. A large portion of the discussion is embodied under the heading: *"Can all the testimony of a large number of witnesses be taken 'en masse,' before a grand jury, relating to a large number of crimes, against a large number of different persons, without special reference to any specific charge, or any specific defendant and such testimony en masse be considered by the jury at the close of all the testimony, and indictments found against a large number of persons, without vitiating the indictments so found?"* The query itself, as well as the discussion under it, reflects the viewpoint of the trial court and it will serve as well as any more elaborate statement might serve as a basis for indicating wherein we differ in opinion. In our judgment the obvious answer to the query is yes. It is manifestly not directed to any matter that is vital to the validity of any indictment. The statute imposes no particular order for the calling of witnesses before a grand jury, nor does it limit the number of subjects or objects that might be under investigation during the grand jury session, nor the number of witnesses that may be called to testify concerning any public offense, nor the number of offenses concerning which one witness may testify, nor is the grand jury bound to give legal definition to a course of reprehensible conduct and head its investigation with the name of a public offense before it can proceed legally to investigate it. The grand jury is an inquisitorial body, sitting largely without court guidance. Its investigations are ex parte. It is not trying defendants, it is ascertaining if they should be placed on trial. When viewed from this standpoint many of the irregularities which seemed vital to the trial court, to us seem but technical at most, and matters which to the trial court seemed to absolutely preclude intelligent consideration, at most involved only the convenience or inconvenience of the jury. If it be assumed that the members sought conscientiously to perform their duty and were possessed of reasonable intelligence, and if their action be clothed with the reasonable presumptions that should obtain, conclusions at variance with those of the trial court are necessitated in many instances. The substantial right of no individual who is indicted by a

grand jury is violated if the grand jury has in fact received evidence sufficient in its judgment to warrant a conviction and if it has in fact indorsed the names of the witnesses giving such evidence upon the indictment returned and has otherwise safeguarded its sessions in the manner required by law. It is significant, in this connection, that with the possible exception of the testimony given by the attorney general relating to the nonappearance of Cathro before the jury, the defendants, who challenged the indictments, did not show that the name of any witness, who had given testimony concerning the charge against any defendant, had been omitted from the indictment. In our opinion, all of the indictments, except those against Cathro, upon which were not indorsed the name of the attorney general, were clearly valid as against the objection that the names of witnesses examined before the grand jury were not indorsed thereon.

We deem it unnecessary to engage in a further discussion of the merits of the action of the district court. It follows from what has been said that the supervising writ must be denied and it is so ordered.

CHRISTIANSON and NUESSLE, JJ., and KNEESHAW, Dist. J., concur.

Mr. Justice JOHNSON, being disqualified, did not participate, Honorable W. J. KNEESHAW, of the Second Judicial District, sitting in his stead.

BRONSON, Ch. J. (concurring). I agree that the court should not invoke the power of superintending control upon the original application as presented. In a recent case this court has said that this power is a branch of the sovereign power of the people, committed as a sacred charge to this court, not to be exercised upon light occasion, or when other and ordinary remedies are sufficient. State ex rel. Lemke v. District Ct. ante, 27, 186 N. W. 381, 387. The grant of this power was not intended to provide for the power of review as by appeal. State ex rel. Red River Brick Corp. v. District Ct. 24 N. D. 28, 32, 138 N. W. 988. Where it is sought to compel action by an inferior court, the power may not be invoked to correct errors in a case where the lower court has not refused to act but has committed some mistake. State ex rel. Northern P. R. Co. v. Judge of District Ct. 3 N. D. 43, 53 N.

W. 433; State ex rel. Atty. Gen. v. Dist. Ct. 13 N. D. 211, 218, 100 N. W. 248.

The constitution provides that this court shall have a general superintending control over all inferior courts *under such regulations and limitations as may be prescribed by law.* N. D. Const. § 86. The Wisconsin Constitution does not contain the underscored words above quoted. See Wis. Const. art. 7. Thus, the Wisconsin cases cited by the petitioner can be distinguished in application of the power. The statute provides that this court in its superintending control over inferior courts may issue such original and remedial writs as are necessary to the proper exercise of its jurisdiction of superintending control. Comp. Laws 1923, § 7339.

In the original application presented to this court it appears that the trial court, upon motion made, set the indictment returned upon statutory grounds.

The statute in such case provides that the court, if it sets aside the indictment, *must order that the defendant,* if in custody, *be discharged* therefrom or, if admitted to bail, that the *bail be exonerated* or, if he has deposited money instead of bail, that the same be refunded to him *unless the court directs that another or an amended information be filed or that the case be submitted to the same or another grand jury.* Comp. Laws 1913, § 10,732. Further, the statute provides that, "if the court directs that another or an amended-information be filed or that the case be resubmitted to the same or another grand jury, the defendant, if already in custody, must so remain unless he is admitted to bail; or, if already admitted to bail, or money has been deposited instead therefor, the bail or money is to be answerable for the appearance of the defendant to answer a new information or indictment, and unless another or an amended information or an information in the place of the indictment set aside, as provided in the last section, is filed within ten days from the date of the order, or the filing of the defendant's waiver of a preliminary examination, or a new indictment is found at the same or next term of the district court, as the case may be, *the defendant must be discharged* and *his bail exonerated* or money refunded as provided in the preceding section." Comp. Laws 1913, § 10,733.

These statutory provisions give to the trial court a power to order that another or amended information be filed or that the case be resub-

mitted to the same or another grand jury. It grants the additional power to the trial court to retain the defendant in custody if he so directs. These statutory provisions so quoted are found in the law of New York, Montana, and California. Cook, Crim. Code (N. Y.) 1918, §§ 317, 318; Mont. Rev. Codes 1907, §§ 9195, 9196; Penal Code, Kerr's Cyc. Code (Cal.) §§ 997, 998. This power so granted to the trial court did not inhibit or deny the power and authority of the prosecuting officials to again resubmit before a grand jury the subject-matter involved in the indictment quashed or to institute proceedings otherwise for a further prosecution. People v. Rosenthal, 197 N. Y. 395, 46 L.R.A.(N.S.) 31, 90 N. E. 991; People v. Breen, 130 Cal. 74, 62 Pac. 408.

Accordingly, the trial court has jurisdiction under the statute to hear the motion to quash the indictment. It had the power to deny or grant this motion. With jurisdiction over the indictment and the person of the defendant, it heard the motion to quash. It granted such motion. It also possessed, then, pursuant to the statute, the jurisdiction and the power to direct the prosecuting officials to resubmit the subject matter to the same or another grand jury or to take proceedings for the filing of an information; also to retain the custody of and jurisdiction over the defendants. The trial court, pursuant to its power and authority, did not order that the subject matter be referred to the same or another grand jury. Thereupon, pursuant to the statute, it became the duty of the trial court to discharge the defendants and exonerate their bail. This was done. Thereupon the trial court dispossessed itself of jurisdiction over the person of the defendants and over the subject matter then pending before him. Thus, pursuant to the statute, it is clear that the statute has provided a specific method for further prosecution when an indictment has been quashed even though the trial court has erroneously quashed the same. First, it permits the trial court to direct the subject matter to be submitted to the same or another grand jury and to retain custody of the defendants concerned; second, the prosecuting officials have the power and authority, irrespective of the court's order, to institute another proceeding either before a grand jury or by way of a preliminary examination and an information to bring the matter before the court, not in the same proceeding but in another proceeding. Section 10,733, Comp. Laws 1913, specifically provides

that an order setting aside an indictment is no bar to a future prosecution for the same offense. I am accordingly of the opinion that the statute has explicitly provided for future proceedings in cases like the case at bar where an indictment has been quashed; that, pursuant to the statute, the trial court, after it made its order discharging the defendants and no order directing the prosecuting officials to resubmit the subject matter to the same or another grand jury, lost its jurisdiction and did not thereafter possess the power or the authority to set aside its own order and reinstate the indictment; State ex rel. Gold v. Secrest, 33 Minn. 381, 23 N. W. 545. See State v. Kelsey, ante, 147, 190 N. W. 817. The statute provides the method for reinvesting jurisdiction through independent proceedings.

E. R. SINKLER, Respondent, v. GURLY SINKLER, Appellant.

(194 N. W. 817.)

Divorce — judgment distributing estate cannot be modified except upon grounds on which ordinary judgments may be modified.

1. Where, in a divorce action, the court decrees a final distribution of the estate of the parties, it is *held*, for reasons stated in the opinion, that the court cannot, several years later, modify such final judgment upon the application of the husband, except upon some one or more of the grounds on which ordinary judgments may be modified, vacated or set aside.

Divorce — failure to make payments under decree finally distributing property held not contempt.

2. For reasons stated in the opinion, it is *held* that the trial court did not err in refusing to adjudge the plaintiff guilty of contempt for failure to make periodical payments to his divorced wife in conformity with the terms of the original decree of divorce.

Opinion filed July 26, 1923.

Divorce, 19 C. J. § 617 p. 272 n. 32; § 699 p. 304 n. 47.

Note.—On validity of agreement made after divorce as a substitute for an award of alimony, see note in 35 L.R.A.(N.S.) 1167.

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

Defendant appeals from a judgment and order dismissing contempt proceeding and modifying an original decree of divorce.

Reversed in part; affirmed in part.

Bosard & Twiford and *Murphy & Toner,* for appellant.

Greenleaf & Wooledge and *Palda & Aaker,* for respondent.

JOHNSON, J. This is an appeal from a judgment and an order of the district court of Ward county, dismissing contempt proceedings against the plaintiff and respondent and modifying an original order and decree of divorce.

On May 19, 1916, E. R. Sinkler commenced a divorce action against Gurly Sinkler, his wife. Answer was in due time interposed, denying the charge and asking for temporary alimony and counsel fees. On the 23rd of March, 1917, the defendant in the divorce action served an amended answer on the plaintiff therein and a cross-complaint alleging desertion, praying for absolute divorce, the custody of the children and for other relief. On the same day, plaintiff answered the cross-complaint, denying the allegations thereof generally. On the 23d day of March, 1917, the action was heard in Ward county. On that date the plaintiff and defendant entered into a contract effecting a settlement of their property rights in view of the pending divorce action and the possibility of a decree. By the terms of this agreement, the defendant in that action released all her interests in the real property of the plaintiff; the plaintiff agreed to pay to the defendant, in the event of a divorce, the sum of $300 when the decree was signed and the further sum of $250 to the counsel for the defendant; plaintiff agreed that his wife should have as her absolute property certain specific personal property; and he would pay her $225 monthly during the term of her natural life "as and for permanent alimony." The defendant, in consideration thereof, agreed to support the children and keep a home for them without charge to them until they should be twenty-five years of age. It was further, in effect, stipulated that the agreement should be construed as a confession of judgment if the husband defaulted in any payments and that judgment might be entered in the district court of Ward county for each and every instalment in default upon the affidavit of Mrs. Sinkler stating the amount due and unpaid, which affidavit

was to be submitted ex parte to the district judge and an appropriate order for judgment made thereon and a judgment entered by the clerk of the district court accordingly. Judgments so entered were to become liens upon the real property of the plaintiff and ordinary execution had thereon. It was further stipulated, in case a decree of divorce were made, that the court should decree in full payment of all claims by defendant against plaintiff's property as permanent alimony to the defendant the sum of $225 monthly, payable as stipulated. The agreement contained the following stipulation: "Neither party shall at any time apply to any court to either decrease or increase said alimony (hereby fixed at the sum of $225 per month)." The contract provided that the stipulation just quoted should be and it was in fact incorporated in the decree.

On the 23d of March, 1917, the court made findings of facts and conclusions of law generally in favor of Mrs. Sinkler for a divorce on the ground of desertion. The sixth finding is hereinafter set forth. The fifth conclusion of law is as follows:

5. "That as permanent alimony the defendant should be awarded the sum of $300 payable upon the entry of this decree (and the further sum of $250 as and for counsel fees) and the further sum of $225 for each and every month during the life of the defendant, payable on the first day of each month, commencing with the first day of April, 1917, said monthly payments should not be increased or diminished at any time or by any court upon the application of either party pursuant to the written agreement of the parties of said action, fixing said alimony."

On the 23d of March judgment was entered in conformity with the finding and the order of the court.

The plaintiff paid the defendant, according to the agreement and the decree, the sum of $300 and $250 to her counsel. Certain other payments were made, but plaintiff defaulted during the years 1921 and 1922, and, acting under the stipulations in the contract, judgments were entered against the husband in Ward county on July 12, 1921 for $525.25, and on December 27, 1921, for $934.82. Executions were issued thereon and levies made on real property of the plaintiff.

On the 17th of January, 1922, the plaintiff being still in arrears under the decree, Mrs. Sinkler applied to the district court for an order

requiring plaintiff to show cause why he should not be adjudged guilty of contempt for failure to pay according to the decree. This order was returnable on the 26th of January, 1922. On January 20, 1922, the plaintiff served notice on the defendant that on the return day for the order aforesaid in the contempt proceedings, he would apply to the court for an order modifying the judgment entered in the original divorce action, on the 23rd of March, 1917, and supported such application by his own affidavit and the files in the action. It is not necessary to set out in full the detailed statement of facts in the affidavit upon which the plaintiff asked the court to modify the original decree as to the payment of $225 monthly. In general, it is based upon the allegations that the plaintiff's earnings as a lawyer have decreased very materially; that his law business has not been lucrative and that he cannot earn an amount sufficient to pay according to the decree and to support himself and his present wife at the same time.

On the 26th of January, on the return day, the defendant replied to the plaintiff's affidavit, denying generally the allegations of inability made by the plaintiff and asserting that the original decree was based upon a contract fairly entered into and setting up other facts not necessary to detail here.

Upon the affidavit and moving papers aforesaid, the matter was heard on April 28, 1922, and the court made its order dismissing the contempt proceedings and modifying the original decree so as to release the plaintiff from the obligation to pay defendant $225 per month during her natural life and permitting and directing plaintiff to pay instead the gross sum of $6,000, in full as settlement of property rights between the parties. The court found that, because of adverse financial conditions, the plaintiff was unable to earn enough to make payments in accordance with the original decree. The gross sum of $6,000 ordered to be paid included the amount of the two judgments heretofore referred to.

On this order of the court judgment was duly entered on the 21st of June, 1922 and Mrs. Sinkler, in this appeal, challenges the correctness of the order and of the judgment.

Our statute, § 4405, Comp. Laws 1913, gives the court control over divorce decrees, and the authority to modify judgments in divorce actions. The statute reads as follows:

Sec. 4405. Support. "When divorce is granted, the court shall make such equitable distribution of the property of the parties thereto as may seem just and proper and may compel either of such parties to provide for the maintenance of the children of the marriage, and make such suitable allowances to the other party for support during life or for a shorter period as to the court may seem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects." See Rindlaub v. Rindlaub, 28 N. D. 168, 147 N. W. 725.

Section 4411, Comp. Laws 1913, provides that either husband or wife may enter into contracts with the other and with other persons respecting property to the same extent as if unmarried. After marriage, the wife has the same rights with respect to property, contracts and torts as before marriage. Section 4412, Comp. Laws 1913, gives husband and wife the power to contract with reference to maintenance during separation.

The right of husband and wife to contract with respect to the division of property in the event of a divorce has also been recognized by the courts. The contract entered into in this case would be enforceable in equity between the parties if not incorporated in the decree. Nelson v. Vassenden, 115 Minn. 1, 35 L.R.A.(N.S.) 1167, 131 N. W. 794. The rule is that agreements respecting property rights, the divorce proceedings be pending, are not void as in contravention of good morals or public policy unless their purpose or effect be in some way to facilitate divorce proceedings. Burgess v. Burgess, 17 S. D. 44, 95 N. W. 279; Ward v. Goodrich, 34 Colo. 369, 2 L.R.A.(N.S.) 201, 114 Am. St. Rep. 167, 82 Pac. 701. Such agreements, when reasonable, when fairly entered into, without fraud or misrepresentation, while they are carefully scrutinized by the courts, are, when confined to the adjustment of property rights, binding and will be enforced. Amspoker v. Amspoker, 99 Neb. 122, 155 N. W. 602; Phillips v. Phillips, 39 R. I. 92, 97 Atl. 593, 12 L.R.A.(N.S.) 848, note; Nelson v. Vassenden, supra.

In the Vassenden Case, Judge Simpson, speaking for the supreme court of Minnesota, says that it is desirable that the parties submit the contract to the court for approval because they are thereby relieved later from the necessity of proving that the contract was fairly entered into

and was not fraudulent or collusive. That is what the parties did in the case at bar. They submitted the contract to the court, obtained the approval of the court thereon and the incorporation of the material portions of the agreement with reference to the division of property in the decree. The defendant and appellant in this action released her claim to any interest in the real property of her husband in consideration of a cash payment, some furniture transferred to her, and certain monthly payments to her during her natural life. She did not ask the court to award her the homestead or any portion of the property at that time owned by her husband who was and is a practising lawyer at Minot. It appears that at that time his practice was lucrative and that his income then was such that to pay her $225 a month did not seem a serious burden to him. It now appears that it has become a burden, because of financial stringencies which may or may not be permanent, for the plaintiff to make such payments. It further appears in the evidence that the property owned by the plaintiff and respondent in Ward County and elsewhere has deteriorated in value and perhaps has ceased to be of substantial value because of circumstances not material to inquire into at this time. Lands have been sold for taxes, tax liens have been permitted to attach, and the like.

The primary question in this case is whether the district court had power to modify the decree of divorce entered in 1917, under all the facts and circumstances of the case; the correctness of the order vacating the contempt order is also challenged.

It is not to be doubted that the court, under the statute and regardless of any contract of the parties to the contrary, at all times retains control of the decree of divorce insofar as the rights of children are concerned. The court likewise may relieve the parties from contempt, if the circumstances require. The trial court, in the exercise of a sound discretion, had the right to relieve Mr. Sinkler from contempt in this case. In this respect no error was committed.

Whether contempt proceedings may, under any circumstances, be maintained against Mr. Sinkler, in view of the stipulation of the parties, on which the decree is founded, and the availability thereunder of the remedy of execution, we do not now decide. That question is not necessarily involved. That question must be answered in the light of the facts and circumstances when it is properly raised.

Is the decree made by the district court in 1917, one that may be modified fundamentally by the court after five years, under § 4405? In so far as it relates to the support of the children or their custody, or to alimony, that is, support for the wife, it can. Is not the decree, however, in reality, a judgment distributing the property, real and personal, of the parties? If it is, on principle and authority, the court erred in modifying it, as it did, in 1922.

In construing a judgment, effect should be given to every word and part of it; of two possible interpretations, that will be adopted which will harmonize with the facts and the law of the case, and which renders it more reasonable, effective and conclusive. A construction acquiesced in by the parties will not be changed without good reason. A judgment should be interpreted with reference to the findings of the court; and if the judgment be ambiguous, recourse may be had to a duly executed stipulation of the parties. 23 Cyc. 1102, 1103; Thayer v. McGee, 20 Mich. 195. With these principles in mind, it becomes necessary to refer to some of the facts bearing upon the intentions of the parties and the real purpose the court intended to accomplish by the decree.

The contract between the parties upon which the award of permanent alimony, so-called, is based, clearly indicates an intention to adjust finally all the property rights of the parties to the marriage. The contract, in the preamble thereof, recites that the parties have made and intend thereby to make a "full and complete settlement of the property rights between the plaintiff and defendant." It is further agreed in the contract that the wife shall convey to the husband her interest in specified real property in Minot and also some farm land. The contract further provided that the wife should receive certain specified personal property, namely, all of the furniture in the so-called "Sinkler Flat" in Chicago; the husband also agreed to pay in cash the sum of $550 and in addition $225 per month during the life of the wife. The wife, in turn, agreed to maintain a home for the children where they might live without expense to them until they arrived at the age of twenty-five years. Simultaneously with the making of the contract and the decree of the court, the wife conveyed all her interest in the real property described in the contract and she has at all times since maintained a home for the children of the marriage without expense

to them. She released her right under § 4406, Comp. Laws 1913, as the innocent party, to have the homestead assigned to her, either absolutely or for a limited period.

The court in the findings of fact found as follows:

6. "The court further finds that the *property rights* of plaintiff and defendant have been adjusted between them by a written instrument duly executed by both plaintiff and defendant and that *such adjustment of property rights* between said parties is hereby ratified and confirmed by the court and that the provisions hereinafter set forth as to permanent alimony, counsel fees and suit money is based thereon."

In the order for judgment the court, further following the contract, says: "Said monthly payments should not be increased or diminished at any time or by any court upon the application of either party, pursuant to the written agreement of the parties to said action, fixing said alimony." The parties to the contract attempted to waive the right, if any, to apply to the court for a modification of the decree, insofar as the adjustment of property rights was concerned. If the stipulation be construed as a waiver by each party of the right to ask to have the decree modified in this respect, would it be competent for them to do so? See Compton v. Compton, 111 App. Div. 923, 97 N. Y. Supp. 618; would it be in any manner an attempt to oust the courts of jurisdiction? See Palmer v. Lavers, 218 Mass. 286, 105 N. E. 1000. The parties had submitted the contract to a court of competent jurisdiction and obtained an approval of the same. They had had their day in court and it may be doubted if this stipulation is not binding as a waiver by both parties of asserting the right of review as far as the property settlement is concerned. Children, of course, could not be affected. We do not decide what the effect of this stipulation is, however, as it is not necessary in the view we take of the case. In any event, this stipulation, in the interest of repose, is some evidence that the parties themselves intended to effect a complete property adjustment and distribution. See 3 C. J. 661, 662, and note.

The decree followed the findings and the conclusions in all material and substantial particulars.

It seems clear from the foregoing statement of facts that the parties intended to adjust finally and fully all property rights and settle all claims arising out of the marriage relation. It is clear, also, that

the court, in making the decree, intended to and did make a final adjustment and settlement of property rights and claims between the parties. It is in other words, evident that on principle, insofar as the property rights of the parties were adjusted in the decree, the decree rests on the same basis as if the court had awarded a gross or lump sum to the wife in lieu of her interest in the property of her husband, of which the court, in a divorce action, could properly take cognizance. The award to the wife, in view of the findings and of the circumstances, cannot properly be construed as alimony in the true technical sense of the word, namely, an allowance for the support and maintenance of the wife alone. We are clear that the court intended, and that such is the effect of the decree, to settle finally, upon the basis of the agreement submitted to it, all the property rights of the parties. Under such circumstances, justice and a regard for the intent of the parties and the purpose of the court requires that the same effect be given to the decree as if a gross sum had been awarded to the wife, or real and personal property divided or apportioned between them.

Under § 4405, the court may, when divorce is granted, (1) equitably distribute the property of the parties, no distinction being made between real and personal property; (2) compel either party to provide support for the children of the marriage; and (3) make a just allowance to the other party for support, during life or for a shorter period. It is, therefore, clearly the duty of the court, when proper foundation is laid in the pleadings, supported by legally sufficient proof, to distribute equitably the real and personal property of the parties to the marriage. Such portion of the decree, however, is not, in any proper sense, alimony. Our code does not use this well understood "term of art" (Calame v. Calame, 25 N. J. Eq. 549) except in §§ 4402 and 4403, in dealing with support, maintenance or suit money, *during the pendency* of the divorce proceeding. Alimony is the allowance made to a woman for her support "out of the husband's estate." Bl. Com. 441. It is not to be understood as involving a distribution of the estate by force of law. Bouvier's Dist. title "Alimony." "A decree for alimony must secure to the wife an annuity or other personal right to maintenance. An absolute right to property cannot be decreed in a case for alimony." Maguire v. Maguire, 7 Dana, 181.

It seems clear, therefore, that a decree under § 4405, distributing

property, awarding support and providing for the children of the marriage, is something more than a decree for alimony, in its proper legal signification. In so far as the court awards money in the decree, whether payable monthly, annually, or at other stated periods, for the support of the wife, such award is in the nature of alimony and, it may be conceded, generally, may be modified as changed circumstances require, under the concluding clause of this section. The same is true with respect to the provisions of the decree for the support or custody of the children of the marriage.

When a court decrees a distribution of the real or personal property—other than money—of the parties, a different situation is presented. It may, and usually will after the lapse of time, become impracticable and often utterly impossible for the court to modify the decree in this respect. Real property is conveyed or encumbered; personal property is wasted, transferred or completely dissipated. A redistribution of property, under such circumstances, becomes not only theoretically difficult, but practically impossible. The courts have, therefore, held, notwithstanding statutes giving control over the decree with right to modify the same, that a judgment decreeing specific real property or finally distributing the estate, is a final judgment and cannot be modified, except, of course, in the same manner and on the same grounds as other judgments. 19 C. J. 272, and cases cited.

The supreme court of Nebraska in the case of Beard v. Beard, 57 Neb. 754, 78 N. W. 255, says:

"The alimony awarded the wife in this divorce suit was a sum in gross meant, and intended by the court, to be in lieu of her dower, homestead, and all her other rights and claims against the property of the husband. It was, in effect, a decree awarding the wife a money judgment for her share of the common property of the husband and wife upon the dissolution of the marriage; and where the court granting the divorce awards the wife a homestead, or other rights in the husband's property, and adjourns sine die, such judgment becomes a positive, final, and conclusive one, and cannot be changed or modified after the term at which it was rendered, except for the causes and in the same manner that other judgments may be modified."

The statutes of Nebraska at the time gave the court the power to modify the divorce decree as to alimony or other allowance for the

wife and children, or either of them, substantially to the same effect as § 4405, Comp. Laws 1913. See also 19 C. J. 272; Kraft v. Kraft, 193 Iowa, 602, 187 N. W. 449. The court in the order for judgment and in the decree uses the expression "permanent alimony." We do not think that the term "alimony" was there used in the technical sense. That would be too narrow a construction to give the decree in view of the findings of the court and the stipulation of the parties. As heretofore pointed out, § 4405 does not use the term. We think that the court, having in mind and before it the contract of the parties according to the terms of which the wife transferred all her interest in the husband's property and assumed definite obligations to support the children, had in mind that a decree for the sum of $225, per month, together with the cash payment and the award of specific personal property, with a provision in the contract for the confession of judgment and enforcement thereof by execution as in cases of ordinary judgment, should be considered in legal effect the same as if an allowance of a gross sum had been made, or a judgment entered, making a final distribution of the estate of the parties.

Both sides presented elaborate and able arguments upon the right of the court, under § 4405, to modify the decree when originally based, as far as the provisions therein for the support of the wife are concerned, upon the agreement of the parties entered into without fraud, collusion or undue influence. This interesting question we find it unnecessary to decide. In some, at least, of those jurisdictions where the right to modify the decree entered upon agreement of the parties as to support of the wife, is held to exist, such power of subsequent modification is denied when the judgment decrees real property or is a final adjudication of property rights. This appears in the citations of authorities heretofore made. Some of the authorities cited as tending to support the view that such power of modification does not exist when the decree, with respect to the provisions thereof for the support of the wife, is founded on a valid contract, are as follows: Henderson v. Henderson, 37 Or. 141, 48 L.R.A. 766, 82 Am. St. Rep. 741, 60 Pac. 597, 61 Pac. 136; Pryor v. Pryor, 88 Ark. 302, 129 Am. St. Rep. 102, 114 S. W. 700; Storey v. Storey, 125 Ill. 608, 1 L.R.A. 320, 8 Am. St. Rep. 417, 18 N. E. 329; Julier v. Julier, 62 Ohio St. 90, 78 Am. St. Rep. 697, 56 N. E. 661; Stanfield v.

Stanfield, 22 Okla. 574, 98 Pac. 334. See also 13 C. J. 464; 1 R. C. L. 947. The following authorities are frequently cited in support of the contrary view: Wallace v. Wallace, 74 N. H. 256, 67 Atl. 580, 13 Ann. Cas. 293; Blake v. Blake, 68 Wis. 303, 32 N. W. 48; Id. 75 Wis. 339, 43 N. W. 144; Camp v. Camp, 158 Mich. 221, 122 N. W. 521; Warren v. Warren, 114 Minn. 389, 131 N. W. 379, 116 Minn. 458, 133 N. W. 1009.

We are, therefore, of the opinion that the decree of the court entered in 1917 was in fact, and was intended by the court and understood by the parties to be, a final adjustment of their property rights to the same extent as if a gross sum or money judgment had been awarded, or a general distribution of the estate had been made, and that the court is now without power to amend the decree and to wipe out the monthly payment stipulated to the wife and substitute a gross sum therefor.

The judgment of the trial court is reversed and the case is remanded with direction to proceed in conformity with this opinion.

CHRISTIANSON and NUESSLE, JJ., concur.

BIRDZELL, J., concurs.

BRONSON, Ch. J. (partly concurring; partly dissenting). This cause was argued and submitted before this court on October 4th, 1922. This court, as then constituted, in December 30th, 1923, through an opinion of the Honorable George M. McKenna, district judge, sitting in place of Mr. Justice Grace, disqualified, rendered its decision. It ordered that the order and judgment of the lower court so far as it related to a modification of the original decree of divorce entered on the 23d day of March, 1917 be reversed; that the appellant recover costs on this appeal and such additional sum as suit money and attorneys' fees as the trial court in its discretion may award. The writer, together with another associate justice, then specially concurred in the decision then rendered. This special concurrence was as follows: "I am of the opinion that the contempt proceedings upon the record were within the sound discretion of the trial court and should not be disturbed. I am further of the opinion that upon the record the judg-

ment for alimony should not be disturbed. Without deciding whether, upon the contract made, the judgment for alimony entered pursuant thereto may be modified under the equity powers of the court. I am of the opinion that the evidence is insufficient to warrant interposition of equitable powers to modify the terms of alimony contained in the decree of divorce. The question of the amount of attorneys' fees and suit money to be allowed the defendant on account of these proceedings should be referred to the trial court for the exercise of its discretion concerning the amount and the time of payment."

Pursuant to a petition, this court, as now constituted, on Jan. 30th, 1923, ordered a rehearing which was had on Feb. 10th, 1923.

I adhere to my conclusions, heretofore presented. I desire to supplement the same as follows;

In May, 1916, plaintiff instituted an action for divorce. In July, 1916, defendant answered asking for dismissal. On March 23d, 1917, defendant, in an amended answer, set up a cross-complaint. Then, the parties made a written agreement concerning settlement of their respective property rights. Therein, the defendant wife agreed to convey to the plaintiff husband certain real property in Minot. It was agreed that the wife should retain the household furniture in a flat in Chicago. Plaintiff agreed, upon the signing of a decree of divorce, to pay defendant $300 and $250 attorneys' fees and thereafter $225 monthly during the life of defendant as permanent alimony. Defendant agreed to maintain a home for three children, the issue of the marriage. It was further stipulated and agreed that neither party shall at any time apply to any court to either decrease or increase such alimony. That, in the event of default, the agreement should stand and be construed by the court as a confession of judgment on plaintiff's part and that judgment might be rendered for each and every installment of alimony due and unpaid upon the affidavit of defendant stating the amount so due and unpaid, and thereupon such amount should become a lien upon all property of plaintiff. It was further agreed that, in the event that judgment should be entered in defendant's favor, the court should decree, in full of all claims against plaintiff's property, permanent alimony to defendant in the sum of $225 payable monthly, and such decree should continue the provision that the parties to the action had agreed upon the amount of such alimony and that they further had

agreed that neither party shall have the right to apply to any court to either increase or diminish such alimony. On the same day, the divorce proceedings came up for hearing in the district court. Findings were made in favor of the defendant. These findings ratified and confirmed the agreement between the parties heretofore stated. They awarded to defendant custody of the minor children, $250 attorneys' fees, $300 in cash, $225 payable monthly during the life of the defendant commencing April 1st, 1917. They provided that such monthly payments shall not be increased or diminished at any time by any court upon the application of either party pursuant to the written agreement of the parties to the action, fixing such alimony. Thus, on the same day, pursuant to these findings a decree of divorce was entered. Plaintiff, after the expiration of ninety days fixed by the decree, re-married and has since resided in Minot following his profession as an attorney. Defendant and the children have resided in Chicago. She has complied with the terms of the decree by providing them with a home and superintending their education. Plaintiff paid to defendant $300 upon entry of the decree, and $250 counsel fees and continued to pay the further sum of $225 per month until the year 1921. He has paid a total of $11,250 including $525 paid in 1921. In addition plaintiff has paid to the children small sums from time to time aggregating $494.50. Plaintiff has paid no amount during the year 1922.

In 1921 defendant instituted proceedings to recover judgments for the alimony then due. Judgments were entered, in June 12th, 1921, for $525.25 and, on December 27th, 1921, for $934.82. An execution was issued upon the first judgment and levy made upon some 200 acres of plaintiff's land. The same was sold and sheriff's certificate issued to defendant. On Jan. 17th, 1922, defendant made application for an order to show cause why plaintiff should not be adjudged to be in contempt. In response thereto plaintiff moved the court for an order modifying the original decree. As grounds therefor, he alleged that he was practically insolvent and unable to pay his debts; that by reason of the financial stringency he had been unable to earn as much money as formerly. He submitted a property statement showing that he owned some 520 acres of farm lands, mortgaged for $6,800 wherein his equity was about $2,500; also that he owned three dwelling houses in Minot in which he had now an equity of about $2,500. He further

stated that the taxes were delinquent for the past three or four years and that he cannot pay the taxes; that he has an equity in some other real estate that does not exceed $2,000; that he is indebted to various persons in the sum of about $5,000; that he is only able, in his law business, to keep his business and household going; that he is able to borrow no more than $5,000 with which to make settlement of all alimony. Defendant resists such application upon the ground that plaintiff was bound by the former contract and decree entered. She controverted the statements that plaintiff was insolvent or unable to pay his debts. She asserted that she was fifty-one years old and under ordinary expectancy would be entitled to receive $30,000 or $40,000 as a lump settlement or payment under the original decree; that she is not able-bodied or able to work and is in poor health through her years of labor as plaintiff's wife in assisting him to accumulate his property. After a hearing, the trial court, in June 21, 1922, made its findings and order to the following effect: That plaintiff had not wilfully or intentionally failed to meet the payments in the original decree; that his failure is due to possession of insufficient cash; that this has been brought about by six successive crop failures in this country and the fact that there is very little money in circulation so that the proceeds of plaintiff's business has shrunk and is now barely sufficient to provide him with the necessaries of life and to meet current expenses; that by reason of the present financial condition of the country and of the conditions existing in this country during the past six years it is impossible for the plaintiff to meet the payments required in the original decree and he is entitled to have the judgment modified concerning payment of alimony so as to direct plaintiff to pay defendant the full sum of $6,000 as permanent alimony in lieu of the monthly payments originally ordered, to be paid as follows: Plaintiff shall pay the judgments of July 12th, 1921, $525.25, and the judgments of December 27th, 1921, $934.82, and the balance, $1,000 on January 1st, 1923, $1,000 on July 1st, 1923, $1,000 on January 1st, 1924, $1,000 on July 1st, 1924, and $539.93 on January 1st, 1925. It was further found that plaintiff was not in contempt. Accordingly, the original decree was modified.

Defendant, before this court, challenges the order and judgment of the trial court upon three principal grounds:

(1) That the trial court was without jurisdiction to modify the original decree.

(2) That, in any event, it had no authority to modify such decree, not attacked upon grounds of fraud or other equitable grounds.

(3) That, in any event, the trial court erred, upon the record, in awarding a lump sum of $6,000 instead of the monthly alimony fixed in the original decree.

In my opinion it is unnecessary to consider or determine the question, concerning which there is a divergence and variety of authority, namely, whether the court, in any event, has the power to either increase or decrease the permanent alimony awarded in the decree. Plaintiff is an able lawyer who has been successful financially at the Bar. At the time when the decree was rendered he was enjoying, comparatively considered, a large and lucrative practice. This continued, in varying degrees, until about the years of 1921 and 1922 when payments to his wife practically ceased. Until that time the financial ability of the plaintiff to pay the award was not questioned. It may be noted that the reason for modification of the original decree, pursuant to the order of the trial court, is based upon the fact that the plaintiff has insufficient cash through crop failures and economic conditions existing in the state and country. There is no showing that plaintiff's earning ability has decreased or that his health has suffered any impairment. Upon the record his earning ability, his legal learning, ripened by years of experience, remains the same. His financial status is impaired at present by reason of surrounding economic conditions. In this regard it may not be overlooked that these press not alone upon the plaintiff. Nevertheless, the trial court, through the modification made, requires plaintiff to pay to defendant the sum of $6,000 in certain payments up to January 1st, 1925, which average, in amount, about $200 monthly, whereas, the original decree provides for the payment of only $225. In other words, although the economic conditions and the present financial status of plaintiff have placed him in a position where he has insufficient cash to meet current monthly payments, yet the court modifies the original decree in such a manner as practically to provide that plaintiff shall, nevertheless, in his present condition, make approximately the same payments, with the further condition that thereafter he shall be relieved from all further liability.

In my opinion, where a fair and equitable agreement has been made between the parties without fraud or imposition, which served to act as a basis for the distribution of the accumulations of a family during the major portion of an ordinary lifetime, it would be inequitable indeed to set aside an award so based because now plaintiff happens, temporarily, to be in a position of need, and not to recognize a corresponding reward that defendant should have had when plaintiff was in prosperity. Again, it would be inequitable to presume that plaintiff, with his present standing as a lawyer and innate earning ability, would not be able again, under normal conditions, to be as successful and prosperous as he was in the days when the decree was rendered.

SAM G. MESKE, Appellant, v. J. A. MELICHER, Respondent.

(194 N. W. 737.)

Accord and satisfaction — remedies of parties when agreement of accord not wholly executed stated.

Where there is an agreement of accord between the parties which is partly but not wholly executed on the part of the defendant, plaintiff, under § 5826, Comp. Laws 1913, providing, "Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed, may either (1) sue on his original claim for any balance remaining after crediting thereon that which has been paid under the accord, or (2) sue on the contract of accord for breach thereof."

Opinion filed July 26, 1923.

Accord and Satisfaction, 1 C. J. § 21 p. 533 n. 9; § 23 p. 534 n. 14.

Appeal from the District Court of LaMoure County, *McKenna*, J.
Action for goods sold and delivered.
From a judgment for the defendant, plaintiff appeals.
Affirmed.
John A. Jorgenson, for appellant.
R. H. Sherman, for respondent.

NUESSLE, J. This is an action to recover money for goods sold and

delivered. The complaint alleges that in September, 1921 the plaintiff sold and delivered to the defendant certain personal property of the reasonable value of $3,100 that the defendant agreed to pay therefor on October first, 1921, but has not done so, though demand therefor has been made. The defendant, answering, denies generally all the matters set out and contained in the complaint, and alleges that on August 15, 1921, the plaintiff was indebted to the defendant in the sum of $2,700 evidenced by a certain note secured by chattel mortgage on the property claimed by the plaintiff in his complaint to have been bought by the defendant; that on said date there was a full accord and satisfaction of such indebtedness, at which time the defendant cancelled the said $2,700 note and delivered the same together with a satisfaction of the mortgage securing it to the plaintiff and agreed to pay to and for the plaintiff the sum of $400, and the same was accepted by the plaintiff in full settlement; that the property described in the complaint was thereupon transferred and delivered by the plaintiff to the defendant; that thereby the plaintiff has been fully paid by the defendant; and that such payment by the defendant and the cancelation and delivery of the note and satisfaction of mortgage in question were accepted by the plaintiff as a full accord and satisfaction. The issues as thus made were tried to a jury, and at the conclusion of the case the defendant moved for a directed verdict. Notwithstanding the statute, chapter 133, Laws of 1921, the motion was granted, and the jury, at the direction of the court, returned a verdict for the defendant. Judgment was thereafter entered on said verdict, and this appeal is from that judgment.

The errors specified and relied upon by the plaintiff as justifying this appeal arise by reason of the rulings of the court on questions of evidence during the course of the trial, and on account of the action of the court in directing the verdict at the conclusion of the trial.

The facts as stated by the plaintiff and appellant in his brief on this appeal (and they are to be considered as established by the evidence and offers of proof of the plaintiff) are as follows: Plaintiff farmed as a tenant certain lands belonging to the defendant on a crop share contract. In November, 1920 plaintiff and his wife executed and delivered to the defendant their promissory note for $2,700 and interest at 10 per cent due in October, 1921 and secured by a chattel mort-

gage on their personal property. At the time of the execution of this note, the 1920 crop had not been sold. Thereafter the defendant sold the entire crop and kept the whole proceeds. In addition there were other accounts between the parties. On August 15th, 1921 plaintiff agreed to remove from the land and terminate his tenancy, and a proposed settlement was effected between the parties as follows: The plaintiff sold and delivered to defendant horses, cattle and machinery for the sum of $3,100. Plaintiff retained his undivided interest in the 1921 crop then harvested but not threshed, and the money due him for conversion for a share of the 1920 crop; *in payment of the $3,100 due for horses, cattle and machinery sold and delivered and for further labor to be done and services performed by defendant for plaintiff, and in settlement of other claims (excepting, however, the 1920 and 1921 crops) defendant was to surrender and cancel the $2,700 note and pay plaintiff $450.* The note was surrendered and canceled and the $450 paid as agreed, but the defendant failed to pay for plaintiff's share of the 1920 crop, and refused to deliver the plaintiff's share of the 1921 crop.

The plaintiff's position is that the accord has not been executed; that, therefore, the plaintiff may elect to treat the accord as null and void, and the $2,700 note paid through conversion by defendant of the plaintiff's share of the 1920 and 1921 crops, leaving the $3,100 purchase price for horses, cattle and machinery still due and unpaid. The defendant's contention is that there was no exception in the agreement of accord as to the 1920 and 1921 crops, and that the defendant was to surrender and cancel the $2,700 note and pay plaintiff $450, and the plaintiff was to receive the same in full satisfaction of all differences between them. At the trial the plaintiff proved the sale and delivery of the personal property for the agreed sum of $3,100. Defendant then offered evidence tending to establish the accord, as he claimed the same to be, and the satisfaction of the same. Plaintiff then sought to show that the agreement of accord was in fact different from that contended for by the defendant in that defendant was to pay plaintiff for his share of the 1920 crop, and deliver to him his share of the 1921 crop, and offered evidence tending to show such an agreement. To this proffer on the part of the plaintiff, the defendant objected on the ground that it was not admissible under the pleadings.

The objection was sustained, and the evidence excluded, and upon this state of the record a verdict was directed for the defendant.

Appellant's assignments of error are predicated on the rulings of the court in excluding evidence on the objection of the defendant as above set out, and in later directing the verdict for the defendant on the record thus made.

It is the appellant's contention that the accord agreement arrived at between the parties was not executed by the defendant, and may, therefore, be considered by plaintiff as repudiated by defendant. An accord, as defined in our statute, § 5825, Comp. Laws 1913, "is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled." Section 5826, Comp. Laws 1913, provides: "*Though the parties to an accord are bound to execute it,* yet it does not extinguish the obligation until it is fully executed." So where an accord has been arrived at, but is not fully executed, the party to whom something yet remains due has, under the section last cited, his remedy in two directions. He may either consider the accord repudiated and sue on the original obligation, crediting thereon that which has been paid and recover the balance remaining—Shubert v. Rosenberger, 45 L.R.A. (N.S.) 1062, 123 C. C. A. 256, 204 Fed. 934; Lehde v. National Union F. Ins. Co. 46 N. D. 162, 180 N. W. 56; Strobeck v. Blackmore, 38 N. D. 593, 165 N. W. 980; 1 C. J. 534; or he may sue on the contract of accord for that which remains due to him on account of that contract. Comp. Laws 1913, § 5826. Williston, Contr. § 1848. At the common law he could not sue on the contract of accord, but had only his remedy on the original obligation after crediting that which had been paid. That is, an accord until satisfied was revocable at the pleasure of either party.

See 2 Parsons, Contr. 9th ed. p. 837 and cases cited; Williston, Contr. §§ 1839, 1840. There is a dictum in the case of Kinney v. Brotherhood of American Yeomen, 15 N. D. 21. 106 N. W. 44, from which it might be inferred that the old common-law rule in this regard is the law in this state. But we think that § 5826 must have been overlooked by the court at the time of rendering that decision. A reference to the original Field Code, § 652, from which our statute was adapted, shows that the rule as we now have it in the first clause of

§ 5826 is based on the case of Billings v. Venderbeck, 23 Barb. 546, which holds that an accord unperformed, consisting of mutual promises, and thus having a new consideration, is binding upon the parties, and an action will lie for a breach of it.

It will be noted that the case at bar is brought to recover the purchase price of certain property sold and delivered to the defendant by the plaintiff. The defendant admits the purchase of the property but contends that the same has been paid for. The only disagreement between the parties is that the plaintiff claims that while the property in question was in fact sold to the defendant and the defendant paid therefor, yet that as a part of the same transaction there was an agreement on the part of the defendant to pay certain other matters in difference between the parties, which he has not done; on the other hand, the defendant admits the purchase and sale of the property in question but denies that there was any further agreement as to the payment of any other items. If there was an accord executory, the plaintiff, as we have shown, may sue on the original claim, crediting thereon that which has been paid. But surely he cannot be permitted to separate that claim into its various constituent elements and credit such payments as may have been made on such items as he sees fit, and sue on the remaining items, declaring on them alone. That is what he has attempted to do here. So far as the personal property is concerned for the purchase price of which he declares, the agreement of the defendant was performed, as plaintiff himself concedes. It is true that under the code, § 7439, Comp. Laws 1913, all forms of pleading are abolished, yet § 7440 provides that the complaint shall contain a plain and concise statement of facts constituting the cause of action without unnecessary repetition. This to apprise the defendant of the nature of the plaintiff's claim. We do not believe that the complaint in this case can be said to meet that requirement, so as to permit plaintiff to prove the case that he contends for. Even the most liberal construction will not sustain his contention. While, if the plaintiff saw fit to consider the accord repudiated for the reason that the defendant had not executed the same, he might do so and sue on the original claim, yet that claim in this case consisted of numerous items in addition to that sued on, and should have been stated in his complaint. Had he pleaded the original claim consisting of the various items that were

the subject of the agreement of accord or those items thereof with respect to which the accord had not been executed, and had the defendant then pleaded an accord and satisfaction thereof, and offered proof in support of his plea, unquestionably the plaintiff might, without any further pleading, have offered in evidence at the proper time anything tending to show what the agreement in fact was and that it had not been complied with. Comp. Laws 1913, §§ 7452, 7467–7477; Kinney v. Brotherhood of American Yeomen, supra; Erickson v. Elliott, 17 N. D. 389, 117 N. W. 361. But he cannot do this when suing on account of a single item which was expressly paid under the accord agreement. That being the case, the rulings of the trial court on the objections interposed by the defendant were right; and although the statute, chapter 133, Laws of 1921, contemplates that no verdict shall be directed, nevertheless in this particular case, since no objection was made to and no error is predicated on, the action of the trial court in disregarding this statute, the judgment must be affirmed. First Nat. Bank v. Strauss, (N. D.) 194 N. W. 900, just decided. This judgment, of course, will be no bar to an action either on the original claims which were the subject of the alleged accord, or on the contract of accord.

Judgment affirmed.

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

BIRDZELL, J., concurs.

RANSOM COUNTY FARMERS PRESS, et al., Appellants, v. THE LISBON FREE PRESS, et al., Respondents.

(194 N. W. 892.)

Elections — corrupt practice act construed as to what elections it is applicable.

1. The Corrupt Practice Act (Comp. Laws 1913, §§ 923–944) applies to all primary and general elections held in the state; but the language of the act indicates that the legislature intended that certain provisions should be applica-

ble only to elections of public officers, while other provisions should be applicable alike to elections of officers and elections involving some measure, proposition or question submitted at an election.

Elections — corrupt practice act ground of contest.

2. Where a candidate for public office, receiving the highest number of votes at the election, has been guilty of corrupt practice, any person claiming the right to the office may contest the validity of such election under §§ 1046 and 1048, Comp. Laws 1913, and assert such corrupt practice as a ground of contest.

Elections — action in equity to annul election will not lie where contest lies under statute.

3. In all cases, where under the statute, such contest lies an action in equity to annul the election will not lie. Whether such action will lie under any circumstances is not decided.

Opinion filed August 6, 1923.

Election, 20 C. J. § 226 p. 184 n. 32 New, p. 186 n. 66 New; § 274 p. 217 n. 47 New; § 275 p. 217 n. 53 New; § 284 p. 223 n. 33.

Appeal from the District Court of Ransom County, *Allen*, J.

Plaintiffs appeal from an order sustaining a demurrer.

Affirmed.

Pierce, Tenneson, Cupler & Stambaugh, for appellants.

"There is much to support this contention. Had Totten in any manner imagined his offer would be construed as a bribe to the voters, he would not have made it, but nevertheless we cannot accept his interpretation of his language. While the amount involved is small, to approve it would utterly defeat the purposes of the corrupt practice act. . . . The corrupt practice act should be liberally construed with the view to its enforcement for the public interest and the purity of elections. Nelson v. Gass, 27 N. D. 357, 146 N. W. 537, Ann. Cas. 1915C, 796. This has been the holding of other states under statutes similar to our own." Diehl v. Totten, 32 N. D. 131, 155 N. W. 74, Ann. Cas. 1918A, 884; Kunder v. Madison (S. D.) 162 N. W. 898; note to L.R.A.1917B, p. 191; 20 C. J. pp. 185, 188; 9 R. C. L. p. 1180.

"The Corrupt Practice Act should be liberally construed with a view to its enforcement for the public interest and the purity of election." Diehl v. Totten, 32 N. D. 131, 155 N. W. 74, Ann. Cas. 1918A, 884.

"The term public office implies an authority to exercise some portion of the sovereign power of the state, either in making, administering or executing laws." State ex rel. McArthur v. McLean, 35 N. D. 216; 29 Cyc. pp. 1361, 1362; State v. Spaulding (Iowa) 72 N. W. 288; note to 63 Am. St. Rep. 187–192.

"While it is not true that every service or duty prescribed by statute constitutes an office, still such statutory provisions concerning a public employment, especially if the duties be of a general nature, are generally sufficient to determine the employment an office." 63 Am. St. Rep. 188 and cases.

"An office is a public charge or employment and the term comprehends every charge or employment in which the public is interested." Michael v. State, 162 Ala. 425, 50 So. 929.

"He who performs the duties of an office is an officer." Com. v. Bush, 131 Ky. 384, 115 S. W. 239.

"An office is a legal entity and may exist though it be without an incumbent." Childs v. State (Okla.) 113 Pac. 545, 33 L.R.A.(N.S.) 563.

The district court "has power to determine all controversies or questions of difference which can possibly be made the subject of civil action." Trott v. State. 41 N. D. 614, 171 N. W. 827 (Colo.) 130 Pac. 618; Shaw v. Circuit Ct. (S. D.) 129 N. W. 907.

Kvello & Adams, for respondents.

"In this state title to a county office may be tried either by the statutory mode of contest; or by a civil action in the nature of quo warranto." State v. Callahan, 4 N. D. 481.

The almost universal rule is that equity does not intervene to try the right of the title to public office. 20 C. J. Elections, 216, § 274; 9 R. C. L. Elections, § 143; 42 Am. St. Rep. 234 (note); Ann. Cas. 1912C, 191, note; 4 Pom. Eq. Jur. 4th ed. § 1756.

"Appellant instituted this contest . . . to have said election *declared void,*" which is only another way of saying that it was a proceeding "to annul and set aside an election." Kunder v. Madison, 162 N. W. 898; Saari v. Gleason, 148 N. W. 293.

"The rule is quite general that equity will not intervene when an adequate remedy is offered at law, and hence in controversies involving the right to an office the injunction will not usually lie, because the

parties have a complete remedy by statute to contest an election or by quo warranto to determine the right resulting therefrom. Where, however, an election relates to the adoption or rejection of some local question and does not include an office it has been held in some jurisdictions, in the absence of another statute authorizing such proceedings, that equity would intervene to determine a contested election because of irregularities or fraud in the conduct thereof." Marsden v. Harlocker (Or.) 120 Am. St. Rep. 786.

It is of the nature of an office that the person exercising its functions or performing its duties should be appointed or elected in accordance with law. See 63 Am. St. Rep. 190.

PER CURIAM. The controversy presented on this appeal involves the validity of the election of the official newspaper of Ransom county. The Enderlin Independent and the Lisbon Free Press both aspired to become the official newspaper of Ransom county, and their names were placed upon the official ballot to be voted at the general election held in November 1922, as applicants or candidates for official newspaper of Ransom County. The Enderlin Independent is a newspaper published by the plaintiff Ransom County Farmers Press, a corporation. The county canvassing board found and duly declared that the Lisbon Free Press had received the highest number of votes cast at the election. After the announcement of the result of the election by the canvassing board, this action was instituted by the Ransom County Farmers Press, a corporation, and one Bangert, secretary of said corporation to annul the election.

The complaint alleges that prior to the election the publisher of the Lisbon Free Press published a statement to the effect that in the event such newspaper was chosen the official newspaper of the county "it promises to put before every voter in Ransom county a copy of the issues containing the delinquent tax list." Plaintiffs aver that this constituted a promise by a candidate for public office to give a valuable thing to an elector with the intent to induce him to vote for such candidate for a public office, and consequently constituted "a violation of the Corrupt Practice Act of the state of North Dakota, invalidating and annulling said election." And they pray judgment:

(1) "That said election of official newspaper be annulled and set

aside by the decree of this court for violation of the Corrupt Practice Act of the state of North Dakota" by reason of the acts of the defendant;"

(2) That it be adjudged that said Lisbon Free Press is not entitled to the office of official newspaper of said Ransom county; and that pending the action the defendant newspaper be enjoined from qualifying or attempting to qualify, and that the county auditor be enjoined from delivering to it the said certificate of election;

(3) That the Enderlin Independent be adjudged the duly elected and qualified newspaper of Ransom county;

(4) For general equitable relief.

The defendants demurred to the complaint on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, and plaintiffs have appealed. Plaintiffs contend that the promise contained in the statement published by the publisher of the Lisbon Free Press is violative of, and that the Lisbon Free Press should be deprived of the benefit of the election under, the following provisions of the Corrupt Practice Act:

"Any person shall be guilty of corrupt practice within the meaning of this article if he expends any money for election purposes contrary to the provisions of this statute, or if he is guilty of treating, undue influence, personation, or the giving or promising to give any money or valuable thing to an elector with the intent to induce him to vote or to refrain from voting for any candidate for public office." Comp. Laws 1913, § 935.

"If upon the trial of any action or proceeding under the provisions of this article for the contesting of the right of any person declared to be nominated to any office or elected to any office, or to annul or set aside such election, or to remove any person from his office, it shall appear that such person was guilty of any corrupt practice, illegal act, or undue influence in or about such nomination or election, he shall be punished by being deprived of the nomination or office as the case may be, and the vacancy therein shall be filled in the manner provided by law." Comp. Laws 1913, § 942.

Respondents contend that these provisions of the Corrupt Practice

Act apply only to elections in which natural persons are candidates for office, and have no application to elections where certain measures or propositions are submitted. Respondents further contend that in all cases where the validity of the election of a public officer of a county is involved, an opposing candidate or any other elector of the county may contest the election; and, hence, an equitable action will in no event lie to determine the validity of the election.

The Corrupt Practice Act (chap. 129, Laws of 1911, as amended by chapters 157, 226 and 227, Laws 1913; §§ 923–944, Comp. Laws 1913) provides:

"No sum of money shall be paid, and no expenses authorized or incurred by or on behalf of any candidate to be paid by him, except such as he may pay to the state for printing, as herein provided, in his campaign for nomination to any public office or position in this state, in excess of fifteen (15) per cent of a year's compensation or salary of the office for which he is a candidate; provided, that no candidate shall be restricted to less than two hundred dollars ($200) in his campaign for such nomination; provided, that the provisions of this article shall not be construed to apply to the candidate's personal traveling expenses. . . ." Comp. Laws 1913, § 923.

Section 2 relates to candidates' statement in publicity pamphlet. Comp. Laws 1913, § 924.

Section 3 specifies rates to be charged the candidates for the various state, district and county offices for publication of statements in the publicity pamphlet. Comp. Laws 1913, § 925.

Section 4 relates to the preparation and printing of the publicity pamphlet by the secretary of state. Comp. Laws 1913, § 926.

Section 5 provides for the preparation of lists of voters by the county auditors of the several counties, and the mailing of a copy of the publicity pamphlet to each voter in the state. Comp. Laws 1913, § 927.

Section 6. "No sum of money shall be paid and no expenses authorized or incurred by or on behalf of any candidate who has received the nomination to any public office or position in this state, except such as he may contribute toward payment for his political party's or independent statement in the pamphlet herein provided for, in excess of fifteen (15) per cent of the annual salary of the office for which he is

nominated; provided, that no candidate shall be restricted to less than two hundred dollars." Comp. Laws 1913, § 928.

Section 7. "Every candidate for nomination or election to public office, including the offices of Senators of the United States, shall within fifteen (15) days after the primary or general election at which he was a candidate, file . . . an itemized statement setting forth in detail all the moneys contributed, expended or promised by him to aid and promote his nomination or election, or both. . . ." Comp. Laws 1913, § 929.

Section 8 provides that moneys shall not be contributed or received in connection with a nomination or election, in any other name than that of the person who in truth supplies the moneys contributed. Comp. Laws, 1913, § 930.

Section 9. "No person shall, in order to aid or promote his nomination or election, directly or indirectly promise to appoint another person or to secure or aid in securing the appointment, nomination or election of another person to any public or private position or employment, or to any position of honor, trust or emolument." Comp. Laws 1913, § 931.

Section 10. "No person shall demand, solicit, ask or invite any payment or contribution for any religious, charitable or other such cause from any person who seeks to be, or has been, nominated to any office, and no such candidate shall make any such payment or contribution, or promise or agree to make the same, if it shall be demanded or asked during the time he is a candidate for nomination or election. . . ." Comp. Laws 1913, § 932.

Section 11. "No corporation, trustee or officer thereof as such, shall pay or contribute in order to aid, promote or prevent the nomination or election of any person, or in order to aid or promote the interest, success or defeat of any person or any political party or organization. And no person shall solicit or receive such payment from any corporation." Comp. Laws 1913, § 933.

Section 12. "Any person or candidate who shall, either by himself or by any other person, either before or after election, or while such person or candidate is seeking a nomination or election, directly or indirectly, give or provide, or pay, wholly or in part, the expense of giv-

ing or providing any drink or intoxicating liquors to or for any person for the purpose or with the intent or hope to influence that person or any other person to give or refrain from giving his vote at such election to or for any candidate or political party ticket *or measure* before the people, or on account of such person or any other person having voted or refrained from voting for any candidate or the candidates of any political party or organization or measure before the people or being about to vote or refrain from voting at such election, shall be guilty of treating. . . ." Comp. Laws 1913, § 934.

Section 13. "Any person shall be guilty of corrupt practice within the meaning of this act if he expends any money for election purposes contrary to the provisions of this statute, or if he is guilty of treating, undue influence, personation, or the giving or promising to give any money or valuable thing to an elector with the intent to induce him to vote or to refrain from voting for any candidate for public office." Comp. Laws 1913, § 935.

Section 14 makes it unlawful to pay any person for attendance at the polls or to furnish transportation to voters. Comp. Laws 1913, § 936.

Section 15. "No publisher of a newspaper or other periodical shall insert either in its advertising or reading columns or any paid matter which is designed or tends to aid, injure or defeat any candidate or political party or organization or *measure* before the people, unless it is stated therein that it is a paid advertisement. No person shall pay the owner, editor, publisher or agent of any newspaper or other periodical to induce him to editorially advocate or oppose any candidate for nomination or election, and no such owner, editor, publisher, or agent shall accept such payment. Any person who shall violate any of the provisions of this section shall be punished for a corrupt practice." Comp. Laws 1913, § 937.

Section 16 makes it unlawful for any person on any election day, "to ask, solicit, or in any manner try to induce or persuade any voter on such election day to vote or refrain from voting for any candidate, or the candidates or ticket of any political party or organization, or any *measure* submitted to the people," and prescribes a penalty for a violation of this section. Comp. Laws 1913, § 939.

Section 17, provides that the name of a candidate shall not be printed on the official ballot at the general election unless he has filed a statement of his expenses as provided by the act. Comp. Laws 1913, § 940.

Section 18. "It shall be unlawful for any person to accept, receive or refrain from becoming a candidate for nomination or election, or by himself or in combination with any other person or persons to become a candidate for the purpose of defeating the nomination or election of any person and not with a bona fide intent to obtain the office." Comp. Laws 1913, § 941.

Section 19. "If upon the trial of any action or proceeding under the provisions of this act for the contesting of the right of any person declared to be nominated to any office or elected to any office, or to annul or set aside such election, or to remove any person from his office, it shall appear that such person was guilty of any corrupt practice, illegal act, or undue influence in or about such nomination or election, he shall be punished by being deprived of the nomination or office as the case may be, and the vacancy therein shall be filled in the manner provided by law." Comp. Laws 1913, § 942.

Section 20. "Any action to contest the right of any person declared elected to any office, or to annul and set aside such election, or to remove from or deprive any person of an office to which he is the incumbent for any offense mentioned in this article must, unless a different time be stated, be commenced within forty (40) days after the return of the election at which such offense was committed. . . ." Comp. Laws 1913, § 943.

Section 21. "Whoever violates any provision of this act, the punishment of which is not specifically provided by law, shall on conviction thereof be punished by imprisonment in the county jail for not more than six months, or by a fine of not more than one thousand dollars or by both such fine and imprisonment." Comp. Laws 1913, § 944.

The Corrupt Practice Act was adopted in 1911. Laws 1911, chap. 129, Comp. Laws 1913, §§ 923–925. At the time of its enactment there was no provision for the selection of official newspapers at an election. In fact, the same legislative assembly which enacted the Corrupt Practices Act, also, enacted a law imposing upon the county commissioners of each county in the state the duty to designate the

official newspaper of the county. Laws 1911, chap. 117. The law providing for the selection of an official newspaper at an election was enacted in 1919. Laws 1919, chap. 187. Hence, it is manifest that at the time the Corrupt Practices Act was enacted, the legislature had no intention that it should apply to an election held for the purpose of selecting an official newspaper.

The statute relating to the selection of an official newspaper at an election (Laws 1919, chap. 187) provides:

Section 2. "At the first general election held throughout the state of North Dakota after the passage and approval of this act, and at the general election in each even numbered year thereafter the legal voters in each organized county in the state shall be entitled to vote for such newspaper in said county as such voter desires to be selected as the official newspaper therein."

Section 3. "At least thirty days prior to any general election held throughout the state, any person, persons or copartnership or corporation owning or operating a newspaper printed and published within the county and admitted to the United States mails, and having complied with the requirements of the Federal Laws governing second-class mail matter, may apply in writing to the county auditor of the county in which such newspaper is located for the placing of the name of such newspaper upon the general ballot to be voted for as official newspaper at said election. . . ."

Section 4. "Such newspaper in such county receiving the highest number of votes cast for official newspaper shall be declared the official newspaper until the next biennial election and until a successor is chosen and the county auditor upon the canvass and return of said vote by the county canvassing board at the time of canvassing other election returns, shall issue a certificate of election to such newspaper receiving the highest number of votes cast at said election. The owner, proprietor or authorized agent of a corporation owning such newspaper shall file a bond to the State of North Dakota of one thousand dollars for the faithful performance of the duties of such newspaper."

Generally speaking there are two classes of elections, or, rather there are two general subjects submitted at an election. The first relates to

the election of public officers; that is, the choice of certain persons to whom, for the time being, the power to exercise certain governmental functions is entrusted. The other involves the presentation to the electors of some question, measure, proposition or project. Both the courts and the legislatures, generally, recognize a distinction between the two classes as regards the effect of offers or inducements to the voters having a tendency to affect their votes. See McCrary, Elections, 4th ed. § 215 and subsequent; State ex rel. Newell v. Purdy, 36 Wis. 213, 17 Am. Rep. 485; State ex rel. Bill v. Elting, 29 Kan. 397; 15 Cyc. 426, 443.

And it is quite apparent that the lawmakers of this state, when they enacted the Corrupt Practice Act, had in mind the fact that two general subjects were submitted at elections; for, it will be noted that while the language in most of the sections of the Act is applicable only to elections of persons who are candidates for public office, three sections, namely, § 12, relating to treating; § 15, relating to political advertisements published in newspapers, and § 16, relating to electioneering on election day, are made applicable not only to the election of public officers but, also, to elections involving *measures* pending before and to be submitted to the people at such election.

We think that the legislature intended that the provisions of the Corrupt Practices Act should apply to all elections at which any question or proposition was submitted to the electorate. In other words, we think that the legislature in enacting the Corrupt Practices Act intended that the provisions of that Act should apply to all elections thereafter held in the state. The legislature, however, in the Act itself indicated that certain provisions should be applicable to elections of public officers, and other provisions applicable to all elections without regard to whether it involves the choice of a public officer or the approval or rejection of a certain measure or proposition, or the determination of any other question, submitted to the voters at an election. As already indicated, it is manifest that when the legislature enacted the Corrupt Practice Act, it could not have had the election of an official newspaper in mind, as no such election was then held. Hence, obviously the lawmakers could not at that time have considered whether an official newspaper should be deemed a county office within the purview of the Act. And we are not at all satisfied that they manifested

any intention, in the law providing for the election of an official county newspaper, to constitute such newspaper a public officer.

The selection of public officers involves, or should involve, a consideration of the fitness of the candidate for the particular office. "The theory of popular government," said Brewer, J. (State ex rel. Bill v. Elting, 29 Kan. 402), "is that the most worthy should hold the offices. Personal fitness—and in that is included moral character, intellectual ability, social standing, habits of life and political convictions—is the single test which the law will recognize." Every public office is created in the interest and for the benefit of the people and belongs to them. The incumbent of such office is invested with certain powers or charged with certain duties pertinent to sovereignty. 22 R. C. L. p. 374. The powers so delegated to the officer are held in trust for the people. 22 R. C. L. p. 379. "And it is the presumption of law that a public office is to be held and executed by the person appointed or elected to it, and it is opposed to the policy of the law to permit an office to be held by one ostensibly as the real officer, but in secret trust for another." Mechem, Pub. Off. § 566.

It is presumed that an officer is chosen because of his fitness to perform the duties of his office, and except in those cases where the law expressly or by necessary implication permits the officer to deputize some one to act for him, it is contemplated that he shall perform the duties of office in person. Even in cases where the officer is authorized to deputize some one to act in his stead, the officer remains the source through which the deputy has power to act. And it is wholly inconsistent with our theory of government that the incumbent of an office may in fact vacate the office, and transfer it and the powers incident thereto to some one else. Under our law (Comp. Laws 1913, § 683), when the incumbent of an office dies, the office becomes vacant, and the deputy, if any, does not become an incumbent of the office. The same is true if the officer becomes insane, and his insanity is judicially determined; if he is convicted of a felony or of any offense involving moral turpitude; or, if he removes from and ceases to be a resident of the state or of the district, county, city, township or village, in which the duties of his office are to be discharged, or for which he was elected.

It is difficult to see how these considerations can apply to an official newspaper. No restriction is placed upon the disposition of such news-

paper. If the property is owned by a corporation, the stock may be sold, and the newspaper come under a new management, and its policies completely changed. The same is true if the newspaper is owned by an individual or by a partnership. In fact such newspaper may be sold to the owner or owners of a newspaper which was an opposing candidate for official newspaper at the election and refused approval by the electors. In the case at bar, for instance, there is no inhibition against the owners and publishers of the Ransom County Farmers Press becoming the owner or owners of the Lisbon Free Press.

In the view we take of the case, however, it is unnecessary to determine whether the election of an official newspaper is the election of an officer, or an election involving a measure, within the purview of the Corrupt Practice Act.

If it is the former, then as respondents contend the election was subject to contest under the express language of §§ 1046, 1048, Comp. Laws 1913. And violations of the Corrupt Practice Act of the nature claimed here may be asserted in such contest. Diehl v. Totten, 32 N. D. 131, 155 N. W. 74, Ann. Cas. 1918A, 884. Hence, there was a plain, speedy and adequate remedy at law available to the unsuccessful candidate, and an action in equity will not lie. See 9 R. C. L. p. 1152; 20 C. J. 216. Whether it is true as suggested that the remedy by contest is exclusive is not involved, and we express no opinion on that question. See, however, 20 C. J. 213; State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025. Nor do we express any opinion as to whether an equitable action will lie under any circumstances to try issues and determine rights such as it is sought to have tried and determined here. See, however, 9 R. C. L. p. 143; 20 C. J. 216.

If it is the latter, that is, if it is an election involving a measure, then there is no provision of the Corrupt Practice Act which ipso facto invalidates the election upon the mere showing of a promise as that alleged to have been made by the publisher of the Lisbon Free Press.

The order appealed from is affirmed.

CHRISTIANSON, NUESSLE, JOHNSON, and BIRDZELL, JJ., concur.

BRONSON, Ch. J., concurs in the principles stated in the syllabus and in an affirmance.

ROY LOGAN, Fred Peterson, C. Bertsch, et al., Appellants, v. CITY OF BISMARCK, a Municipal Corporation, A. P. Lenhart, J. P. French, J. A. Larson, H. A. Thompson, C. W. Henzler, Constituting the Board of City Commissioners of Said City of Bismarck, and M. H. Atkinson, City Auditor, Respondents.

(194 N. W. 908.)

Municipal corporations — proposition to issue bonds for constructing or purchasing waterworks held not invalid, as submission of double question.

1. A submission by the city commission of a proposition to issue bonds in a stated amount for "constructing or purchasing" waterworks for the city, is a single question and is, therefore, not within the condemnation of the rule announced in Stern v. Fargo, 18 N. D. 289.

Municipal corporations — majority of votes for constructing or purchasing waterworks sufficient to carry.

2. Under the statutes and decisions in this jurisdiction, a majority of the votes cast upon the question of bonding the city for the purpose of constructing or purchasing waterworks, if in the affirmative, carries the proposition and it is not necessary that a majority of all the legal voters of the city vote in favor thereof.

Municipal corporations — ordinance for delivery of bonds for purchase of waterworks system held valid.

3. For reasons stated in the opinion, it is *held*, that the ordinance enacted by the city commission, providing for the delivering of the bonds, conform substantially with the question as submitted to the voters and with the resolution ordering the election.

Opinion filed August 17, 1923.

Municipal Corporations, 28 Cyc. p. 1589 n. 54; p. 1590 n. 67; p. 1600 n. 83 New.

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

Plaintiffs appeal from an order and judgment dismissing the complaint.

Affirmed.

O'Hare & Cox (*Wm. Langer, S. L. Nuchols* and *Chas. L. Crum*, amici curiæ), for appellants.

Note.—As to what objects or purposes may be combined in a single question submitted to the voters of a municipality, see note in 26 L.R.A.(N.S.) 665.

"The subject of purchasing a particular waterworks plant already in existence is utterly diverse from that of building a new one. It needs neither argument or illustration to make this plain truth apparent to any mind of ordinary capacity. The judgment of the Mayor and Council upon one of these subjects might well be approved by the people through a majority vote in favor of bonds, although the judgment of the same officials upon the other subject would be overwhelmingly repudiated at a bond election." Leavenworth v. Wilson (Kan.) 76 Pac. 400; Gas & Water Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335; Truelsen v. Duluth, 61 Minn. 48, 63 N. W. 714; North v. Platt Co. 29 Neb. 447, 45 N. W. 692.

The court construes the powers of such corporations strictly and requires strict compliance with the statute and with the authorization as expressed by the voters at the polls for the issuance of the bonds. Stern v. Fargo, 122 N. W. 400; Vose v. Waterloo Water Co. 163 Ind. 69, 71 N. E. 208; Champagne v. Harmon, 98 Ill. 491.

C. L. Young, City Attorney (*Newton, Dullam & Young* of counsel), for respondents.

The object is a single one, the acquiring of a water works system, and so it is held by the great weight of authority. Albuquerque v. Water Supply Co., 24 N. M. 368, 174 Pac. 217; Bowen v. Garber (Okla.) 185 Pac. 1095; Tulloch v. Seattle, 69 Wash. 178, 124 Pac. 81; Thomas v. Grand Junction, 13 Colo. App. 80, 56 Pac. 667; Clark v. Los Angeles, 160 Cal. 30, 116 Pac. 722; Hartigan v. Los Angeles, 170 Cal. 313, 149 Pac. 590; Sioux Falls v. Farmers Loan & T. Co., 69 C. C. A. 373.

"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." State v. Glaisdell, 18 N. D. 31, 119 N. W. 360.

JOHNSON, J. This is an appeal from a judgment of the district court of Burleigh county, sustaining proceedings of the city commission of Bismarck, relating to the issuance of bonds for the purpose of providing a system of waterworks for the furnishing of a water supply to the inhabitants of the city.

The facts alleged in the complaint, so far as material to a decision of the controversy, are as follows: The city commission, on April 17, 1923, passed a resolution calling a special election to be held on the 14th day of May following, between the hours of 8 A. M. and 9 P. M. for the purpose of submitting the following question to the electors of the city: "Shall the city of Bismarck issue bonds in the sum of $225,000 in the denomination of $1,000 each, payable one-twentieth each year for twenty years, with interest thereon at the rate of 5 per cent per annum, payable semi-annually, such interest payments to be evidenced by interest coupons attached to such bonds, for the purpose of constructing or purchasing waterworks for the furnishing of a supply of water to the inhabitants of such city?" In this resolution the various wards, precincts and voting places were designated and inspectors and judges of election were appointed. Due notice of this special election was given by the city auditor by posting and by publication as required by law. The election was held on the 14th of May, pursuant to the resolution and notice thereof as aforesaid, and the total number of votes cast at such election was 1,347 of which 1,257 were in favor of and 90 were against issuing the bonds. The number of registered voters in the city of Bismarck, on the date of the election, was approximately 3,621 and it is evident that a majority of the registered voters did not vote at the election. Thereafter the city commission advertised for and received bids for the sale of the bonds in the sum of $225,000 and in due time entered into a contract for the sale thereof, one twentieth to be paid each year, commencing June 1, 1924 and ending June 1, 1943. It further appears that, pursuant to the terms of the contract, the city commission passed an ordinance authorizing the issuance of $225,000 in bonds; that such ordinance provided for the payment of $11,000 on the first day of June, 1924, and a like sum on the first day of June of each and every year thereafter until the first day of June, 1943, when the last payment will be due; on that date the sum of $16,000 shall be paid with interest, according to the terms of the contract.

It is asserted by the plaintiffs that they are taxpayers and that they will suffer irreparable loss and damage if the bonds aforesaid are sold and delivered according to the contract, and they allege that the special election was void and ask that the city commission and the other defend-

ants be perpetually restrained and enjoined from delivering the bonds, or any portion thereof, to the purchasers under the contract.

The defendants answer, admitting all of the allegations of fact except the allegations of ¶¶ 10 and 11, in which it is alleged, in substance, that the election was void and that the plaintiffs will suffer irreparable injury if the bonds are delivered.

Upon the issues thus framed, the trial judge dismissed the complaint and judgment was entered accordingly.

The appellants challenge the legality of the proceedings upon the following grounds; First, that the special election was void because a double question was submitted to the voters and that the resolution of the commission ordered the submission of a double question. This contention is based upon that portion of the resolution which is as follows: *"For the purpose of constructing or purchasing waterworks."* It is claimed that this is in reality a double question rendering the proposition indefinite and uncertain. Secondly, that the special election was void because a majority of all the legal voters in the city did not vote in favor of the proposition, though an overwhelming majority of those who voted at the election voted in favor of issuing the bonds. Thirdly, that the contract is illegal and the Commission exceeded its powers in this that the ordinance, providing for the issuance of the bonds, requires that they shall be paid in twenty years, one twentieth each year, but that the contract calls for a payment of less than one twentieth each year for nineteen years and more than one twentieth at the end of the twentieth year.

We shall consider these propositions in the order presented. Section 183 of the Constitution, so far as material, provides: "Provided, further, that any incorporated city may become indebted in any amount not exceeding 4 per cent of 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." This language was substantially incorporated in § 3818, Comp. Laws 1913, subd. 4, and also in § 3599, Comp. Laws 1913. Section 3818, in part, reads as follows: "The board of city commissioners shall have power: 4. To borrow money on the credit of the corporation for corporation purposes, and to issue

bonds therefor . . . provided, further, that any city when authorized by a majority vote at a general or special election, may become indebted in any amount not exceeding four per centum of such assessed value without regard to the existing indebtedness of such city, for the purpose of constructing or purchasing waterworks for the purpose of furnishing a supply of water to the inhabitants of such city . . . and such city may issue bonds therefor . . ." Chapter 34, Comp. Laws 1921, amending subd. 70, § 3818, Comp. Laws 1913, specifically provides that the city may "purchase, acquire by eminent domain, erect, lease, rent, manage and maintain any system of waterworks. . . ." It is not required in this chapter, or elsewhere, that the question of acquiring waterworks, whether by purchase, lease or original construction, as apart from the question of issuing bonds to pay for the same, shall be submitted to the voters at any general or special election.

It seems to us that the real question submitted to the voters is whether the bonded indebtedness of the city shall be increased by the amount specified as necessary for the contemplated improvement, in the instant case, for the purpose of providing a system of waterworks. The maximum permissible general indebtedness under the constitution and under the statutes is five per cent of the assessed value of the property in the city; for the purpose of acquiring a system of waterworks, by purchase or original construction, four per cent additional indebtedness may be incurred. Whether such indebtedness shall be incurred, in addition to indebtedness already existing, is the real question to be decided. Fundamentally and in the final analysis the power granted by chap. 34, supra, to purchase or construct waterworks would in most cases be wholly nugatory without the power to incur necessary indebtedness in acquiring the plant. It is the last question that is of vital concern to the voters and taxpayers and that is the one required to be submitted to them. Questions of policy, as to whether the city shall build, or purchase, lease or acquire by eminent domain, as such, are not specifically required to be submitted to the electors. Decisions on these and other matters, involving the management of the affairs of the city, must be made by the duly constituted authorities in the exercise of discretion.

The authorities are quite unanimous that the proposition of issuing bonds must be submitted to the voters in such a way as not to involve

two or more distinct and unrelated questions. The law on this point was settled in this state in Stern v. Fargo, 18 N. D. 289, 26 L.R.A. (N.S.) 665, 122 N. W. 403. In that case a dual question was in fact submitted to the electors and the election was held void. The question before us in the instant case is whether a double question was in fact submitted.

The fundamental purpose which the city sought to accomplish was to provide an adequate water supply for its inhabitants, and the question was whether an indebtedness in the sum of $225,000 should be contracted for such purpose. That purpose might be accomplished either by purchasing an existing plant or by constructing a new one. Either method would be equally within the power of the commission, once the funds had been made available in the proper manner. Under § 183 of the Constitution, above quoted, providing waterworks for the city is recognized as *one purpose,* and constructing a sewer system another purpose. The method of accomplishing this single purpose, of providing waterworks and a water supply, whether by purchase or construction, is not required to be submitted to the voters, as heretofore pointed out. The city might contract to have a plant erected, it might itself erect the plant, or it might purchase an existing plant. It would not be seriously contended that the Commission must submit to the voters each or all of these methods. Many matters must be left to the discretion of the duly constituted authorities who are, and should be, held responsible to the voters for the manner in which such discretion is exercised. We are satisfied that the purpose sought to be accomplished is single, is clearly expressed and that the question was submitted in the manner required by the statutes and the constitution. The proposition is not stated in the alternative, within the condemnation of the rule laid down generally against such form of submission. The voters, in the instant case, were not required to vote bonds for two purposes in order to accomplish one object. There is but one proposition before the voters and that is the question of increasing the bonded indebtedness of the city for the purpose of providing a system of waterworks that will furnish the citizens of the city an adequate supply of water; whether the system shall be built or purchased refers to the *manner* of executing the will of the voters if they decide that a system of waterworks shall be provided by the city. This view we think is supported

by the better reason as well as by the weight of authority. Hartigan v. Los Angeles, 170 Cal. 313, 149 Pac. 590; C. B. Nash Co. v. Council Bluffs (C. C.) 174 Fed. 182; State ex rel. Canton v. Allen, 178 Mo. 555, 77 S. W. 868; (see also State ex rel. Columbia v. Allen, 183 Mo. 283, 82 S. W. 103); Farmers' Loan & T. Co. v. Sioux Falls, 69 C. C. A. 373, 136 Fed. 721 (S. D. Statutes); Hurd v. Fairbury, 87 Neb. 745, 128 N. W. 638; Henderson v. Shreveport, 137 La. 672, 69 So. 90; Tulloch v. Seattle, 69 Wash. 178, 124 Pac. 481; People v. Sisson, 98 Ill. 335; Wood v. Ross, 85 S. C. 309, 67 S. E. 449; Bergen v. Gubna, 10 Hun, 11 (see Everett v. Potsdam, 112 App. Div. 727, 98 N. Y. Supp. 963); Ryan v. Tuscaloosa, 155 Ala. 479, 46 So. 638; Simpson v. Nacogdoches, — Tex. Civ. App. —, 152 S. W. 858; Swann v. Murray, 146 Ky. 148, 142 S. W. 244; Oklahoma City v. State, 28 Okla. 780, 115 Pac. 1108; Bowen v. Garber, 77 Okla. 16, 185 Pac. 1095; Thompson-Houston Electric Co. v. Newton (C. C.) 42 Fed. 723; Albuquerque v. Water Supply Co. 24 N. M. 368, 5 A.L.R. 519, 174 Pac. 217. To this list should be added Truelsen v. Duluth, 61 Minn. 48, 63 N. W. 714, though cited by "amicus curiæ" in behalf of the appellant as supporting the contrary view. One of the questions submitted in that was "To issue . . . bonds . . . for the purpose of erecting or purchasing a water and light plant." This the court held was a single question, though the election was held void because other and antagonistic propositions were submitted at the same time.

In the case of State ex rel. Canton v. Allen, 178 Mo. 575, 77 S. W. p. 875, supra, the court says: "In support of this position, respondent relies chiefly upon the case of McBryde v. Montesano, 7 Wash. 69, 34 Pac. 559. The propositions submitted to the voters in that case were two, which were entirely different and distinct propositions—one —to fund $20,000 of an old debt; the other, to borrow $5,000 for future use. But they were submitted as one, and it was held that they could not be united, so as to have one expression of the voter answer both propositions. There is a marked distinction between that case and the one at bar, in this: In that case there were clearly two distinct propositions, having different objects in view, while in the case in hand the proposition submitted to the voter was to increase the bonded indebtedness of the town and to purchase or erect an electric light plant. The

same end was intended to be accomplished, but in two different ways, to be determined upon by the board of trustees in the exercise of their discretion. The proposition submitted to the voters was the exact proposition that they were called upon to decide, and while it is, in all probability, *true that some of the voters might have wished to vote for the erection of the plant, and others to purchase a plant already erected, and they did not have the chance to express their views in this regard, we do not think that such fact invalidates the election that was held, or the bonds that were issued by the town in pursuance thereof.*" (Italics are ours.)

In only three jurisdictions have we found a different rule announced. See Leavenworth v. Wilson, 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367; Marcellus v. Garfield, 71 N. J. L. 373, 58 Atl. 1099; Elyria Gas & Water Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335. We shall not attempt to distinguish these cases from or harmonize them with the authorities heretofore cited. In Kansas and Ohio the pertinent constitutional provisions, with respect to municipal corporations, were, when the cases were decided, substantially identical, very restrictive, imposing upon the legislature the duty to so regulate the power of taxation by cities as to prevent abuse thereof, but wholly dissimilar from our § 183, quoted above. In New Jersey the Constitution was silent on the subject. In view of our constitutional provisions, we should hesitate, were there no other precedents in point, to accept as conclusive, or even persuasive, the authority of these cases. We do not question their correctness under local statutes and Constitutions, but they are not in point or conclusive in the instant case.

It is next contended by the appellant that the election is void because less than a majority of the electors of the city voted in favor of issuing the bonds. This contention is wholly without merit. It is specifically provided in § 4015, Comp. Laws, 1913, that the bonds may be authorized by a "majority vote of the qualified electors of such city or municipal corporation *voting thereon* at an election regularly called for that purpose."

While § 3818, Comp. Laws 1913, subd. 4, is a more recent enactment than § 4015, the former is but a re-enactment of § 3599, subd. 5, and defines the powers of the city commission in terms substantially identical with those used in defining the powers of the council in cities not

under the commission form of government. There is no conflict on this point between the two statutes and the legislative intent is clearly expressed in that portion of § 4015, Comp. Laws 1913 quoted above, contrary to counsel's contention. Moreover, it is established in this jurisdiction that 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. State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360; State ex rel. Byerley v. State Canvassers, 44 N. D. 126, 172 N. W. 80. See also Spangler v. Mitchell, 35 S. D. 335, 152 N. W. 339, Ann. Cas. 1918A, 373.

It is contended by the appellant that the ordinance passed by the commission, providing for the delivery of the bonds, is not drawn in conformity with the question as submitted to the electors and as provided in the resolution adopted by the commission calling the election, and that the ordinance is therefore void. The ordinance provides for the retirement of $11,000 of the bonds each year for nineteen years and of $16,000 the twentieth year after the date of issue. Under the proposition submitted to and approved by the voters. one twentieth of the amount of the bonds was to be retired each year and the denomination was fixed at $1,000 for each bond. Both provisions cannot be complied with, as a mathematical calculation will demonstrate. One or the other must be disregarded. One-twentieth of the total issue is $11,250. That would mean that eleven $1,000 bonds would mature and that in order to comply with the requirement that one-twentieth be retired each year, another bond in the sum of $250 would have to be issued. It is plain that it would not be advantageous for the city to issue bonds in such a small denomination. The ordinance provides for the retirement of that amount nearest to $11,250, permissible if the bonds are in the proper denomination, to wit: $1,000 each. We think this is a substantial compliance with the mandate of the voters and it cannot be said that anybody is prejudiced thereby.

After careful consideration of the matter, we have come to the conclusion that the trial court committed no error and that its judgment must be affirmed. It is so ordered.

BIRDZELL and NUESSLE, JJ., and BERRY, Dist. J., concur.

Justice CHRISTIANSON did not participate, Honorable H. L. BERRY, Judge of the Sixth Judicial District, sitting in his stead.

BRONSON, Ch. J. (dissenting). This cause has been presented upon stipulation out of term time and without full opportunity for argument and consideration. It is unfortunate, that, through the urgent situation existing and the request of the parties that prompt action be taken, full argument and consideration may not be had. I am of the opinion that the question submitted to the voters, namely, shall the city issue bonds for the purpose of *constructing or purchasing* waterworks, is a double question and falls within the inhibition of the rule announced in Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403. In that case this court said: "Our whole election system, whether it relates to candidates or public improvements or works, is built up and founded on the fundamental principle that every elector shall be given the opportunity to vote for or against any candidate, or any proposition, independent of and separate from his vote for or against any other candidate or proposition." Further, in the cited case, this court quoted with approval language from the case of Leavenworth v. Wilson, 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367, and, in particular, as follows: "Since, therefore, no bonds may be issued for any purpose, or for any set of purposes, unless the people be consulted and give their consent, every voter must have a fair opportunity to register an intelligent expression of his will." Guided by these principles, and upon logical grounds, I am therefore of the opinion that the question submitted in the instant case may not be termed single. Can it be properly said that the real question submitted was,—Shall the city issue bonds for the purpose of providing a system of waterworks? If a question in such form had been submitted would there be any question about its illegal character? The statute permits the city to purchase, erect, lease, rent, manage and maintain any system of waterworks. Sess. Laws, 1921, chap. 34. The Constitution permits the bonding of a city for the purpose of constructing or purchasing waterworks. N. D. Const. § 183. Assuredly, an authorized bond issue does not comprehend leasing or renting a waterworks system. If the voters had authorized a bond issue for constructing a waterworks system, manifestly, it would not have authorized the purchase of an existing

system. Again, if the voters had directed a bond issue for the purchase of a waterworks system, the bonds or the proceeds thereof could not be used for the construction of a waterworks system. May it be urged logically that, since, the proposition submitted to the voters in the instant case is single, the city is authorized to use the bonds or the proceeds thereof to *both construct and purchase* a waterworks system? Yet the issue as submitted to the voters requires *either a purchase or a construction.* Two propositions are involved; either, a construction, or a purchase. A bond issue may be authorized for construction; a bond issue may be authorized for purchase. The two propositions are dissimilar; the constitutional and statutory statement in the alternative emphasizes the dissimilarity. Hence, if the discretion is placed in the people requiring the sanction of a favorable vote to authorize the bond issue, this discretion must express itself upon a definite proposition and purpose and may not be delegated to those to whom it has not been entrusted. Leavenworth v. Wilson, supra; Cain v. Smith, 117 Ga. 902, 44 S. E. 5. Furthermore a rule of strict construction applies to the proceedings in the case at bar. Stern v. Fargo, supra. The voters have directed a bond issue payable one twentieth each for twenty years with interest at 5 per cent per annum; the ordinance involved has changed the yearly payment so as to permit the issue of bonds in the denomination of $1,000 each, again a double proposition was submitted to the voters; *either* the bonds had to be issued in the denomination of $1,000 each or in part for a lesser amount; *or* the percentage of payments per year had to be varied: Again, through an ordinance, those to whom this discretion was not given seek to exercise such discretion. In my opinion, regardless of the deserving character of the project contemplated, the rule of law, as I see it, should be applied and an injunction awarded.

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ACCORD AND SATISFACTION.

1. Where there is an agreement of accord between the parties which is partly but not wholly executed on the part of the defendant, plaintiff, under § 5826, Comp. Laws 1913, providing, "Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed, may either (1) sue on his original claim for any balance remaining after crediting thereon that which has been paid under the accord, or (2) sue on the contract of accord for breach thereof." Meske v. Melicher, 1160.

ACCOUNT STATED.

1. In an action upon an account stated, where merchandise was sold, thereafter a note given therefor, later, a payment made, the note surrendered to defendant, and a slip made, signed by the defendant, evidencing the balance due, and, where, before action commenced, defendant destroyed the note, it is *held*, for reasons stated in the opinion, that the action was properly brought and that the evidence supports the jury's verdict that the merchandise was sold by plaintiff to defendant. Miller v. Caffray, 625.

AGRICULTURE.

1. Under chapter 13, Laws 1918, as the complaint shows, appellant and his tenant made an application to Burke County for seed grain at a certain price amounting to $352. The tenant signed the formal contract and at the foot of the same appellant signed as follows: "As owner of the real estate described in the above contract I hereby agree to the terms of the same."

   Held, that the word terms as here used means conditions and stipulations; also, an interpretation which gives effect is to be preferred to that which makes void. He who takes the benefit must bear the burden. As the complaint shows, appellant has taken the benefit of his application and contract to obtain the seed grain amounting to $352, and of course he must pay for it. Burke County v. Gerding, 414.

ANIMALS.

1. Under the laws of South Dakota and North Dakota (S. D. Rev. Codes 1910,

ANIMALS—continued.

§§ 1669, 1670; N. D. Comp. Laws 1913, §§ 6844, 6845), a person who is employed to herd and care for sheep at a monthly wage is entitled to a herder's lien, as against the owner who consented to such employment, upon the sheep so placed under his care and in his custody. Mead v. Bockorny, 437.

APPEAL AND ERROR.

1. Where a motion to vacate a judgment is made upon grounds which appeal to the discretion of the court, raising questions not predicated solely upon errors of law occurring anterior to the judgment, an order denying the motion to vacate is appealable to this court under subdivision 2 of § 7841, Comp. Laws, 1913. Boyd v. Lemmon, 64.
2. An appeal does not lie from an order dismissing an action. Malherek v. City of Fargo, 123.
3. In an action on an insurance policy, at the close of the testimony, the defendant moved for a directed verdict. This motion was overruled and the case was submitted to the jury, who failed to agree upon a verdict. Defendant thereupon renewed its motion for a directed verdict and moved for, a judgment notwithstanding the disagreement of the jury, which motion was overruled by the trial court.

   Held, an order overruling a motion for a directed verdict and denying a motion for judgment notwithstanding the disagreement of the jury is not an appealable order within § 7841, Comp. Laws, 1913. Bowen v. Mont. Life Ins. Co. 140.
4. Where lessees, as partners in a farm lease, agreed to pay a rental of $800 for five successive years, and, thereafter, the lessor, upon notice of dissolution of the partnership and the assumption of the partnership assets and liabilities, received the individual notes of the purchasing partner, and where, thereafter, the lessor extended the time of payment for rent due in 1911, 1912, or 1913 by accepting renewal notes, but made no extension of time concerning the rent due in 1914,

   It is *held*, in an action for the rent due in 1914,—

   That it was a question of fact concerning recognition and intention of the lessor in receiving the notes of the purchasing partner, and that the findings of the trial court, unless clearly opposed to the preponderance of the evidence, are presumed to be correct. Blecker v. Johnson, 156.
5. Where a party moves for a new trial, he must present all grounds which he claims entitle him to a new trial. In other words, he cannot present one ground in the trial court, and another ground in the appellate court. O'Dell v. Hiney, 160.
6. A party who assails the rulings of a trial court in the admission or exclusion of evidence either by motion for a new trial or on appeal must specify

APPEAL AND ERROR—continued.

the particular ruling or rulings which are claimed to be erroneous. O'Dell v. Hiney, 161.

6a. Where defendants have made an application to the court direct for a change of venue, based upon their residence in other counties, and have secured an ex parte order for the transfer of the cause to a county of defendants' residence, and, where notice thereof was served upon the plaintiff, all within the time prescribed by § 7418, Comp. Laws, 1913, and, where thereafter, plaintiff, upon a motion to vacate such order, makes no showing of merits that the defendants are not entitled, as a matter of right, to such change, or that the order would or should have been otherwise, if made after notice and hearing, it is held, that the order of the trial court should not be reversed for the reason that it requires the performance of idle acts. State v. Bloom, 224.

7. Certain assignments of error predicated upon the instructions to jury examined and held nonprejudicial. Rohlik v. Farmers Insurance Co. 235.

8. A motion for a new trial on the ground of excessive damages appearing to have been given under the influence of passion or prejudice is addressed to the sound judicial discretion of the trial court. And the appellate court will not interfere unless a manifest abuse of such discretion is shown. In this case it is *held*, that the supreme court cannot say that the trial court abused its discretion in granting a new trial. Mason v. Underwood, 243.

9. In the above-entitled appeal, there was no proper or legal service of the notice of appeal or of the undertaking on appeal, hence, the appeal is dismissed. Am. Loan & Investment Co. v. Dalen, 323.

10. Where during the course of a trial the parties adopt a certain procedure, they cannot in the appellate court assert that such procedure was erroneous. Malherek v. Fargo, City of, 522.

11. The action of the trial court in refusing to grant a motion to vacate a judgment under § 7483, Comp. Laws 1913, will not be reversed by this court except for manifest abuse of discretion. For reasons stated in the opinion, it is held that the trial court did not abuse its discretion in refusing to grant the motion of the defendant to vacate the judgment. French & Sons Piano Co. v. Getts, 577.

12. An order denying plaintiff's motion for judgment on the pleadings held not appealable. Wall v. First Nat. Bank, 703.

13. In an action for damages for malpractice, where the plaintiff in making his case, on cross-examination of the defendant under the statute, inquired whether defendant was a member of the Northwestern Medical Association, and being answered in the affirmative, he further asked whether defendant had reported the case in to the association, and again whether it was not one of the purposes of the association to protect doctors against malpractice actions, *held* prejudicial error even though the objections interposed to such questions were sustained by the trial court, and the witness not required to answer. Stoskoff v. Wicklund, 708.

APPEAL AND ERROR—continued.

14. Two separate and distinct garnishment actions, which have not been consolidated either by stipulation of the parties or order of the court, will not be treated as consolidated so as to permit them to be brought up for appellate review by one appeal merely because they were submitted to the trial court at the same time, and by the same counsel, and the trial court disposed of both actions by one order. Doerr v. Huether, 717.
15. Where the error committed upon the trial of an action relates solely to a question which is separable from the other issues determined by the first verdict, the new trial may be restricted solely to the question affected by the error. Jacobson v. Horner, 742.
16. Where the notice of appeal from a judgment, undertaking and specifications of errors are served on the respondent and filed with the clerk of the district court more than six months after the notice of entry of judgment, and motion is made to dismiss the appeal from such judgment upon the ground that it is not timely made, under § 7821, Comp. Laws 1913, such motion must be granted. Embden State Bank v. Schulze, 777.
17. When the order of the trial court denying motion for judgment notwithstanding the verdict, or for a new trial, is served on the adverse party by mail, the time within which an appeal may be taken therefrom, which is sixty days under § 7820, Comp. Laws 1913, is doubled, as provided in § 7954, Comp. Laws 1913, following More v. Western Grain Co. 31 N. D. 369, 377; Embden State Bank v. Schulze, 777.
18. To review the sufficiency of the evidence to support the verdict, a motion for a directed verdict or for a new trial is necessary. Bailey v. Davis, 838.
19. In an action under the Federal Employer's Liability Act to recover damages, it is *held*, for reasons stated in the opinion, that the verdict of the jury finding that the defendant was negligent and that the plaintiff did not assume the risk will not be disturbed. Bailey v. Davis, 838.
20. For reasons stated in the opinion it is *held* that the admission of certain evidence was nonprejudicial. Bailey v. Davis, 839.
21. This case was tried on the theory that the plaintiff had a lien in the nature of a chattel mortgage on the grain alleged to have been converted. This theory will not be departed from in this court, following Ugland v. Farmers' & M. State Bank, 23 N. D. 536. Weigel v. Powers Elev. Co. 867.
22. In a case appealed to the supreme court for a trial de novo under § 7846, Comp. Laws 1913, it is *held* to be the duty of the lower court, on remand of the record to it, to comply with the mandate of the supreme court and to obey the directions therein. And where the supreme court directs that a judgment be modified in certain particulars, it is the duty of the court to modify the original judgment as, and only as, directed; and it has no power to make other modifications or changes in such judgment. Colter v. Dill, 903.
23. An order for judgment is not appealable under Comp. Laws 1913, § 7841;

APPEAL AND ERROR—continued.

appeal dismissed on the authority of Malherek v. Fargo, 23 ante, 123, and other cases therein cited. Olness v. Duffy, 933.

24. In a trial to the court without a jury where proper specifications of the insufficiency of the evidence are made, it is unnecessary to make a motion for a new trial in order to review the sufficiency of the evidence. Ransom County Farmers Bank v. Cavett, 980.

25. An application to vacate a default judgment on the ground of surprise, mistake, or excusable neglect is addressed to the sound judicial discretion of the trial court on the particular facts existing in the case, and the trial court's ruling will not be disturbed on appeal unless an abuse of discretion is shown. State Bank v. O'Laughlin, 37 N. D. 532; Farmers & M. State Bank v. Stavn, 993.

26. Following Emery v. First Nat. Bank, 32 N. D. 575, and prior decisions, it is *held* that an action to foreclose a mortgage in which a jury is called to find a part or all of the facts is not "an action tried . . . without a jury," within the meaning of § 7846, Comp. Laws 1913, as amended by chapter 8, Laws 1919, and is therefore not governed by that statute as to the manner of review upon appeal. Mpls. Threshing M. Co. v. Huncovsky, 1086.

27. For reasons stated in the opinion, it is *held* that the failure to determine a material issue presented by the pleadings and evidence is error which requires reversal of the judgment. Mpls. Threshing M. Co. v. Huncovsky, 1086.

28. In an action for assault and battery where defendant inflicted upon plaintiff a serious injury with a club, it is *held*, for reasons stated in the opinion:

Where written instructions were submitted to counsel before the close of the case, an objection, which was made to four distinct and separate paragraphs thereof upon four different subjects and which wholly failed to specifically direct the attention of the trial court to an error, now asserted upon appeal, in one of such paragraphs of the instructions, although otherwise specifically it directed the court's attention to another paragraph thereof, is too general for the assignment of error thereupon. Hrabek v. Patocka, 1119.

29. That the rejection of testimony and offers of proof concerning anterior provocative acts of plaintiff, made to disprove or minimize malice was, under the circumstances, not prejudicial. Hrabek v. Patocka, 1119.

ASSIGNMENTS.

1. A provision in a contract between an automobile distributor and an automobile dealer to the effect that the dealer will not assign the contract or any rights thereunder without the written consent of the distributor goes only to the rights and duties incident to the performance of the contract, and does not render void an assignment by the dealer of the money due on

ASSIGNMENTS—continued.

the contract, made after the contract has been canceled, and the obligations assumed by the dealer thereunder have been fully discharged. Dixon-Reo Co. v. Horton Motor Co. 304.

ATTACHMENT.

1. In this action the plaintiffs sue to recover $18,000, though they may recover a much smaller sum. They have levied an attachment on property which is amply sufficient to secure their claim and have secured an order for sale of a herd of pure bred live stock worth about twice the amount of their claim. Defendant appeals from such order and from a subsequent order denying a motion to vacate the same. Both orders are reversed. American Com. Company v. Randolph, 476.

ATTORNEY AND CLIENT.

1. Where an attorney at law has acted as an attorney for, and an officer of, a creamery association in collecting notes which should be, and were, applied as collected upon a mortgage given by such creamery, and where, while so acting, he purchased and received an assignment of such mortgage and thereafter foreclosed such mortgage for his own benefit, it is *held:*

(a) That, in keeping with the good faith required of the relationship, he could not purchase an adverse interest in his client's property for his advantage prejudicial to his client's interest.

(b) That by purchasing such mortgage he became a trustee for his client subject only to a lien for such fees or services as might be due him. White Earth Creamery Co. v. Edwardson, 394.

BANKS AND BANKING.

1. The plaintiff having pleaded, as the occasion for the loss sustained by the A. bank, the payment of a certain draft and his partial reimbursement of the A. bank on account of such payment and the taking of an assignment from the A. bank of its claim against the H. bank, and the evidence showing that the draft so paid represented items for which the H. bank had taken credit by remittance through a correspondent and that T. had an assignment from the A. bank of these items aggregating the amount of his reimbursement, it is held that there is no failure of proof under § 7480, Comp. Laws, 1913. Tonne v. State Bank, 770.

2. In a suit to recover upon promissory notes, where defendant has set up counterclaims for commissions due to him on land sales and for moneys loaned by him in operating a land department, and where it appears that defendant was appointed manager of such land department by a directors' resolution, which provided that bank funds should not be used in its land department, and where, pursuant thereto, defendant bought and sold lands

BANKS AND BANKING—continued.

upon contracts of sale, personally received moneys from purchasers and disbursed the same to original vendors, received notes from purchasers and used some of the same as well as his personal notes in financing such land department, without any showing that the bank received or retained actually any earnings or profits from the conduct of such land department, it is *held*, for reasons stated in the opinion, that the trial court erred in finding that the bank was liable for either commissions due to, or for moneys loaned by defendant. Ransom County Farmers Bank v. Cavett, 980.

3. Where a bank received a check for $500, dated May 28th, 1918, payable on September 1st, 1918, to plaintiff's order and where, pursuant to and in reliance upon an oral agreement and a subsequent letter by the bank agreeing to pay the same on September 1st, 1918, plaintiff shipped to the maker of the check a road grader, it is *held*, that the transaction was an independent undertaking in the nature of a letter of credit by the bank upon which it was liable. Russell Grader Mfg. Co. v. Farmers' Exch. State Bank, 999.

BASTARDS.

1. Where a new trial is demanded in a bastardy proceeding on the ground that the evidence is insufficient to sustain the verdict which declared the defendant to be the father of the child; and the trial court in denying the motion distinctly expresses the belief that the verdict is wrong; that the evidence in the case shows that there is a greater probability that a person other than the defendant (who has been referred to in the evidence) is the father of the child; and where the transcript of the evidence adduced upon the trial fully justifies the views thus expressed by the trial court, the order denying a new trial will be set aside and a new trial ordered. State v. Weber, 325.

BILLS AND NOTES.

1. In an action by an assignee to foreclose a real estate mortgage where the defendants filed a counterclaim, seeking the recovery of certain moneys which the plaintiff retained and sought to apply upon the mortgage note,—the foreclosure action being by stipulation tacitly abandoned and the contested issue limited to the counterclaim, the evidence is examined, and it is *held* to show

(a) That the plaintiff is not a bona fide purchaser of the note and mortgage.

(b) That the plaintiff had knowledge of the rights of the defendant under the real estate purchase contract and participated in the acts resulting in failure of consideration to the defendant, wherefore it became liable to repay to the defendant any balance retained that would otherwise be ap-

BILLS AND NOTES—continued.

plicable to the payment of the mortgage note. Dakota Live Stock & Invest. Co. v. Bishop, 343.

2. Where an answer alleges that defendant received no consideration whatsoever for a promissory note, it is *held*, upon demurrer, to sufficiently aver an ultimate fact presenting an issue upon consideration. Security State Bank v. Peterson, 585.
3. Where an answer has alleged facts concerning fraud and misrepresentation whereby no consideration existed in the making of a promissory note, it is *held*, upon demurrer that a defense is asserted. Security State Bank v. Peterson, 585.
4. Where an answer has alleged an oral agreement not to enforce a note and not to hold the maker personally liable and, where such allegations, in connection with averments of fraud and misrepresentation, may establish a note of accommodation without consideration, it is *held*, for reasons stated in the opinion, that a defense is asserted. Security State Bank v. Peterson, 585.
5. Where worthless checks or drafts are used as instrumentalities in a "kiting" process with a view to swelling the apparent assets of a bank, the bank in whose interest they are thus used having no right to expect or require their payment, is not entitled to presentment and notice of dishonor under §§ 79 and 114 of the Negotiable Instruments Law, §§ 6964 and 6999, Comp. Laws, 1913. Tonne v. State Bank, 771.
6. If such instruments be paid by the drawee bank through remittance to a correspondent, the payment does not discharge the liability of the bank of origin. Tonne v. State Bank, 771.
7. Mere possession of a promissory note, payable to order, does not entitle the holder to enforce it against the maker without proof of indorsement, or transfer by the payee, if such indorsement and transfer are denied by the maker, although a purported indorsement appears on the back of the instrument. In such a case the duty devolves upon the plaintiff to prove title to the note; and if such indorsement is made by an agent or employee of the payee, the plaintiff must prove the authority of the agent to transfer title by indorsement. Embden State Bank v. Schulze, 778.
8. In an action upon a promissory note where the defense was asserted that no consideration was given and that the note was executed to secure bondsmen upon an undertaking which had been discharged through litigation, it is *held*, for reasons stated in the opinion, that no defense to the note has been established. First Nat. Bank v. Carroll, 1022.
9. Where notes are given to a bank at the solicitation of its president to enable it to carry, in a form satisfactory to the bank examiner, an indebtedness owing by a corporation in which the president and the makers and indorsers of the notes are personally interested, and, where the bank subsequently fails and the receiver sues on the notes, the makers and in-

BILLS AND NOTES—continued.

dorsers are estopped to defend on the ground that the notes were given for the accommodation of the bank. Vallely v. Devaney, 1107.

10. Where the undisputed evidence shows that the notes were given pursuant to the arrangement stated above with the understanding between the president of the bank and the makers and indorsers of the notes that the latter were not to be held personally liable and that the notes were not to be paid by them, the defendants are estopped, as against the receiver, to assert in defense that the president of the bank entertained a secret fraudulent intention to hold them personally liable to the bank. Vallely v. Devaney, 1107.

BROKERS.

1. A broker who, pursuant to a contract of employment, procures a buyer ready, willing, and able to purchase his principal's land upon terms mutually satisfactory, as evidenced by a valid contract made between the parties, is entitled to recover his commission, although the terms of such contract have not been fully consummated. Koffel v. Rhud, 194.
2. For reasons stated in the opinion it is *held*, that the trial court properly sustained objections to three questions propounded by the defendant. Koffel v. Rhud, 194.
3. A broker who, pursuant to his contract of employment has produced a purchaser ready, willing, and able to purchase the land of his principal, upon terms satisfactory to such principal, is entitled to his commission. Neff v. Schrader, 213.
4. Where brokers produced such purchaser with whom the principal made a valid contract for the sale of his land and agreed with his brokers concerning the amount of the commission to be paid, and where, thereafter, such principal and the purchaser, by mutual agreement, without notice to, or the consent of, the brokers, canceled the contract, the principal retaining the initial payment made upon the contract, it is held, for reasons stated in the opinion, that the brokers are entitled to their commission. Neff v. Schrader, 213.
5. In an action to recover commission and overage earned upon the sale of apples in carload lots for the defendant, it is *held:*

   Where the written negotiations of the parties show that plaintiff was expected to solicit its own trade and where, in pursuance of the arrangement, it solicited orders in its own name and forwarded them to the defendant who accepted with knowledge of the terms, it is bound by the contract so evidenced. Hellstrom v. Price, 687.
6. An attempt to cancel orders which is rendered ineffective by the refusal of principal, who had accepted the orders to cancel them, does not preclude recovery of commission and overage on account of such orders when later filled by the defendant. Hellstrom v. Price, 687.

BROKERS—continued.

7. Where plaintiff, a broker has sustained loss by reason of being held answerable to a purchaser on account of the failure of the fruit furnished by defendant to fulfil the warranty of quality, the broker may recover such loss in an action against the principal. Hellstrom v. Price, 688.

BUILDING AND LOAN ASSOCIATIONS.

1. Section 6 of chapter 150 of the Session Laws of 1919, known as the Home Builders' Act, is construed and *held* to authorize the construction of homes for members of the Home Buyers' League, who have assumed the prescribed contingent liability to the state. State v. Wallace, 1076.
2. The same section is further construed to place a limitation of $5,000 upon the price of a home to be built for such a member, and, in applying the limitation, the house and lot is considered as real property and as an entity. State v. Wallace, 1076.

CARRIERS.

1. The common-law duty is imposed upon a carrier to furnish cars reasonably coopered for the purposes intended in an intrastate shipment. Williston Coal & Ice Co. v. Davis, 191.
2. A complaint, alleging failure to so cooper cars and the furnishing of such cooperage by a shipper in intrastate shipments of lignite coal to his damage, alleges a cause of action. Williston Coal & Ice Co. v. Davis, 191.

CHATTEL MORTGAGES.

1. In an action of claim and delivery, where the plaintiff claimed a lien, prior to that of defendant, on the proceeds of a crop of rye, the evidence is examined, and it is held to support the finding of the trial court to the effect that the plaintiff's lien was prior. Hillsdorf v. First State Bank, 274.
2. In an action to recover damages for conversion of property alleged to have been redeemed by the plaintiff, under § 8134 of Comp. Laws, 1913, from mortgage foreclosure sale, it is *held:*

   A notice of redemption, under § 8134, is sufficient if it apprise the agent conducting the sale of the mortgagor's intention to redeem certain property sold from the foreclosure sale, though it may contain an erroneous designation of the mortgagee. Harth v. St. Paul Cattle Loan Co. 467.
3. Section 8134 of the Compiled Laws of 1913, which requires the redemptioner to tender the amount for which the property was sold "with the costs of sale," is construed and held to embrace the item of sheriff's fees in the costs of sale. Harth v. St. Paul Cattle Loan Co. 467.
4. The plaintiff held a chattel mortgage, given by one Elayer, upon certain grain. The mortgage had been duly filed in the office of the register of deeds of the proper county. The note secured by the mortgage was payable

CHATTEL MORTGAGES—continued.

October 1st, 1920. On or about October 2d, 1920, Elayer delivered the grain to the defendant elevator company, who received it in storage, and thereafter on October 4th, 1920, issued storage tickets to Elayer and in his name for all of said grain. On that same date the elevator company received actual notice of plaintiff's mortgage. On January 29, 1921, plaintiff made formal demand upon the defendant for the delivery of the grain or the proceeds thereof. The demand was refused. On May 13, 1921, one Anderson brought action against Elayer and garnished the defendant elevator company. On June 18, 1921, plaintiff brought this action for conversion of the grain. On July 29th, 1921, the elevator company interposed an answer in the garnishment action and attached thereto duplicates of the storage tickets issued to Elayer and served notice upon the plaintiff in such garnishment action and upon the plaintiff in this action that such duplicate storage tickets had been deposited, in the office of the clerk of the district court where such actions were pending, as provided by § 7594, Comp. Laws, 1913. It is *held*,

That the refusal of the defendant elevator company to comply with plaintiff's demand *prima facie* established a conversion. Sand v. St. A. & D. Elevator Co. 503.

5. In this state, where a chattel mortgage is a mere lien, and as such transfers no title to the property mortgaged, a complaint, in an action for conversion, which alleges a special interest and right of possession in plaintiff by reason of unpaid demand notes secured by chattel mortgages, and the wrongful conversion of the property by a defendant not the mortgagor, but which fails to allege any demand for payment, or breach of condition stipulated in the mortgage which entitles the mortgagee to possession of the property, fails to state a cause of action. Hellstrom v. First Guaranty Bank, 531.

6. Where the receipt required to be surrendered to the mortgagor by the mortgagee, under § 6763, Comp. Laws 1913, is incorporated in the body of the mortgage, and the mortgagor signs but once, and in the usual place at the end of the body of the instrument, it is *held* that this is not a substantial compliance with the statute and that the filing of such an instrument is not notice to anyone. Stoffel v. Sullivan, 695.

7. Where defendant purchased a tractor and gave a note and mortgage thereupon to secure the unpaid purchase price and immediately transferred, by bill of sale, this tractor to his wife, and where, thereafter, in an action to foreclose the mortgage, defendant set up various counterclaims for damages sustained in failing to get possession of the tractor and, also, concerning an agreement to reduce the price of such tractor, it is *held*, for reasons stated in the opinion, that such counterclaims have not been established. Sando v. Burke, 751.

8. Where a chattel mortgagee authorized the mortgagor to sell a certain pool

CHATTEL MORTGAGES—continued.

hall outfit, to receive the proceeds, and, thereafter to pay such proceeds to the mortgagee, and, where the trial court, in an order for judgment, found that such mortgagee had consented to the sale of such property by the mortgagor, and, by so doing, had waived the lien, it is *held*, for reasons stated in the opinion,—

(a) That the finding is supported by the evidence, is determinative, and, is sufficient.

(b) That the lien was waived. Calkins v. Stevens, 768.

9. In an action to foreclose a chattel mortgage securing a note for $1,500, the evidence is examined, and it is *held* that the note had been paid and discharged prior to the bringing of the action. Underwood State Bank v. Weber, 814.

10. In an action upon a promissory note and to foreclose a chattel mortgage where the issue involved concerned the question whether a note and mortgage have been surrendered and canceled by the taking of a new note and mortgage, it is *held*, for reasons stated in the opinion, that the findings of the trial court are well supported by the evidence. First National Bank v. Riden, 1030.

CONSTITUTIONAL LAW.

1. Chapter 38, Session Laws, 1921, which provides for the conciliation of controversies, where the amount involved is $200 or less, is a valid enactment and in no manner contravenes, as contended, certain provisions of the Constitution of the United States or of the state of North Dakota. (The appellant claimed that the act was invalid as contravening some of the provisions of the Constitution of the United States and many of the provisions of the state Constitution. The grounds on which the unconstitutionality of the statute is asserted are so numerous that it would be impracticable to state them all in a syllabus. In the opinion they are fully analyzed and decision made of them.) Klein v. Hutton, 248.

CONTEMPT.

1. Where an order to show cause is issued on an affidavit which alleges facts making it proper for the court to institute an inquiry as to the disposition of seized liquors but which does not purport to allege any contempt, and where, in response to the order to show cause, the party to whom it is directed does not personally appear and does not in other respects comply with the order, and where the court issues a second order to show cause reciting therein the additional negative facts with respect to the nonappearance and the failure to file a sufficient inventory and account, directing the defendant to show cause why he should not be punished for contempt, it is held that the original affidavit, together with the recital of facts in

CONTEMPT—continued.

the second order to show cause, is a sufficient pleading to support a judgment of conviction for contempt. In re Dunbar, 852.

2. The judgment in the instant case is examined and *held* not to be in conformity with § 8181, Comp. Laws 1913, which prescribes the procedure requisite to a legal conviction of contempt committed in the immediate view and presence of the court, in that there was no order stating the facts which constituted the offense and reciting that the same occurred in the immediate view and presence of the court. In re Dunbar, 852.
3. Section 8188, Comp. Laws 1913, which requires the court or judge before whom an accused is produced by virtue of a warrant or an order to show cause, to cause interrogatories to be filed specifying the facts and circumstances of the offense charged against the accused, is mandatory. In re Dunbar, 852.

CORPORATIONS.

1. In an action to foreclose a mechanic's lien where the trial court found no valid lien to exist by reason of alterations made in the date of making an owner's consent, to a lien, it is *held*, for reasons stated in the opinion, that the findings of the trial court are supported by the evidence and that plaintiff is not entitled to a personal judgment against the contesting defendant for the amount of the debt involved. Regent Grain Co. v. Sadler, 945.

COUNTIES.

1. The board of county commissioners in accepting the lowest responsible bid exercise a discretion which may consider the ability, capacity, experience, efficiency, and reputation of the bidders. Chaffee v. Crowley, 111.
2. In an action to enjoin repairs to a courthouse, pursuant to the award of a contract, it is held, for reasons stated in the opinion, that the contract was properly let and that there are sufficient moneys available for its purposes. Chaffee v. Crowley, 111.
3. In three separate applications for original writs of mandamus to compel county commissioners to meet and county commissioners and county auditors to submit to the voters, pursuant to three separate petitions, respectively, presented to them, the questions of forming a proposed Lake county out of Burke county, eighteen townships in Renville county, and seven townships in Ward county; and, also, the question of withdrawing six townships from Renville county, which now contains only twenty-four townships, and adding the same to Ward county, it is *held*,

That each petition must be considered by itself and that there is no presumption that the subscribers to one petition consented to the request contained in another. State ex rel. v. County Commissioners, 151.

4. That the petition requesting the withdrawal of eighteen townships in Renville county composed of twenty-four townships, and the incorporation of

COUNTIES—continued.

the same in the proposed Lake county, likewise, violates the constitutional requirement. State ex rel. v. County Commissioners, 152.

5. That it is doubtful whether § 3205, Comp. Laws 1913, and article 3, of which it forms a part, apply to the merger and destruction of existing counties and the creation of a new county composed of the territory in whole or in part of such counties to be destroyed. State ex rel. v. County Commissioners, 152.

5a. In an action by a resident and taxpayer to enjoin the sheriff from appointing and continuing in employment special deputies, and other county officials from paying county funds to such special deputies so appointed, it is *held:*

(a) That, as against the sheriff, plaintiff, upon the allegations of the complaint, is in the position of a private individual sustaining no threatened loss and having no right to maintain the action.

(b) That, as against the other defendants, the complaint does not allege, nor the record show facts sufficient to warrant any injunctive relief. McLean v. Scofield, 384.

6. In a taxpayers' suit to enjoin the county commissioners from paying for culverts and bridges, it is *held*, for reasons stated in the opinion, that the trial court properly refused to grant an injunction. Backhaus v. Lee, 821.

7. Where, at the time of the taking effect of the depositary law (chapter 56, Laws of 1921), public funds were on demand deposit in banks which did not meet the requirements of the law, and where the deposit was allowed to remain in the noncomplying banks until they failed three months afterward, the treasurer and his bondsmen are liable for the loss sustained. Slope County v. Douglas, 1026.

8. The evidence is examined and *held* to show that there was no settlement had between the county treasurer and the county commissioners or between the county treasurer and his successor in office on the basis of the unauthorized deposits being accepted as cash. Slope County v. Douglas, 1027.

9. A petition invoking the jurisdiction of the redistricting board, under § 3262 of the Compiled Laws of 1913, relating to redistricting of counties into commissioner districts, need not contain any definite proposal of changes. State ex rel. v. Kopriva, 1040.

10. The word "congressmen" in § 3262, used in connection with the requirement of the number of voters who must sign a petition, is construed to mean a representative in the House of Representatives, and the number of votes cast for such office is held to be the basis for determining the sufficiency of a petition for redistricting. State ex rel. v. Kopriva, 1040.

COURTS.

1. Section 86 of the Constitution vests in the supreme court general superintending control over inferior courts. This power enables and requires it,

COURTS—continued.

in a proper case, to control the course of litigation in district courts so as to prevent injustice in cases where there is no appeal, or the remedy by appeal is inadequate. State ex rel. Lemke v. Dist. Court, 27.

2. In the instant case, a restraining order was issued at the commencement of a taxpayers' suit, which order, among other things, enjoined the state treasurer from depositing state funds, and funds of state institutions in the bank of North Dakota. The laws of the state require the state treasurer to deposit such funds in the bank of North Dakota. For reasons stated in the opinion, it is *held:* That the order so issued is erroneous; that the case presented to this court is one within, and requires the exercise of, the constitutional power of superintending control over inferior courts; and that the facts and circumstances require that the restraining order be vacated and set aside. State ex rel. Lemke v. Dist. Court, 27.

3. The power of the supreme court, under § 86 of the Constitution, to exercise superintending control over inferior courts is not affected by the fact that the district court was acting within its jurisdiction. State ex rel. v. District Court, 1127.

CRIMINAL LAW.

See also Habeas Corpus.

1. In the application for writ of habeas corpus where a petitioner was committed upon a sentence of six months in the county jail, and released thereafter under suspended sentence in order that she might receive medical attention and upon directions to report thereafter, and where subsequently petitioner, having failed to report, was arrested and committed for the unexpired term of the sentence, it is held following, Re Hart, 29 N. D. 38, that her detention is legal even after the expiration of six months elapsed time from the date of the first commitment. In re Harris, 7.

2. In a criminal prosecution for unlawfully possessing intoxicating liquor, where evidence concerning the seizure under a search warrant was rejected and no evidence was offered or introduced that intoxicating liquors were found in defendant's possession, and where defendant has appealed from an order directing the jury to find for defendant and from a judgment of acquittal, it is *held,* that the questions presented are moot and the court has no jurisdiction thereover. State v. Kelsey, 148.

3. Where, in such criminal action, the trial court has advised a verdict, and a verdict and judgment of acquittal were returned, defendant's bondsmen exonerated and defendant discharged, thereby devesting the trial court of all jurisdiction in the action, it *held,* for reasons stated in the opinion, that the state, under § 10993 Comp. Laws 1913, possesses no right of appeal. State v. Kelsey, 149.

4. In a prosecution for the crime of assault with intent to kill, it is *held:*

CRIMINAL LAW—continued.

That prejudicial error did not occur in testimony concerning conclusions of law. State v. Mozinski, 228.

5. That testimony concerning the disposition of manufactured whisky, unfaithfulness, and ill will of defendant towards his wife's parents was properly admitted as part of res gestæ and to show intent and motive. State v. Mozinski, 228.

6. That evidence concerning attempts of defendant to kill his wife, and relations of the parties was properly admissible to show relationship, motive, and intent. State v. Mozinski, 228.

7. That scope of cross-examination is largely committed to the sound discretion of the trial court and its exercise will not be disturbed unless manifest prejudice results. State v. Mozinski, 228.

8. That the verdict rests upon some evidence of substantial nature proper to submit to a jury. State v. Mozinski, 228.

9. The generally accepted test of responsibility for crime is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act. State v. Throndson, 348.

10. A defendant in a criminal action may waive his right to the services of counsel, the procurement of witnesses or a jury trial. State v. Throndson, 348.

11. An examination of the record discloses that at the time of the killing the defendant was mentally able to distinguish between right and wrong and understood fully the nature of his act; that his confessions were made freely and voluntarily and with mental capacity to understand their contents and the legal effect thereof. State v. Throndson, 348.

12. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and the appellate court will not interfere unless it is shown that such discretion has been abused. State v. Stepp, 376.

13. In this case it is *held* that no abuse of discretion has been shown. State v. Stepp, 376.

14. The appellant in a certiorari proceeding has the burden of showing prejudicial error, affirmatively, by the record. For reasons stated in the opinion it is *held* that the appellant here has failed to do so. Brissman v. Thistlethwaite, 417.

15. Where officers of the law, even though uninvited, entered the dwelling house of defendants and there found defendant committing the crime of manufacturing intoxicating liquors, whereupon they arrested the defendants and seized instrumentalities, of an evidentiary nature, then being used in the commission of the crime, it is *held*, that the proof of such instrumentalities and their reception in evidence was not violative of the constitutional

CRIMINAL LAW—continued.

provision that no party in any criminal case shall be compelled to be a witness against himself. State v. Pauley, 488.

16. For reasons stated in the opinion it is *held*, that the error, if any, in admitting a search warrant and the return thereon in evidence, is error without prejudice. State v. McDaniels, 648.

17. Where on a joint trial evidence inadmissible as to one of the defendants is received without objection and submitted to the jury without instruction as to its consideration, the matter not having been called to the attention of the trial court by a request for an appropriate instruction or otherwise, error cannot be predicated thereon. State v. Hand, 677.

18. Section 10,822 of the Compiled Laws of North Dakota for 1913, which requires that "all instructions must first be reduced to writing, unless by consent of both parties entered in the minutes, the instructions are given orally and taken down by the stenographer of the court, in shorthand," is mandatory. State v. Mitchell, 726.

19. That the testimony of two witnesses, whose attendance could not be procured, as given at a former trial, was properly admitted. State v. McCarty, 912.

20. That the admission of certain rebuttal testimony concerning the commission of other larcenies was not erroneous. State v. McCarty, 912.

DAMAGES.

1. Upon a second trial of an action for personal injuries the plaintiff recovered $10,000 damages. A motion was made in the trial court for judgment non obstante, or, in the alternative, for a new trial, which motion was denied. The evidence is examined, and it is held that it is not insufficient, as a matter of law, to sustain the verdict. Daniels v. Payne, 370.

2. In an action for personal injuries sustained by plaintiff in opening a cellar door and being precipitated into a cellar adjacent to a street, it is *held:*

(a) That the law of the case upon the alleged facts is fully set forth in Steinke v. Halverson, 46 N. D. 10.

(b) That the facts proved support the facts alleged.

(c) That the trial court did not err in its instructions to the jury.

(d) That the verdict is not excessive. Steinke v. Northern Tel. Co., 433.

DEMURRER.

1. The defendant demurred to the complaint, upon the grounds that it did not state sufficient facts to constitute a cause of action, and the trial court made an order sustaining the demurrer, from which plaintiff appealed. Anderson v. Board of Education of City of Fargo, 181.

DEPOSITIONS.

1. After a trial has occurred and briefs have been filed, it is irregular and

DEPOSITIONS—continued.

improper for one party, upon his own notice and without action of the court or consent of the other party to take, return, and submit in evidence, a deposition. Bahnemann v. Lehmann, 729.

2. Chapter 56 of the Session Laws of 1921, providing for legal depositaries of public funds, is construed and *held* to require the deposit of all funds in the custody of the various treasurers of municipal corporations in public depositaries qualifying under the act. Slope County v. Douglas, 1026.

DIVORCE.

1. Where, in a divorce action, the court decrees a final distribution of the estate of the parties, it is *held*, for reasons stated in the opinion, that the court cannot, several years later, modify such final judgment upon the application of the husband, except upon some one or more of the grounds on which ordinary judgments may be modified, vacated or set aside. Sinkler v. Sinkler, 1144.
2. For reasons stated in the opinion, it is *held* that the trial court did not err in refusing to adjudge the plaintiff guilty of contempt for failure to make periodical payments to his divorced wife in conformity with the terms of the original decree of divorce. Sinkler v. Sinkler, 1144.

DRAINS.

1. A contractor, who is engaged in excavating a public drainage ditch, must use, in the performance of his contract, reasonable care so as to avoid injury to adjacent lands and to him the familiar maxim "sic utere tuo ut non alienum lædas" is applicable. Weller v. Mulgrew & Sons Co., 636.
2. Where a contractor engaged in excavating a drainage ditch has obstructed and filled up an old road ditch that served to drain flood waters in the territory tributary and, where, after a heavy rain, flood waters in such road ditch, through the obstruction, were cast upon plaintiffs' field and, thereupon, the contractor, becoming cognizant of the conditions, removed the obstruction by a communicating ditch where by such ditch properly functioned to drain off flood waters, and where, thereafter, after receiving advice from the chairman of the drainage commission to use his own judgment, the contractor renewed the prosecution of the work and again maintained the obstruction so as to cast flood waters upon plaintiffs' fields and to destroy his crops there growing, it is *held* for reasons stated in the opinion, that, under the circumstances, the duty was imposed upon the defendant to exercise reasonable care in the continuation or renewal of the work, for the failure of which plaintiffs may recover damages suffered thereby. Weller v. Mulgrew & Sons Co., 636.
3. A right of way release, granted by plaintiffs to the county for the construction of such drainage ditch, did not release damages occasioned by the contractor's negligence. Weller v. Mulgrew & Sons Co., 637.

DRAINS—continued.

4. Questions concerning the extraordinary character of the storm and concerning the sole contributing and proximate cause of the damages awarded, were for the jury. Weller v. Mulgrew & Sons Co., 637.

DRUGGISTS.

1. In a neighborhood where pig cholera prevailed to an alarming extent the plaintiff and defendant were in a kind of pig partnership. In a neighborly way, and not for any reward, and to save his own pigs as well as those of the plaintiff, defendant gave the plaintiff some dope which he had bought and used for pig cholera. The plaintiff gave it to nineteen pigs and one sick sow, and within three days they all died. This action was commenced on the claim that the cholera dope had poisoned the pigs, and defendant appeals from a judgment against him.

   Held: That the testimony clearly shows that the pigs died of the cholera, and not of poison; and as it appears that plaintiff has no chance to prevail on a second trial, the judgment is reversed and the action dismissed. Johnson v. Kittleson, 92.

ELECTIONS.

1. The Corrupt Practice Act (Comp. Laws 1913, §§ 923-944) applies to all primary and general elections held in the state; but the language of the act indicates that the legislature intended that certain provisions should be applicable only to elections of public officers, while other provisions should be applicable alike to elections of officers and elections involving some measure, proposition or question submitted at an election. Ransom County Farmers Press v. Lisbon Free Press, 1165.
2. Where a candidate for public office, receiving the highest number of votes at the election, has been guilty of corrupt practice, any person claiming the right to the office may contest the validity of such election under §§ 1046 and 1048, Comp. Laws 1913, and assert such corrupt practice as a ground of contest. Ransom County Farmers Press v. Lisbon Free Press, 1165.
3. In all cases, where under the statute, such contest lies an action in equity to annul the election will not lie. Whether such action will lie under any circumstances is not decided. Ransom County Farmers Press v. Lisbon Free Press, 1165.

ERROR.

1. That statements made by the state's attorney in his argument do not constitute prejudicial error. State v. Mozinski, 228.

EVIDENCE.

1. The court erred in excluding certain testimony offered by defendant. Nesvold v. Gerding, 207.

EVIDENCE—continued.

2. In an action on a fire insurance policy for the loss of certain stacks of unthreshed grain, evidence of yield of like crops during the same season, in neighboring fields of like quality and character, under similar conditions and circumstances, is admissible upon the question of the amount of loss sustained. Rohlik v. Farmers Insurance Co. 235.
3. Certain assignments of error predicated upon rulings on evidence examined and held nonprejudicial. Rohlik v. Farmers Insurance Co., 235.
4. The defendant on the trial attempted to give certain evidence to substantiate certain defenses set forth in the answer. On objection, the same was not received. It then made an offer of proof, setting forth the evidence which it desired to introduce. The offer was denied.

   For reasons stated in the opinion: It is *held* that the court erred in refusing to receive the evidence and in the denial of the offer thereof. National Cash Register Co. v. Midway City Creamery Co., 441.
5. Where notes for the purchase price of lands due the vendor and for commission due a broker were secured by a mortgage made to the vendor, and where, thereafter, the notes representing the commission were transferred by the vendor to the broker by an indorsement thereupon without recourse pursuant to an extrinsic parol agreement that such commission notes and the lien of their security should be inferior to that of the vendor, it is *held*, for reasons stated in the opinion, that parol evidence was properly received concerning such extrinsic agreement and that the same did not serve to vary or contradict the contract of indorsement. Krueger v. Dulas, 542.
6. In construing statutes, the courts may take judicial notice of the history of the times when they were enacted. North Fargo v. Fargo, 598.
7. Witnesses who were members and directors of a corporation are not, by virtue of that fact alone, qualified to testify to the value of property of the corporation which is alleged to have been converted. Company A, First Regiment v. Hughes, 626.
8. The testimony of the cashier of the plaintiff to the effect that before the note in suit was indorsed to the plaintiff bank, he talked with the president of the payee, and was advised by the president of the payee that the person who had possession of the note in suit had authority to indorse notes belonging to the payee, is hearsay and incompetent upon the question of authority of the agent to transfer title by indorsement and, if properly objected to, should be excluded. Embden State Bank v. Schulze, 778.
9. The plaintiff in an action in conversion has the burden of establishing his title to the property in suit. For reasons stated in the opinion it is *held* that in this case the plaintiff has failed to establish ownership of the property claimed to have been converted. Dearborn Truck Co. v. Nedreloe, 793.
10. While individual sales sometimes are competent evidence of value, they are not competent to establish market value of wheat when there is an established market, like the wheat market in the cities and villages in North

EVIDENCE—continued.

Dakota, without showing, by competent evidence, that such individual sales are in fact made at the prevailing market price of wheat at the time and place of the conversion. Weigel v. Powers Elevator Co., 868.

11. Where no direct proof has been adduced concerning the means by which an employee was injured in the course of an employment, and where, his declarations, made after the time of an alleged injury, established that his head received a blow through coming in contact with an iron pulley while he was engaged in constructing a unit in an elevator, it is *held*, for reasons stated in the opinion, that the declarations were properly admissible as part of the res gestæ. Gotchy v. N. D. Workmen's Comp. Bureau, 915.
12. Action for money had and received. The record examined, and *held*, that on the showing made, by evidence introduced and offers of proof, viewing the same in the light most favorable to plaintiff, no recovery can be had. Raasch v. Goulet, 936.
13. As between the immediate parties to a negotiable instrument, absence of consideration therefor is a defense and may be established by parol. Farmers & M. State Bank v. Stavn, 993.
14. While parol evidence of a contemporaneous agreement or understanding is inadmissible to contradict, vary, or explain the terms of a negotiable instrument, it may be introduced to show that the instrument was given without consideration. Farmers & M. State Bank v. Stavn, 993.
15. Applying the rules of law as stated in Simon v. Chicago, M. & St. P. R. Co. 45 N. D. 251, which control the decision in the instant case, it is *held* that the evidence sustains the findings of the trial court in favor of the plaintiff upon all the facts necessary and material to establish a right to recover a judgment. Simon v. Chicago, M. & St. P. Ry. Co. 1003.

EXECUTORS AND ADMINISTRATORS.

1. It is *held*, that this section does not create a new remedy, or confer a new right of action, but merely recognizes the existing rule that a judgment may be vacated by an equitable action upon certain grounds, and limits the time in which such action may be brought. Kranz v. Tavis, 553.
2. For reasons stated in the opinion, it is further *held*, that the evidence in this case does not establish facts justifying interference with a decree of distribution. Kranz v. Tavis, 553.

EXEMPTIONS.

1. The exemption which may be claimed by a wage earner in a garnishment suit ancillary to an action to enforce the collection of a bill for groceries and provisions is fixed by chapter 72, Laws 1921, and § 7782, Comp. Laws 1913 has no application. Radke v. Padgett, 405.

FRAUDULENT CONVEYANCES.

1. Where a creditor seeks to set aside a transfer of property, as one in violation

FRAUDULENT CONVEYANCES—continued.

of the provisions of § 7220, Comp. Laws, 1913, it must appear from the pleadings, proof, or facts existing in the case, that one seeking to have such transfer set aside has a vested and specific lien upon the property claimed to have been fraudulently transferred as for illustration, a judgment upon which an execution has been issued and returned, wholly or in part unsatisfied, or a lien acquired by attachment proceedings, etc. Bank of Sanborn v. France, 1.

2. Where the creditor seeks to set aside a transfer of property, on the ground that the transfer is fraudulent, it must appear, not only, that the debtor fraudulently transferred the same, but, as well, it must appear the transferee co-operated and acted with the debtor to consummate the fraud. Bank of Sanborn v. France, 2.
3. For the reasons stated in the opinion, the demurrer to the complaint is properly sustained. Bank of Sanborn v. France, 2.
4. Under a writ of attachment and execution, the defendant sheriff levied on certain land of the plaintiff as the property of his daughter, Celia Rostad. The claim was that she had conveyed the property to her father to defraud creditors. *Held*, that the conveyance was made and taken in good faith and for a fair and valuable consideration, and not to hinder or defraud any creditor. Ohlquist v. Turner, 262.

GARNISHMENT.

1. For purposes of garnishment under § 7567, Comp. Laws, 1913, the situs of a debt is not necessarily the domicil of the creditor. Bingenheimer Merc. Co. v. Weber, 312.
2. Where a resident of this state sues a resident of Montana, obtaining substituted service, and where he garnishees a railroad company doing business in both states, but not organized under the laws of either, and the latter makes a return, showing indebtedness owing to the defendant, it is *held:*

   The courts of this state have jurisdiction to render a valid judgment in garnishment. Bingenheimer Merc. Co. v. Weber, 312.
3. In garnishment suits there is exempt from garnishment to the head of a family who is a resident of this state wages or salary in the sum of $15 per week, and every employer should "pay to such person such exempt wages or salary not exceeding the sum of $15 per week of each week's wages earned by him, when due, upon such wage earner making and delivering to such employer his affidavit that he is such head of a family and residing with the same in this state," notwithstanding the service of the papers in the garnishment action; the balance, if any, of the weekly wage owing by the employer to such wage earner should be held by the employer to abide the event of the garnishment suit. Laws 1921, chap. 72. Radke v. Padgett, 405.

HUSBAND AND WIFE.

1. Where, in an action brought by the wife for the alienation of the affections of her husband, the court instructs the jury that they can in no event return a verdict in favor of the plaintiff unless they find that the acts of the defendants on which the suit is predicated were occasioned by actual malice towards the plaintiff, no error was committed by the trial court in further instructing the jury that in event they find plaintiff entitled to recover, under the evidence and instructions, exemplary damages may also be awarded. Oster v. Oster, 723.

2. In an action to foreclose certain chattel mortgages executed by one of the defendants, the other defendant, wife of the mortgagor, claimed to be the owner of some of the property mortgaged. The evidence is examined, and it is held to support the findings of the trial court that the wife of the mortgagor is estopped to assert her title as against the mortgagee. Bank of Inkster v. Christensen, 1047.

INDEMNITY.

1. Appellant, a municipal corporation, licensed respondent as a master plumber. As such he dug a trench in appellant's street, and, on refilling the same, left the excess of dirt piled on each side of the sidewalk. A pedestrian, passing along the walk at the place where the dirt was piled, fell and was injured. She sued the appellant city, alleging negligence by reason of the dirt piles, and had a verdict, the jury finding that by reason of mud on the walk the same was not reasonably safe. Prior to the trial, appellant notified respondent of the pending suit and requested him to defend. This he refused to do, but he consulted with the appellant's attorneys, was present during the trial, and was himself sworn as a witness.

On a suit by appellant city to recover over from respondent licensee for damages paid, it is *held:*

A municipal corporation required to pay damages to a person injured on its streets has, unless it is also a wrongdoer, a remedy over against a third person who is at fault and has so used the streets as to produce the injury. Keller v. Fargo, City of, 562.

2. Where seasonable notice of the pendency of the action is given and an opportunity to defend afforded to a third party against whom a defendant claims a right of action to recover over, the judgment therein entered against such defendant is conclusive as against such third party as to all matters material to and necessarily determined by such judgment. Keller v. Fargo, City of, 563.

3. Where, in a suit against a defendant municipal corporation by a person injured, the physical cause of the injury is established, but the question of the responsibility for the creation of such physical cause by a third party is not material or necessary to a determination of the action, such third party in a suit against it by the defendant to answer over, is not concluded

INDEMNITY—continued.

as to the matter of negligence on his part, and such defendant corporation must establish that such physical cause was created through his negligence. Keller v. Fargo, City of, 563.

4. Under such circumstances, §§ 6641 et seq., Comp. Laws 1913, do not enlarge the liability of a third party who has given a bond of indemnity against any negligence on his part or any unfaithful or inadequate work done by him. Keller v. Fargo, City of, 563.

INDICTMENT AND INFORMATION.

1. In an information for a statutory offense, it is not necessary to negative an exception in the statute unless the exception is such as to render the negative of it an essential part of the definition of the offense. State v. McDaniels, 648.
2. Following State v. McDaniels, ante, 648, just decided, held that in an information for a statutory offense, it is not necessary to negative an exception in the statute unless the negative of the exception is an essential part of the definition of the offense. State v. Hand, 677.
3. Sections 10,731, 10,732, 10,733 and 10,734, Comp. Laws 1913, are held to provide an exclusive procedure governing motions to dismiss indictments, and when indictments are erroneously dismissed upon motion, the further proceedings must be as contemplated in the statute. State ex rel. v. District Court, 1127.

INFANTS.

1. In 1921 the county presented to the city a claim for $1348.80, being 25 per cent of the sum paid for mothers' pensions. The claim was presented and allowed and paid under a misapprehension of the law by all parties, all supposing that they knew and understood the law and all making the same mistake as to the law. Hence, the payment was not voluntary. The city officers had no legal or moral right to make payment and give away the money of the city. Hence, the county must refund the money. City of Bismarck v. Burleigh County, 205.

INJUNCTION.

1. In an application for an original writ to enjoin the state canvassing board from canvassing the returns of a recall election, upon ground of the insufficiency of the recall petitions, it is improper by equitable interposition to enjoin such canvassing board. State ex rel. Laird v. Hall, 12.
2. Ordinarily, injunctions should not be issued on allegations made on information and belief, or, if so issued, should be dissolved. State ex rel. Lemke v. Dist. Court, 27.

INSURANCE.

1. An insurance agent, authorized to issue, assign, cancel, and attach permits to fire insurance policies, may waive conditions in a policy, within the powers intrusted to him, the same as his company. McDowell v. Fireman's Fund Ins. Co., 176.

2. An agent, possessed of such powers, may waive a stipulation of nonwaiver contained in the policy so far as the same conflicts with his powers. McDowell v. Fireman's Fund Ins. Co., 176.

3. It is the duty of an insurance company to affirmatively plead breaches of conditions contained in a policy. McDowell v. Fireman's Fund Ins. Co., 176.

4. To present a waiver of such conditions, it is unnecessary for the insured to plead the same in a reply. McDowell v. Fireman's Fund Ins. Co., 176.

5. In an action upon a fire insurance policy, where the defense presented breaches of conditions in a policy concerning vacancy, unoccupancy, increase of hazard through mortgage and conveyance of the premises, it is *held* that the trial court properly submitted the questions of waiver to the jury. McDowell v. Fireman's Fund Ins. Co., 176.

6. The provision in the North Dakota Standard Fire Insurance Policy that the insurer shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs; that such loss or damage shall be ascertained or estimated according to such actual cash value, and shall in no event exceed what it would then cost to repair or replace the same is valid as regards fire insurance on personal property and fixes the measure of indemnity in a fire insurance policy upon personal property in this state. Rohlik v. Farmers Insurance Co., 235.

7. The defendant issued a fire insurance policy, whereby it insured plaintiff's granary for the sum of $800. Thereafter it was totally destroyed by fire. In an action to recover, defenses were interposed to the effect that plaintiff made false statements and representations in the application for the insurance, with reference to the value of the granary. The jury in a special verdict found against the defendant in this respect and in its verdict fixed the value of the building at $800, which was equal to the amount of insurance on the granary stated in the policy.

   It is *held:* That these findings of the jury are supported by substantial evidence. Jakober v. Com. Union Ins. Co., 270.

8. There was no fraud in the destruction of the property. The loss was total. In these circumstances, under the provisions of § 6624, Comp. Laws 1913, plaintiff was entitled to recover the amount of insurance written in the policy, or $800. Jakober v. Com. Union Ins. Co., 270.

9. In an action, on a policy of insurance, for damages caused by windstorm it is *held:*

   That the trial court did not err in denying defendant's application for leave to amend the answer. Roquette v. Farmer's Insurance Co., 478.

INSURANCE—continued.

10. That instructions complained of were nonprejudicial. Roquette v. Farmers Ins. Co., 478.

11. In an action on a life insurance policy where the insured failed to pay the annual premium, which was made the subject of a separate contract for extension, and where a note given for the premium provided for fifteen days' grace, and that in case it was not paid on or before the last day of the grace period the policy should immediately terminate, and where, upon acceptance of the note, a receipt was given upon which was stamped the condition stated in the note, it is *held:*

The evidence is insufficient to establish a waiver of the terms of the policy or the conditions of the extension note and insufficient to establish an estoppel. Kroksather v. Western Union Life Ins. Co. 619.

12. Where a premium is not paid within the time stipulated in the policy, and where within the grace period an extension agreement is entered into, evidenced by a note and a conditional receipt, the provisions of such note and conditional receipt with reference to termination of the policy upon nonpayment are controlling. Kroksather v. Western Union Life Ins. Co., 619.

13. In an action upon policies of life insurance, where the insurance company seeks to exercise the right of forfeiture for failure to pay an annual premium, it was *held,* following the law of the case announced upon a former appeal, and, for reasons stated in the opinion, that the questions of waiver and estoppel concerning the exercise of such right, were for the jury. Carroll v. N. Y. Life Ins. Co. 798.

14. In an action against an insurance company to recover on an accident policy, the burden is upon the company of establishing that an injury to the insured, shown to be the result of an accident, is within an exception contained in the policy, where payment is resisted on the ground that there is no liability by reason of such exception. Flath v. Bankers Casualty Co., 1053.

15. In an action to recover on an accident insurance policy which provides "No indemnity shall be allowed for any loss . . . resulting directly or indirectly . . . while insured is violating any law or ordinance," evidence examined, and *held* that the accident, on account of which the recovery is claimed, was the direct result and consequence of a violation of the laws of the United States and within the exception exempting from liability. Flath v. Bankers Casualty Co., 1053.

INTERPLEADER.

1. That the defendant has not brought itself within the provisions of § 7594, Comp. Laws 1913, permitting a bailee to make deposit in court when adverse claims are made to moneys or property in his custody, so as to be relieved from liability for the conversion so established. Sand v. St. A. & D. Elevator Co., 503.

INTOXICATING LIQUORS.

1. A criminal information alleging that defendants committed the crime of manufacturing liquor, through wilfully and unlawfully making, fermenting, and distilling a liquor which was intoxicating for a beverage, states a criminal offense, pursuant to § 10,092 Comp. Laws 1913. State v. Pauley, 488.

2. In a criminal action for violation of the State prohibitory law (Laws 1921, chap. 97), the evidence is examined and *held* to sustain a verdict of guilty. State v. McDaniels, 648.

3. An information for violation of the state statute which prohibits the unlawful manufacture of intoxicating liquors, or the possession of any utensil, contrivance, or machine designed or intended for use in the unlawful manufacture of intoxicating liquors (Laws 1921, chap. 97), need not negative the proviso in such statute permitting certain liquors to be manufactured, sold, "furnished and possessed when permitted by Federal statute." State v. McDaniels, 648.

4. In a criminal action for a violation of the State Prohibitory Law (Laws 1921, chap. 97), the evidence is examined and *held* to sustain the verdict of guilty. State v. Hand, 677.

5. Chapter 97 of the Session Laws of 1921, which makes it the duty of a peace officer to seize intoxicating liquors being transported in violation of law and which requires such officer to proceed against the person arrested and authorizes the court, upon conviction of such person, to order the liquor destroyed, is construed and *held* to subject seized liquors to the control of the court having authority to order destruction. In re Dunbar, 851.

6. The court under whose control seized liquors are held by a peace officer has jurisdiction to inquire concerning the liquors and to require the person in possession to account for the same. In re Dunbar, 851.

7. A peace officer has not the right to remove seized liquors without the consent of the court in which a prosecution is pending, and an order for destruction signed by a judge of another district does not preclude inquiry by the court under whose control liquor is held. In re Dunbar, 851.

8. One having possession of seized liquors and who is under obligation to account to the court therefor, must respond to the orders of the court at the peril of being held guilty of contempt. In re Dunbar, 852.

JUDGMENT.

1. The motion to vacate the judgment in the instant case invokes the exercise of discretion by the trial court, and, inasmuch as the proposed answer excuses defendants' neglect and sets forth defenses which are prima facie good, it is held that the discretion was not properly exercised. Boyd v. Lemmon, 64.

2. For reasons stated in the opinion, the trial court erred in making its orders

JUDGMENT—continued.

denying plaintiff's motions to vacate the judgment entered in the above-entitled cases. Central Met. Bank v. Am. State Bank, 165.

3. Where a motion is made by the defendant to vacate a default judgment upon the ground of excusable neglect, and where at the time the judgment was entered, an answer, verified by the attorney for the defendant on information and belief, was on file, and the case was at issue, and such answer disclosed a defense on the merits, it is *held* that no affidavit of merits is necessary, following Harris v. Hessin, 32 N. D. 25; and Peterson v. Finnegan, 45 N. D. 101. French & Sons Piano Co. v. Getts, 577.
4. The findings and judgment of the trial court are reviewed and modified as to the amount of defendant's indebtedness existing at the time of the giving of the note in suit. Underwood State Bank v. Weber, 814.
5. A judgment on a counterclaim will be denied where the transactions out of which the claim arose were with persons who are not parties to the record and where the rights of such third parties are involved. Underwood State Bank v. Weber, 815.
6. Following Bovey-Shute Lumber Co. v. Donahue, 43 N. D. 247, and prior decisions, it is *held* that under § 7966, Comp. Laws 1913, an action is terminated when the time for an appeal from the judgment has expired; and the trial court has no authority thereafter to entertain a motion for judgment notwithstanding the verdict or for a new trial, over the objection of the adverse party, unless the final character has been suspended by proceedings commenced within the time allowed by law for appeal from the judgment. Coughlin v. Aetna Life Ins. Co. 948.
7. The final character of the judgment is not suspended under the provisions of chapter 133, Laws 1921, because a motion for a directed verdict is made upon the trial of the cause. Coughlin v. Aetna Life Ins. Co., 948.
8. In the instant case defendant contends that a motion for judgment notwithstanding the verdict or for a new trial was made, and, in effect, submitted within the time allowed for appeal from the judgment. For reasons stated in the opinion this contention is not sustained. Coughlin v. Aetna Life Ins. Co., 948.

JURY.

1. In a prosecution for the larceny of certain calves it is *held*, for reasons stated in the opinion, that the objection made to the jury panel because it was dismissed and recalled, is without merit. State v. McCarty, 912.

JUSTICES OF THE PEACE.

1. Following Richardson v. Campbell, 9 N. D. 100, it is a jurisdictional prerequisite in appeals from justice's court that the undertaking be served with the notice of appeal. Stonehouse v. Smith, 124.

JUSTICES OF THE PEACE—continued.

2. Though a justice of the peace has no authority under § 9110 of the Compiled Laws of 1913 to order a limited stay of execution in a forcible entry and detainer action, where such stay is, nevertheless, ordered, in pursuance of a stipulation carrying out an agreement for a settlement of the controversy, the defendant who obtains the benefit of such stay is estopped to pursue his remedy by way of appeal from the judgment. Ray Improvement Co. v. Hurich, 134.

LANDLORD AND TENANT.

1. Following Merchants' State Bank v. Sawyer Farmers' Co-op. Asso. 47 N. D. 375, it is held that the provision, in a farm lease on the share plan, reserving title to all crops in the owner of the land is effective without filing the farm lease as a chattel mortgage. Maher v. Boehmer, 592.
2. For reasons stated in the opinion, it is *held* that the instructions to the jury in the instant case were contrary to the rule stated in the preceding paragraph, and that the trial court was correct in ordering a new trial on account of such erroneous instructions. Maher v. Boehmer, 592.

LIMITATIONS.

1. For reasons stated in the opinion, it is held that plaintiff's cause of action had not accrued within six years prior to the time of its commencement, the action purporting to be one to recover upon an open, mutual, and current account. Burke v. Welo, 119.
2. This is an appeal from a judgment in favor of the defendant on a directed verdict. On the trial the court sustained an objection to any evidence on the ground that it appeared that the action was barred by statute. The objection to the evidence was, in effect, a demurrer to the complaint on the ground that it appeared on the face of the complaint that the cause of action did not accrue within six years. But an objection that the action was not commenced within the time limited by statute can only be taken by answer. Hence there was manifest error in sustaining an objection to any evidence. Judgment reversed. Chicago & N. W. Ry. Co. v. Nepstad, 221.

MALICIOUS PROSECUTION.

1. An action will lie in this state for the malicious prosecution, without probable cause, of a proceeding the object of which is to have a person adjudged insane and committed to the state insane asylum. Pickles v. Anton, 47.
2. For the purpose of showing the malice of the defendant in instituting such inquisition of lunacy against the plaintiff, the personal relations previously existing between the parties may be shown. Pickles v. Anton, 48.
3. Where the charge of insanity, which forms the basis of an action for malicious prosecution, is based upon the alleged destruction of certain prop-

MALICIOUS PROSECUTION—continued.

erty, it is proper to show any facts and circumstances surrounding such destruction which tend to show the reason for the alleged destruction, or which tend to throw any light upon the mental condition of the person who was so charged with having committed such alleged insane act. It is, also, competent to show whether the defendant in making the charge of insanity to the public officials fully and correctly informed such officers of such facts and circumstances. Pickles v. Anton, 48.

4. For reasons stated in the opinion it is *held* that in this case it cannot be said as a matter of law that the defendant had probable cause for instituting the inquisition for lunacy, that the prosecution thereof was not malicious, or that the verdict returned by the jury is excessive. Pickles v. Anton, 48.

MANDAMUS.

1. That the petition requesting the withdrawal of six townships from Renville county which contains only twenty-four townships, violates the constitutional requirement, § 167, Const., and mandamus will not issue to compel an idle act. State ex rel. v. County Commissioners, 152.
2. That the submission to the votors in Burke county of the question of forming the proposed Lake county would be an idle act for which the writ of mandamus will not issue. State ex rel. v. County Commissioners, 152.

MARRIAGE.

1. In 1879 the plaintiff was duly married to defendant and until six or seven years ago he has lived with her as his wife, and they have one son forty-one years old and a daughter thirty-nine years. Now he brings suit to annul the marriage because of a supposed impediment arising from prior marriage terminated by death or divorce. The plaintiff has wholly failed to prove any impediment. Action dismissed. Powers v. Buckey, 137.

MASTER AND SERVANT.

1. The primary object of all insurance contracts is to afford indemnity, and forfeiture provisions will be construed, if possible, so as to avoid forfeiture and afford indemnity. This rule is applicable to obligations created by the North Dakota Workmen's Compensation Act as regards claims for injury or death. Bordson v. N. Dak. Workmen's Comp. Bureau, 534.
2. For reasons stated in the opinion it is *held* that the plaintiff has established a valid claim against the Workmen's Compensation Fund. Bordson v. N. Dak. Workmen's Comp. Bureau, 534.
3. Upon an appeal from a decision of the workmen's compensation bureau the cause is a proceeding not triable under the so-termed "Newman Act." Gotchy v. N. D. Workmen's Comp. Bureau, 915.
4. Where a claim was filed by a claimant after sixty days from the time of the

MASTER AND SERVANT—continued.

injury and death of an employee but within one year after his death, and, where the bureau received such claim and dismissed the same upon the ground that the deceased was injured in the course of an employment, it is *held*, for reasons stated in the opinion, that objections made concerning the time of filing are without merit. Gotchy v. N. D. Workmen's Comp. Bureau, 915.

5. Where an employee, a carpenter, had previously appeared to be active and healthy, and, while engaged in an employment, his head received a blow, more or less severe, from an iron pulley proximate, and where, thereafter, the deceased became ill, suffered an operation upon his cranium and thereafter died, and where, pursuant to a post-mortem examination and medical diagnosis made before and after his death, it appears that the deceased was suffering from a glioma which, through the superinducing cause of an external blow, might cause a hemorrhage so as to occasion his death, it is *held*, for reasons stated in the opinion, that the questions of the proximate cause of the employee's death was one of fact and that the findings of the trial court in that respect should not be disturbed. Gotchy v. N. D. Workmen's Comp. Bureau, 915.

6. Where the deceased, a carpenter, was intermittently employed by an elevator company in doing its carpenter work and general repair work and prior to the time of his injury had been engaged for some forty days in constructing a unit or leg for an elevator and doing some other general repair work, and where such carpenter was employed by the hour and his methods of prosecuting the work were in some respects subject to the control of the elevator company, it is *held*, for reasons stated in the opinion, that the decedent, at the time of his injury was an employee of the elevator company engaged in the course of its business. Gotchy v. N. D. Workmen's Comp. Bureau, 915.

7. Upon an appeal from the decision of the compensation bureau, it is *held*, for reasons stated in the opinion,

(a) That the court has the power to determine the right of the claimant and to fix the compensation within the limits prescribed in the Compensation Act.

(b) That the court has not the express power to award a lump sum.

(c) That, after judgment, the bureau may not deny or reverse the right of the claimant thus established upon appeal.

(d) That, after judgment, the bureau may increase or decrease the award, or may award a lump sum, all pursuant to and consistent with the judgment rendered and the continuing obligations and duties imposed upon the bureau. Gotchy v. N. D. Workmen's Comp. Bureau, 915.

8. Section 2 of the Workmen's Compensation Act (Sess. Laws 1919, chapter 162), which defines "employment" as including employment by the state and all political subdivisions, and which defines "employee" as meaning every person engaged in a hazardous employment under any appointment

MASTER AND SERVANT—continued.

or contract of hire, is construed and *held* to embrace policemen employed by a city. Fahler v. City of Minot, 960.

9. Section 11 of the same act, which provides that employers who fail to comply with the provisions requiring payment of premiums shall not be entitled to the benefits of the act during the period of noncompliance "but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment," etc., and that they shall not avail themselves of the defenses of the fellow-servant rule, assumption of risk and contributory negligence, is construed in the light of cognate provisions and of the policy manifested by the entire act, and it is *held* that a noncomplying employer is liable to an injured employee within the act, or to his personal representatives in case of death, where the damages were suffered by reason of injuries sustained in the course of employment, regardless of questions of fault. Fahler v. City of Minot, 960.

10. Where a city had not complied with the Workmen's Compensation Act and a policeman employed by it was killed in the course of his employment, the city is liable in damages to the personal representatives of the deceased on account of the death so occurring. Fahler v. City of Minot, 960.

11. Where plaintiff, a section hand, of three years' experience as a section hand, was directed to unload grain doors piled in three piles in a box car, and where, after removing the central pile, one of the others toppled over, injuring plaintiff, it is *held*, for reasons stated in the opinion, that such facts, appearing upon the face of the complaint, do not constitute actionable negligence on the part of the defendant, based upon (a) failure to furnish a reasonably safe place in which to work, or (b) to instruct and warn servant as to the method of work, or of the danger that a pile might fall when the one in the middle was removed. Torgerson v. Mpls., St. P. & S. Ste. M. Ry. Co. 1097.

12. Where it appears on the face of the complaint, that the risk or danger, if any, arises by reason of the actual prosecution of the work, because of change in conditions, and the manner in which the work is from time to time prosecuted, the rule that the master must furnish the servant a reasonably safe place to work has no application. Torgerson v. Mpls., St. P. & S. Ste. M. Ry. Co. 1097.

13. The duty to warn exists only when the master possesses knowledge of risks or dangers, or should, in the exercise of ordinary care for the servant's safety, have such knowledge, not within the knowledge of the servant or discernible by the latter, in the exercise of ordinary care. There is no liability for failure to anticipate danger to a servant or to warn him thereof, unless the master's knowledge of the danger or opportunity to have knowledge thereof, having in mind the master's primary duty to make inquiry is superior to that of the servant. Torgerson v. Mpls., St. P. & S. Ste. M. Ry. Co. 1097.

14. It is not the duty of the master to warn or instruct a servant of ordinary in-

MASTER AND SERVANT—continued.

telligence and experience, with his faculties of observation unimpaired, as to the operation of natural laws. Torgerson v. Mpls. St. P. & S. Ste. M. Ry. Co. 1097.

15. The allegation that plaintiff did not "know or appreciate the danger to himself in the sudden shifting of the doors" is not necessarily sufficient to make a case for the jury. If a person of ordinary prudence, of the age and experience of the plaintiff, in the same or a similar situation, would have known and appreciated the danger and risk, the servant will be deemed, as a matter of law to have assumed the risk. Torgerson v. Mpls. St. P. & S. Ste. M. Ry. Co. 1097.

16. When the complaint, upon its face, fails to show actionable negligence on the part of the defendant, and affirmatively shows that the risk was an ordinary one, and was therefore assumed by the plaintiff, a demurrer thereto should be sustained. Torgerson v. Mpls. St. P. & S. Ste. M. Ry. Co. 1097.

MORTGAGES.

1. In an action for the foreclosure of a real estate mortgage, personal judgment may be rendered for the amount found due upon the personal obligation secured by the mortgage not only against the mortgagor, but also against his grantee who has assumed and agreed to pay the mortgage debt. When such judgment is rendered no further action on the part of the court will be necessary to ascertain the amount of the deficiency. Bull v. Smith, 337.

2. For reasons stated in the opinion, it is *held* that said chapter 132, Laws 1919, is applicable only to mortgages executed and delivered after it became operative, and is inapplicable to mortgages executed and delivered prior to that time. First National Bank v. Bovey, Shute & Jackson, 450.

3. Chapter 131 of the Laws of 1919, which provides for thirty days' written notice before proceedings to foreclose a mortgage on real property, is construed and held not to negative the ordinary legal effect of an acceleration clause in a mortgage and note. State Bank v. First Nat. Bank, 611.

4. Where a mortgagor was in default in failing to pay two annual interest notes secured by real estate mortgage, and where the mortgagee had served notice of the exercise of an option to declare the whole amount due, such declaration being in accordance with an acceleration clause in the mortgage and note, a subsequent tender of the interest during the thirty-day notice period, provided in chapter 131 of the Laws of 1919, does not cure the default or reinstate the mortgage. State Bank v. First Nat. Bank, 611.

5. Where defendant, after conviction of murder and while pending an appeal, repurchased certain farm personalty from his brother-in-law, the plaintiff, and, with his wife, executed notes and mortgages for an expressed consideration of $24,300, and where, thereafter, in an action to enforce the notes, and foreclose the mortgages, defendant, being an escaped convict,

MORTGAGES—continued.

and his wife, through an attorney, assert through answer and evidence that the transaction was affected with fraud, duress, and undue influence, was usurious, and for a real consideration of $14,300 only, it is held, for reasons stated in the opinion, that the findings and judgment of the trial court in plaintiff's favor are sustained by the evidence. Bahnemann v. Lehmann, 729.

MOTHERS' PENSION.

1. Chapter 185, Session Laws of 1915, commonly known as the Mothers' Pension Act, is not a poor relief statute, but the pension therein provided as rather in the nature of a compensation by the state for services rendered in rearing future citizens in proper surroundings. In re Walker, 682.
2. Where a mother has been granted a pension under chapter 185, Session Laws 1915, and removes from the county wherein she qualified for the pension and resides for over one year in another county in the state, it is held that she does not, merely because of such removal, under the facts stipulated in this case, lose the right to such pension. The legal effect of permanent removal, with intention to acquire permanent residence in another county, on the right to a continuance of a pension, is not decided. In re Walker, 682.

MUNICIPAL CORPORATIONS.

1. In an action for personal injuries resulting from the collision of a truck of the defendant with a Ford sedan operated by the plaintiff at the intersection of a street and an alley, it is *held* that the questions of negligence, contributory negligence, and proximate cause were for the jury; and hence, that the trial court did not err in denying motions for a directed verdict and for judgment notwithstanding the verdict. Sheffield v. Stone, Ordean, Wells Co. 142.
2. An ordinance which provides that no undertaking establishment shall be established or maintained within those parts of the city occupied mainly for residences is indefinite and uncertain, and, therefore, invalid. Wasem v. Fargo, 169.
3. Chapter 70, Laws 1915, provides: "All municipalities in the state of North Dakota shall be absolutely exempt from all liability to any person for damages for injuries suffered or sustained by reason of accumulation of snow and ice upon sidewalks within such municipality, unless *actual knowledge* of the defective, unsafe, or dangerous condition of such sidewalk or crosswalk shall have been possessed by the mayor, board of city commissioners, police officer, or marshal of such municipality forty-eight hours previous to such damage or injury, and such actual knowledge shall in no case be presumed from the fact of the existence of such condition, but in all cases the same shall be proved as an independent fact." In the instant

MUNICIPAL CORPORATIONS—continued.

case it is held the trial court was correct in ruling that, as a matter of law, plaintiff had failed to show the *actual knowledge* required by the statute. Malherek v. Fargo, City of, 522.

4. Cities and villages in North Dakota are municipal corporations and possess only such powers as are conferred on them by statute. Doubtful claims of power, or doubt or ambiguity in the terms used by the legislature, are resolved against the corporation. North Fargo v. Fargo, 597.
5. Construing § 3753, Comp. Laws 1913, as amended by chapter 68 of the Session Laws of 1915, with reference to the annexation of territory by cities, it is held that a city may not annex a portion of the territory within the limits of an incorporated village, although a part of the boundaries of the village border upon and adjoin the boundaries of the city. North Fargo v. Fargo, 598.
6. A municipal corporation is a creature of the legislature. Its rights, powers, duties, and territorial extent are fixed by the legislature and can be abridged, modified, taken away, or altered only in the manner provided by the legislature. North Fargo v. Fargo, 598.
7. A submission by the city commission of a proposition to issue bonds in a stated amount for "constructing or purchasing" waterworks for the city, is a single question and is, therefore, not within the condemnation of the rule announced in Stern v. Fargo, 18 N. D. 289. Logan v. Bismarck, 1178.
8. Under the statutes and decisions in this jurisdiction, a majority of the votes cast upon the question of bonding the city for the purpose of constructing or purchasing waterworks, if in the affirmative, carries the proposition and it is not necessary that a majority of all the legal voters of the city vote in favor thereof. Logan v. Bismarck, 1178.
9. For reasons stated in the opinion, it is *held*, that the ordinance enacted by the city commission, providing for the delivering of the bonds, conform substantially with the question as submitted to the voters and with the resolution ordering the election. Logan v. Bismarck, 1178.

NEWSPAPERS.

1. Where, in publishing a legal notice, a printer departs widely from the copy and from directions given, adding useless and unnecessary composition, such composition is not a proper basis for computing the legal publication fee under chapter 93 of the Laws of 1921. Mandan News Pub. Co. v. Board of City Commissioners, 756.

NEW TRIAL.

1. The defendant made a motion for a new trial. The trial court made an order denying the motion. In this the trial court did not err. Lofthouse v. Galesburg State Bank, 96.
2. In an action upon a note for a portion of the purchase price of a tractor the

NEW TRIAL—continued.

defendant answered alleging that rescission had taken place for breach of warranty and claimed damages. Verdict for the defendant awarding damages and a new trial granted.

Held, the record shows that the trial court did not abuse its discretion in granting a new trial. Grewer v. Schafer, 115.

3. This case presents a claim for services as a farm laborer. There have been two trials—twenty-four jurors and one judge have concurred in the same verdict of $300 and interest. The appeal is taken on the insufficiency of evidence. The specification is that the plaintiff failed to establish his case by a fair preponderance of competent evidence. *Held*, that the trial court did not err in denying a new trial. Welzstein v. Barth, 131.

4. *Held*—evidence held to show no fraud, misrepresentation, coercion or duress in procuring confession or plea of guilty.

The record shows that no undue advantage was taken of the defendant by the officers of the law or that he was advised or coerced, or forced to enter a plea of guilty. No disposition shown on the part of any of the officers to prevent the defendant from procuring the services of an attorney or having a trial if he wished. He was also admonished by the court as to his right, and for this and other reasons stated in the opinion it is held that the court did not err in denying defendant's motion for a new trial. State v. Throndson, 348.

5. For errors of law the judgment is reversed and a new trial granted. Grandin Invest. Co. v. Hartung, 364.

NOTES.

See Bills and Notes.

OFFICERS.

1. In filing recall petitions and calling a special election thereupon, the secretary of state exercises a duty and a discretion concerning the sufficiency of such recall petitions. State ex rel. Laird v. Hall, 11.

2. Where the secretary of state has received and filed recall petitions and has called a special election thereupon, and, where an election has been held pursuant thereto, without any objection before the secretary of state and without any proceedings in any court prior to such election to review or control the acts of the secretary of state, it must be presumed that the secretary of state has performed his duty and exercised his discretion pursuant to the law and that electors, seeking, after such election, to question the performance of his duty and discretion, have acquiesced in such presumption. State ex rel. Laird v. Hall, 12.

PARTNERSHIP.

1. That the extension of time accorded for rent due in 1911, 1912, or 1913 did

PARTNERSHIP—continued.

not serve to discharge the obligation of the selling partner, as surety, for the rent due in 1914. Bleeker v. Johnson, 156.

2. In an action for dissolution of partnership and for an accounting evidence examined and *held* sufficient to support findings of trial court. Pettibone v. Tuttle, 1033.
3. From an examination of the evidence the court is of the opinion that the evidence wholly fails to establish that a partnership existed between plaintiff and defendant as alleged in the complaint. Pettibone v. Tuttle, 1033.

PHYSICIANS AND SURGEONS.

1. In an action for damages for malpractice, evidence examined and held that on the record as made there is presented a question of negligence as one of fact for determination by the jury. Stoskoff v. Wicklund, 708.
2. The mere fact of the loss of a leg under the care of a physician, although negligence on the part of such physician is established, is not in itself sufficient to sustain a verdict for damages in the absence of evidence tending to show that such loss was the proximate consequence of such negligence. Stoskoff v. Wicklund, 708.

PLEADING.

1. The trial court erred in allowing an amendment of the complaint, which presented a new cause of action. Burke v. Welo, 119.
2. In a complaint for conversion, where there are allegations of general ownership and right of possession followed by specific recitals setting forth a special ownership through chattel mortgages, such specific recitals control in determining the sufficiency of the complaint in stating a cause of action. Hellstrom v. First Guaranty Bank, 531.
3. A complaint assailed for the first time at the trial by an objection to the introduction of evidence on the ground that the complaint fails to state facts sufficient to constitute a cause of action will be liberally construed. Jacobson v. Horner, 741.
4. In the instant case, a complaint in an action by the seller against the buyer to recover damages for nonacceptance of goods *held* not vulnerable to such general objection. Jacobson v. Horner, 741.
5. T., cashier of the A. bank, partially reimbursed it for losses sustained in carrying paper drawn by or on behalf of the H. bank and paying a draft representing the amount of credit balance in favor of the H. bank so obtained. T. took an assignment from the A. bank of items unpaid by the H. bank aggregating the amount of his payment to the A. bank. In an action by T. to recover the amount paid to the A. bank to reimburse it, it is *held:*

   Where it is apparent on the record that the defendant was not misled by the allegations in the complaint nor unprepared to meet the proof offered

PLEADING—continued.

it is not prejudiced by any variance there may be between the allegations and the proof. Tonne v. State Bank, 770.

6. The demurrer admits the truth of all well pleaded facts, but not necessarily the inferences or conclusions drawn therefrom, though alleged in the complaint; facts presumed or reasonably or necessarily inferred from those alleged are also admitted. Legal conclusions or inferences of fact, which are not presumed or which may not be reasonably or necessarily inferred from the facts alleged, are not admitted by the demurrer. Torgerson v. Minneapolis, St. P. & S. Ste. M. Ry. Co. 1096.

PRINCIPAL AND AGENT.

1. In an action brought by plaintiff to recover profits on the sale of a certain tractor and certain money deposited with the defendant to indemnify the defendant, in certain conditions set forth in the opinion, plaintiff had judgment for such profit and the amount of money so deposited.

Held, for reasons stated in the opinion, that plaintiff was not entitled to receive profit on the sale of the tractor. Anderson v. Tabor Co. 301.

2. An agent's powers or the fact of his agency cannot be established by his own declarations. Bratton v. Hoerr, 719.

3. While the rule is that where a substantial showing amounting to prima facie proof as to the fact of the agency has been made, an agent's acts and admissions may be admissible under proper instructions, evidence examined and held not to warrant the application of that rule in this particular case. Bratton v. Hoerr, 719.

4. Mere possession of a promissory note by an agent of the payee gives rise to no presumption of authority in such agent to indorse such paper so as to transfer title thereto. Authority in an agent to indorse negotiable instruments will not be implied from the fact of agency, unless it be necessary in order to carry out the express authority conferred on the agent by his principal. Embden State Bank v. Schulze, 778.

PRINCIPAL AND SURETY.

1. In an action to recover on a fidelity bond where the plaintiff bank seeks to recover by reason of the embezzlement of its cashier in making large loans to a customer with whom he was jointly associated in farming operations, it is *held*, for reasons stated in the opinion, that the evidence is insufficient to establish any embezzlement. First State Bank v. Northern Trust Co. 283.

2. A demand note taken by the creditor from the principal debtor is not a contract for an extension of time such as will discharge the obligation of a surety for the same indebtedness. Bottineau County Bank v. Stafford, 942.

3. In the absence of a notice, under § 6683, Compiled Laws of 1913, the creditor is not required to proceed originally against the principal debtor, an l,

PRINCIPAL AND SURETY—continued.

where he holds a real estate mortgage securing indebtedness and, where he obtains judgment against the principal debtor, he is not required to exhaust remedies on the mortgage or the judgment before proceeding against the surety at the peril of being held to have exonerated the surety under § 6681, Compiled Laws of 1913. Bottineau County Bank v. Stafford, 942.

PROCESS.

1. Where an affidavit for publication states that defendants are not residents of this state; that they reside in the county of Hennepin and state of Minnesota; that the affiant does not know and is unable to ascertain the particular place of residence or postoffice address of the said defendants, or either of them, and where no copy of the summons and complaint was mailed or served upon defendants, it is *held*, that such affidavit does not comply with the statutory prerequisites §§ 7428, 7430, Comp. Laws, 1913, and that service based thereupon is invalid. Paul v. Green, 319.

RAILROADS.

1. It is a matter of defense for the carrier to show that such cooperage concerns interstate rates or Federal regulations, of such an administrative character, and so subject to Federal administration, during a period of Federal control, as to suspend the common-law duty imposed. Williston Coal & Ice Co. v. Davis, 191.

REMOVAL OF CAUSES.

1. In an action brought in a state court directly under the Federal Employer's Liability Act, where, under the facts pleaded and proved, it is doubtful whether the employee, at the time of his injury, was then engaged in interstate commerce, and, where the defendant has failed to show in the record a petition and bond for removal of the cause, or any fraudulent attempt to evade the right of removal, and, where further, it is not shown that any different result would be obtained if the action had been removed, and where the state statute, (N. D. Laws 1915, chap. 207) applicable to intrastate commerce, embodies practically the same identical language as the Federal Employer's Liability Act, it is *held:*

(a) That it is immaterial whether the Federal act or the state act be applied.

(b) That the defendant has waived its right of removal, if any it had. Bailey v. Davis, 838.

SALES.

1. In an action by the seller against the purchaser of personal property for damages for nonacceptance of such property, the seller is entitled to recover such damages as naturally resulted from the purchaser's refusal to

SALES—continued.

carry out the contract, that is, the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract. (Uniform Sales Act, Laws 1917, § 64, chap. 202.) Jacobson v. Horner, 741.

2. Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market price or current price at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptance, then at the time of the refusal to accept (Uniform Sales Act, Laws 1917, § 64, chap. 202) where there is no available market at the place where the goods ought to have been accepted, then, for the purpose of computing damages for breach of contract occasioned by the refusal of the buyer to accept and pay therefor, the market value may ordinarily be ascertained by taking the value at the nearest available market, less the cost of delivery at such market. Jacobson v. Horner, 741.

3. Plaintiff, as holder and assignee of storage tickets representing grain stored by him and others with the G. U. Co-op. Elevator Company, a public warehouse, sued the defendant in conversion. Defendant was a grain commission merchant and had loaned money to the elevator company under a contract that it should be used in buying grain and in defraying incidental expenses, the borrower agreeing to ship to the defendant the grain purchased to be handled by the latter on commission with the privilege of applying the proceeds on the debt. The elevator company had shipped to the defendant grain required to redeem outstanding storage tickets, which grain the defendant sold, retaining the proceeds and crediting it on the elevator company's debt. It is *held:*

1. Under § 3114 of the Compiled Laws of North Dakota for 1913, the delivery of grain to a warehouse under contract whereby the latter agrees to deliver a like amount and grade to the holder of the receipts, is a bailment and not a sale. Kastner v. Andrews, 1059.

SCHOOLS AND SCHOOL DISTRICTS.

1. Chapter 122 of the Session Laws of 1921, is construed, and it is held that it authorizes electors of school districts by a majority vote to increase the tax levy above the limit otherwise prescribed. State ex rel. v. Kramer, 108.

2. Chapter 144 of the Session Laws of 1915 is construed, and held, not applicable as to the time of certification to an additional tax authorized by the electors under Chapter 122 of the Session Laws of 1921. State ex rel. v. Kramer, 108.

3. Plaintiff brought an action against the defendant charging it in her complaint with negligence in establishing and maintaining upon its school playgrounds, certain apparatus, consisting of several heavy swings and chutes, more particularly described in the complaint, and in appropriate language

SCHOOLS AND SCHOOL DISTRICTS—continued.

alleged such apparatus to be a nuisance; and further alleging that her son, while on the school playgrounds, by reason of such negligence was injured and killed. She claimed damages in the sum of $25,000, and, in addition thereto, $200 to cover burial expenses of the boy and for physician's fees. Anderson v. Board of Education of City of Fargo, 181.

4. The order of the trial court was proper, in that the defendant in providing such swings and chutes and apparatus in question for the use of the schools, was acting in a governmental capacity, and therefore, was not subject to a suit, either in an action for damages or otherwise. Anderson v. Board of Education of City of Fargo, 181.

5. Chapter 214 of the Session Laws of 1919, as amended by chapter 61 of the Laws of the Special Session of 1919, is construed and held to have no application as a tax limitation statute to taxes levied under § 1224 of the Comp. Laws 1913, as amended by chapter 216 of the Laws of 1919 and chapter 66 of the Laws of the Special Session of 1919, for the county tuition fund for the support of the public schools. Davis v. Pierce County, 397.

SPECIFIC PERFORMANCE.

1. In a proceeding for specific performance of a contract for a deed, where the vendee alleges a defense and introduces evidence of misrepresentation concerning the distance of the land from vendee's home farm, it is *held*, for reasons stated in the opinion, that the findings for, and judgment of, specific performance were properly rendered. Paulson v. Hammond, 265.

2. Acting pursuant to a contract that was invalid by reason of the applicant not being a member of the Home Buyer's League and by reason of the price being in excess of that authorized by the statute, the state built a house for a purchaser, purporting to act under the authority of the Home Builders' Law, and the purchaser went into possession and made certain advancements and improvements. It is held the contract will not be specifically enforced, but in an action to enforce it, equitable considerations will be applied and an alternative judgment directed, giving the purchaser an option to obtain a return of advancements made with interest or to require the state to convey upon the payment or securing by him of the reasonable value of the property. State v. Wallace, 1076.

STATUTES.

1. For reasons stated in the opinion it is *held* that § 8, chapter 211, Laws 1919 was not repealed by chapter 7, Laws 1921. State ex rel. Coghlan v. Poindexter, 201.

2. Statutes must be construed with reference to other statutes concerning the same subject-matter or a part of the same general system of legislation. North Fargo v. Fargo, 597.

STATUTES—continued.

3. It is presumed that the legislature, in enacting a statute, did not intend absurd or unjust consequences, or great public inconvenience. North Fargo v. Fargo, 598.

STATUTORY PROVISIONS.

1. Section 7762, Comp. Laws 1913, which provides: "The purchaser from the time of the sale until a redemption . . . is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof," was amended by chapter 132, Laws 1919, to read as follows: "The debtor under an execution or foreclosure sale of his property shall be entitled to the rents, use and benefit of the property sold from the date of such sale until the expiration of the period of redemption." First National Bank v. Bovey, Shute & Jackson, 450.
2. Section 8809, Comp. Laws 1913, reads: "No action for the recovery of any estate, sold by an executor or administrator or otherwise disposed of under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent unless it is commenced within three years next after the sale. An action to set aside a decree directing or confirming a sale or otherwise disposing of such property may be instituted and maintained at any time within three years from the discovery of the fraud or other ground upon which the action is based." Kranz v. Tavis, 553.

SUBROGATION.

1. It is a general rule that acquiring title and causing the lien of a mortgage to be canceled by payment, in ignorance of defects in the title will afford ground of equitable relief for cancelation of the release and for subrogation to the lien of the mortgage released, where there is no element of estoppel, the rights of bona fide parties are not affected, and the restoration of the released mortgage will place the holder of the junior lien in no worse position than he was at the time the mortgage was released. Hodge v. Dunlop, 125.
2. In the instant case the plaintiff purchased a tract of land from one who represented that he was the owner of the tract in fee simple, subject alone to two certain mortgages. After acquiring such title the plaintiff, in good faith and in reliance on the representations made by his vendor, paid the first mortgage and caused the same to be released. Subsequently, plaintiff learned that his vendor owned only one half of the fee simple estate; and that there was a judgment against the owner of the other one half of such estate, which was a lien junior to the mortgage released. There are no subsequent purchasers, and the holder of the judgment has in no manner changed his position, and the restoration of the mortgage will place him in no worse position than he was at the time the mortgage was released.

SUBROGATION—continued.

Held, that the plaintiff is entitled to have the mortgage restored and to be subrogated to the rights of the holder of the mortgage as against the owner of the judgment. Hodge v. Dunlop, 125.

TAXATION.

1. Where the recitals in a tax deed, pursuant to the statutory form prescribed by law at the time of its issuance, show that the tax sale was illegal, the tax deed so issued is void on its face. Brett v. St. Paul Trust Co. 654.

TENDER.

1. A negotiable instrument made payable at a certain city is not payable at a "special place" within the meaning of § 6955, Comp. Laws, 1913 (§ 70, Uniform Negotiable Instruments Law), which makes ability and willingness to pay at the special place equivalent to a tender of payment. Corbett v. Olsaker Printing Co. 103.

TRIAL.

1. In an action for an accounting tried in May, 1911, the court, according to the clerk's minutes, found that there was a balance due the plaintiff, ordered a judgment in his favor and directed the plaintiff's counsel to prepare findings in harmony with the statement of the account as presented to him by the court. Except as the minutes of the court's decision appears, entered by the clerk in his minutes, there was no written decision and no findings of fact, conclusions of law and order for judgment filed with the clerk. In July 1921, after an ex parte hearing, the successor of the judge who tried the case directed the entry of a judgment in favor of plaintiff and judgment was thereupon accordingly entered. Thereafter defendants moved to vacate the judgment and asked leave to file an amended answer setting up, among other defenses, the statute of limitations, a discharge in bankruptcy and laches. It is *held:*

   The clerk's minutes do not constitute a written decision filed with the clerk as required by § 7638, Comp. Laws 1913. Boyd v. Lemmon, 64.

2. In an action tried to the court without a jury, pursuant to chap. 8, Laws 1919, amending the so termed "Newman Act" it is the duty of the trial court, where objection is made, to rule upon evidence offered. Peoples State Bank v. Steenson, 100.

3. For reasons stated in the opinion the trial court erred in refusing on motion of defendant to strike out certain incompetent evidence and in receiving over defendant's objection, certain other incompetent evidence. Burke v. Welo, 119.

4. Certain errors assigned upon instructions considered, and held without merit. Hutlberg v. Hutlberg, 761.

TRIAL—continued.

5. Where counsel specifically objects to testimony on the ground that it is hearsay, and later objection to the same line of testimony is made on the ground that it is incompetent, irrelevant, and immaterial, it is *held*, for reasons stated in the opinion, that the general objection is sufficient. Embden State Bank v. Schulze, 778.
6. Where incompetent testimony is admitted over objection and where counsel thereafter cross-examines the witness upon the same matter, the objection is not waived. Embden State Bank v. Schulze, 778.
7. Where evidence is properly objected to, the objection need not be repeated when other evidence of the same class is offered. Embden State Bank v. Schulze, 779.
8. Although a motion for dismissal and a motion for a directed verdict are both, in effect, demurrers to the evidence, nevertheless, they are not identical. Bailey v. Davis, 838.
9. Assuming, without deciding, that the colloquy between the court and counsel for the defendant at the close of the trial was a sufficient request for an instruction, it is *held* that such request was properly denied because no foundation was laid in the pleadings for evidence of a statutory seed lien which would be entitled to priority over the lien claimed by the plaintiff, following Citizens Nat. Bank v. Osborne-McMillan Elevator Co. 21 N. D. 335, p. 341. Under proper pleadings, evidence of the existence of such a statutory lien would be admissible to reduce damages, and in such a case, proper instructions, with reference thereto, should be given on request. Weigel v. Powers Elevator Co. 869.

TROVER AND CONVERSION.

1. The facts pleaded and proved by plaintiff, in the state of the record, establish conversion by the defendant of certain of plaintiff's buildings, more particularly described in the opinion. Nesvold v. Gerding, 207.
2. In an action for the conversion of personal property, the evidence is examined, and it is *held* sufficient to support a finding of conversion. Company A, First Regiment v. Hughes, 626.
3. In establishing value of property the same rules govern in actions for conversion as in other actions in which the question of value is involved. Dearborn Truck Co. v. Nedreloe, 793.
4. When property is taken subject to a lien, a conversion thereof does not take place until some affirmative act on the part of the defendant, like tortious detention thereof from the owner, or the party entitled to the possession thereof, or an exclusion or defiance of such party's rights, or the withholding of possession under a claim of title inconsistent with that of the plaintiff or owner. Conversion under the facts in this case, and the theory on which it was tried, took place at the time of the demand and refusal. Weigel v. Powers Elevator Co. 867.

TROVER AND CONVERSION—continued.

5. For reasons stated in the opinion, it is *held* that at the time of the alleged conversion of the grain, there was a grain market, in the legal sense, at Killdeer, North Dakota. Weigel v. Powers Elevator Co. 867.

TRUSTS.

1. Where one of the designated beneficiaries under a trust conveyed all of his right, interest, title, and estate therein to a brother it is *held*, for reasons stated in the opinion, that such conveyance did not in any manner affect the title and estate of the trustee nor the inchoate rights of other beneficiaries pursuant to the trust. Brett v. St. Paul Trust Co. 654.

2. Where a will has been probated and allowed at the domicil of the testator affecting lands devised in a foreign state, and where such will was also probated and allowed in the state where the lands are situated, and where, pursuant to action taken in both jurisdictions, the title thereto was vested by decree of the probate courts in a trustee upon an express trust, and where, thereafter, through an action in equity at the domicil of the testator, the trustee was removed and a new trustee appointed over all the trusts, including the land in a foreign state, and where, subsequently, in another action, the new trustee secured a determination by a court at the domicil of the testator that he was the owner, individually, of the land by reason of tax deeds, it is *held*, for reasons stated in the opinion as follows:

(a) That the courts at the domicil of the testator had jurisdiction and authority to remove the trustee and appoint a new trustee.

(b) That the new trustee did not receive a valid title to the land in North Dakota which he could receive and accept while acting as trustee pursuant to the void tax deed issued to him. Brett v. St. Paul Trust Co. 654.

3. A trustee cannot secure title personally by adverse possession while the duties of a trustee under an express trust are imposed upon him. Brett v. St. Paul Trust Co. 654.

VACANCIES.

1. Defendant appeals from a judgment against his claim to the office of game and fish commissioner. It appears that the defendant never qualified by filing with the secretary of state an oath of office. Hence his office became vacant and the governor had a legal right to fill the vacancy. State ex rel. v. Bloom, 890.

2. The failure of an appointive member of the board of administration to file his oath of office with the secretary of state within the time prescribed by law, creates a vacancy in such office and works a forfeiture of all right thereto on the part of the person who has so neglected to file his oath of office. State ex rel. v. Cahill, 895.

VENDOR AND PURCHASER.

1. In an action to cancel a contract for a deed where a strict foreclosure has been ordered without granting to the vendee any redemption period, it is held, for reasons stated in the opinion, that a period for redemption should be accorded. Peoples State Bank v. Steenson, 100.

2. In an action to recover back money advanced toward the purchase of a certain lot and to impress a lien therefor, the evidence is examined and it is *held:*

   Plaintiff has sustained the burden of proving misrepresentation or concealment of fact in regard to what was included in the legal description of the lot. Iverson v. McDonald, 550.

3. For reasons stated in the opinion, it is *held* that the interpretation of the contract, for the sale of the land on which the grain alleged to have been converted was raised, by the trial court, was correct, to the effect that it was incumbent upon the vendee thereunder to deliver to the vendor one half of all the crops annually. Weigel v. Powers Elevator Co. 868.

WAREHOUSEMAN.

1. The above statute, considered in connection with § 3113 of the Compiled Laws of 1913 and with §§ 9, 10, 16, 23, 24 and 54 of the Uniform Warehouse Receipts Act, chapter 250, Session Laws of 1917, contemplates a continuous bailment until redemption of the receipts, notwithstanding the right of the warehouseman to mingle fungible goods with other goods and to substitute one mass for another, thus destroying the identity of the grain of a particular depositor. Kastner v. Andrews, 1059.

2. Where the mass, which is owned in common by the holders of the outstanding warehouse receipts up to the aggregate of their receipts, is reduced below that which is required to satisfy outstanding receipts, the warehouseman cannot confer good title upon a purchaser. Kastner v. Andrews, 1059.

3. The holder of a warehouse receipt or storage ticket is not estopped to assert his title as against a purchaser in good faith from a warehouseman. Kastner v. Andrews, 1059.

4. The remedy of a receipt holder upon the surety bond of a public warehouseman is not exclusive. Kastner v. Andrews, 1059.

WILLS.

1. Section 5680, Comp. Laws 1913, which provides that "all beneficial devices, legacies, or gifts whatever made or given in any will to a subscribing witness thereto are void unless there are two other competent subscribing witnesses to the same," applies only to subscribing witnesses to the will. Keller v. Reichert, 75.

2. For reasons stated in the opinion it is held that questions of fraud and undue influence were for the jury. Keller v. Reichert, 75.

3. Following Riedlinger v. Feil, 48 N. D. 908, an appeal from a judgment in

WILLS—continued.

district court allowing the probate of a will properly triable to a jury, is not triable de novo in the supreme court. Erickson v. Backman, 277.

4. In such case, the findings of the trial court are presumed to be correct unless clearly opposed to the preponderance of the evidence. Erickson v. Backman, 278.
5. For reasons stated in the opinion, findings, determining a will to be genuine and allowing its probate, are upheld. Erickson v. Backman, 278.
6. Where a will devised land to a trustee with active duties concerning the collection of rentals and income therefrom and the payment of the net income to beneficiaries in the discretion of the trustee during the lifetime of one of them, with the power, after his death, to sell the land and to pay the proceeds, in the discretion of the trustee, to certain beneficiaries, it is *held*, for reasons stated in the opinion, that an express trust was created with title vested in the trustee and without any title or estate being vested in the cestui que trusts. Brett v. St. Paul Trust Co. 653.
7. The finding of a jury to the effect that the will offered for probate if not the true will of the testator is not contrary to, but has substantial support in, the evidence. Hutlberg v. Hutlberg, 761.
8. The contention that a will is contractual as well as testamentary will not be considered when presented for the first time in the appellate court. Hutlberg v. Hutlberg, 761.

WITNESSES.

1. Section 7871, Comp. Laws, 1913, which provides that in a "civil action or proceeding by or against executors, administrators, heirs at law, or next of kin in which judgment may be rendered or ordered entered for or against them, neither party shall be allowed to testify as to any transaction whatever with or statement with or statement by the testator or intestate, unless called to testify thereto by the opposite party," is not applicable in proceedings for the probate or contest of a will. Keller v. Reichert, 74.
2. Reliance upon the constitutional privilege of refraining from answering incriminating questions does not purge one of a contempt consisting in the failure to render an account ordered by the court having jurisdiction. In re Dunbar, 852.
3. Where a witness, in testifying upon the question of the market value or the market price of different kinds of grain more than one year before, who has no independent recollection of such market price, has a copy of records kept in the office of the corporation in whose employ as a manager he was at the time such records were made, showing what price it paid for various kinds and grades of grain on the date of the alleged conversion, and when such witness is, after examining such copy, unable to testify that he has any independent recollection of the market price, and his recollection is not, in fact, refreshed by referring to such copy, no evidence being offered

WITNESSES—continued.

to show who made the copy, when it was made, or whether it was correct when made, it is *held* that the witness is, in fact, testifying from a copy of the records without proper foundation; that the use of the copy as a memorandum for the ostensible purpose of refreshing the recollection of the witness is improper, and the testimony should not have been received over proper objection. Weigel v. Powers Elevator Co. 868.

4. It is not required that a memorandum or writing, to be proper for the purpose of refreshing the recollection of a witness, shall have been made by the witness himself, or that it be an original writing, if the witness, after inspecting it, can speak from his own recollection, or otherwise guarantee the accuracy of the record or memorandum used. Weigel v. Powers Elevator Co. 868.